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APPLY TO:—THE AUTHOR,

“SWAMI VILAS,”

EGMORE, MADRAS.

COMMENTARIES ON THE CODE OF CRIMINAL PROCEDURE (ACT V OF 1898)

As Amended by Acts XII, XVIII and XXXVII of 1923, Acts VII and XVIII of 1924, Acts III, VIII, XXIII, XXIX, XXXII and XXXVII of 1925, Acts II, XXXIV and XXXVI of 1926, Acts X and XXV of 1927 and other Acts up to 31st of December, 1929.

BY

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"Procedure is but the machinery of law after all—the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when in place of facilitating, it is permitted to obstruct and even to extinguish the legal rights and is made to operate where it ought to subserve"—*Mr. Lord Denning, L.J., R. v. A.A. [1925]*.

"Fiat Justitia ruat cælum." Let there be justice, though the Heavens fall.

"To no man will We sell or deny or delay right or justice"—*Magna Carta*.

FOURTH EDITION
(REVISED AND ENLARGED).

MADRAS

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1930

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PRINTED AT
THE ROYAL PRINTING WORKS,
MOUNT ROAD, MADRAS.

DEDICATED
TO THE EVER-INSPIRING
MEMORY OF MY BELOVED BROTHER
Dr. S. SWAMINADHAN

Who to my extreme sorrow did not survive to see
the publication of this edition.

PRINTED AT
THE ROYAL PRINTING WORKS,
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PREFACE.

THE present edition has been carefully revised and partly re-written in the light of the various decisions under the Code since the last edition in 1927. The case law has been brought up to 1st January 1930. Many important decisions which have not yet been reported any where, say for instance the recent decisions of the Madras High Court as to whether proceedings under section 144 of the Code are subject to the revisional jurisdiction of the High Court and as to the right of further cross-examination in *good behaviour* cases have been noted in appropriate places. The value of having the text of the Code with all amendments and alterations brought up to date cannot be overestimated. In the present edition all amendments and alterations up to date have been carefully incorporated and references are also given to the various amending Acts along with the amendments and alterations.

A large mass of general information which will be of real interest to the Bench and the Bar, see for instance the headings '*Duty of Advocate appearing for the defence*' at pp. 618-619, and '*The Court of Criminal Appeal in England*' at pp. 732-733, have been collected and introduced in the present edition. About 2,000 new cases have also been added and the new matter so incorporated in this edition covers about 300 pages in print. The general index has been revised and made more exhaustive by the addition of a number of new headings. The task of preparing an exhaustive and accurate list of cases cited is by no means easy and any error in citation in the body of the work is corrected in the list of cases given in the beginning of the work.

It is confidently hoped that the present edition will be as popular with the Bench and the Bar as the previous ones and

will be found to be clear, concise and thoroughly exhaustive and also easy of reference, the author having always kept in mind in preparing the commentaries the exact wording of the sections of the Code.

The authorities cited herein have been verified more than once now, but in a work of this magnitude covering so extensive a field, mistakes must inevitably occur in spite of every endeavour to avoid them and for such shortcomings the indulgence of all those who have occasion to use this work is specially craved.

My sincere thanks are due to Mr. K. A. Raghunatha Iyer B.A., B.L., Advocate for his having kindly assisted me in verifying the authorities cited, in preparing the list of cases and in correcting the proofs.

"SWAMI VILAS,"
EGMORE,
10th January, 1930.]

S. RANGANADHAIYAR.

Although the cost of production has increased considerably, in order to put this edition within the easy reach of all, especially junior members of the Bar, the Law students, and the Subordinate Magistracy and the Police, the price of the book has not been increased and has been kept down as low as possible.

The indulgence of the Bench and the Bar is specially craved for the errors and imperfections which must inevitably creep in, in a work of this magnitude dealing with thousands of decided cases, many of which are not easily reconcilable. It is hoped that the ready appreciation which this work has enjoyed before, in the hands of the Bench and the Bar and of the students, will be extended to the present edition as well.

My sincere thanks are due to Mr. W. T. Sundararajan, B.A., B.L., High Court Vakil, who has so kindly assisted me in the preparation of this edition.

"SWAMI VILAS,"
EGMORE,
1st January, 1927. }

S. RANGANADHAIYAR.

beginners. Great pains have been taken in the selection of cases; decisions which do not turn on the language of the sections of the Code, or, which merely repeat the wording of the section without any attempt to examine the same critically are ignored. As far as possible the very words used by the learned Judges in their Judgments are extracted, and to save time and unnecessary labour and also disappointment which is more important, cases which are no longer Law on account of their being overruled by later cases, or, rendered obsolete by the new amendments, are prominently given in their appropriate places. Preference is given to the latest decisions and when a case is reported in the authorised series, reference to the authorised series alone is given and no cross-references to private publications are made. This mode of citation has the great advantage of reducing the size of the volume and making it very handy. The additions and alterations newly made in the Code, are printed in italics so that the change in the Law may readily be perceived. At the beginning of the commentary to each section, the change in the law is briefly summarised and the scope and object of the important sections are explained. All the reported decisions up to the end of August, 1923, which throw any light on the interpretation of the language of the sections of the Code have been incorporated. An exhaustive Index is given at the end of the volume for ready reference

* * * * *

My thanks are due to Mr. W. T. Sundararajan, B.A., B.L., who has assisted me considerably in the preparation and publication of this work. * * *

I am fully conscious of the many defects and shortcomings in this work and I shall consider my labour sufficiently rewarded if the work proves useful to those for whom it is intended.

"SWAMI VILAS,"
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1st September, 1923.

S. RANGANADHAIYAR.

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ABBREVIATIONS OF REPORTS AND TEXT BOOK CITED.

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| <p>A. Indian Law Reports, Allahabad Series.
 A.C. Law Reports, Appeal Cases.
 A.L.J. Allahabad Law Journal.
 A.W.N. Allahabad Weekly Notes.
 Agra H.C. Agra High Court Reports.
 Agra. Agra Sudder Reports.
 B. Indian Law Reports, Bombay Series.
 B.L.R. Bengal Law Reports.
 B.L.R. Appx. Pungal Law Reports, Appendix.
 B.H.C.R. Bombay High Court Reports.
 B.H.C.R. (Ap. Cr.) Bombay High Court Reports, Appellate Criminal.
 B.H.C.R. (Cr. Ca.) Bombay High Court Reports, Crown Cases.
 Bom. L.R. Bombay Law Reporter.
 Bur. L.R. Burma Law Reports.
 C. Indian Law Reports, Calcutta Series.
 C.L.J. Calcutta Law Journal.
 C.L.R. Calcutta Law Reports.
 C.W.N. Calcutta Weekly Notes.
 Cen. L.R. Central Provinces Law Reports.
 Cr. L.J. Criminal Law Journal.
 Cr. L. Rev. Criminal Law Review.
 Ind. App. Law Reports, Indian Appeals.
 Ind. Cas. Indian Cases
 L.B.R. Lower Burma Rulings.
 L.W. Law Weekly.
 Lah. Indian Law Reports, Lahore Series.
 Lah. L.J. Lahore Law Journal.
 Luck. Indian Law Reports Lucknow Series.
 M. Indian Law Reports, Madras Series.
 Mad. Jur. (N. S.) Madras Jurist New Series.
 M.H.C.R. Madras High Court Reports.
 M.H.C.R. Appx. Madras High Court Reports Appendix.</p> | <p>M.C.C.R. Mysore Chief Court Reports.
 M.I.A. Moore's Indian Appeals.
 M.L.J. Madras Law Journal.
 M.L.T. Madras Law Times.
 M.W.N. Madras Weekly Notes.
 N.W.P.H.C.R. North-West Provinces High Court Reports.
 Nag. L.R. Nagpur Law Reports.
 P.R. The Punjab Record.
 P.L.R. The Punjab Law Reporter.
 Pat. Indian Law Reports, Patna Series.
 [Pat.] Patna High Court Cases (C.W.N. Supplement).
 Pat. L.J. Patna Law Journal.
 Pat. L.T. Patna Law Times.
 Ran. Indian Law Reports, Rangoon Series.
 Ratanlal. Ratanlal's Unreported Criminal Cases of the Bombay High Court.
 Sind L.R. Sind Law Reports.
 W.R. (Cr.) Sutherland's Weekly Reporter, Criminal Rulings.
 W.R. (F.B.) Sutherland's Weekly Reporter, Full Bench Rulings.
 W.R. (Cr. Let.) Sutherland's Weekly Reporter Criminal Letters.
 Weir I & II. Weir's Criminal Rulings of the Madras High Court.
 Arch. Cr. Pl. Ev. & Pra. Archbold's Criminal Pleading, Evidence and Practice.
 Ros. Cr. Ev. & Pra. Roscoe's Criminal Evidence and Practice.
 Forsyth, His. Tr. by Jury. Forsyth's History of Trial by Jury.</p> |
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THE CODE OF CRIMINAL PROCEDURE

ACT V OF 1898

*An Act to consolidate and amend the law relating to
Criminal Procedure.*

[AS AMENDED UP TO DATE.]

THE AMENDMENTS OF 1923 AND THEREAFTER ARE PRINTED IN ITALICS.

WHEREAS it is expedient to consolidate and amend the law relating
to Criminal Procedure; it is hereby enacted as
Preamble. follows:—

Preamble.—Lord Coke says "preamble is the key to open the meaning of the makers of the Act and the mischiefs it was intended 'to remedy'; although it may explain, it cannot control the enacting part which may often go beyond the preamble. It is part of the Act and may be used to explain it, 2 M.H.C.R. 232 at 234. See 55 C. 67; 9 Lah. 260. The preamble of an Act being thus a key to its understanding, it may properly be consulted in order to fix the scope or limit of a statute, 9 B. 333 at 343; 12 A. 409 at 417-18. The preamble of a Code must be understood to overlie the whole Act giving colour and controlling its provisions and by showing the intention of the Legislature supplying *pro tanto* the rule of interpretation of those provisions. 2 A. 74 at 90. If a section of the Act makes imperative provisions somewhat in excess of the apparent ambit of the preamble to the Act, the section must govern, 43 M. 529 (P.C.) at 538; 103 Ind. Cas. 652 (2). There can be no doubt that the preambles to statutes do not always cover in the wide and general terms in which they are necessarily couched, all the specific offences, which are to be found provided for within the enacting portions of the statute itself. It is an undoubted rule of construction that where the language of the enacting sections of a statute is clear, the terms of a preamble cannot be called in aid to restrict their operation or to cut them down. The purpose for which a preamble is framed to a statute is to indicate what in general terms was the object of the Legislature in passing the Act but it may well happen that the general terms will not indicate or cover all the mischief which in the enacting portions of the Act itself are found to be provided for, 11 A. 262 at 266; 22 B. 321 at 330-31. The preamble cannot control the enactment, 55 C. 67; 9 Lah. 260, "In construing an Act of Parliament when the intention of the Legislature is declared by a preamble, we are to give effect to that preamble to this extent, namely, that it shows what the Legislature is intending; and if the words of the preamble have a meaning which does not go beyond that preamble or which may come up to the preamble, in either case we prefer that meaning to the one showing an intention of the Legislature which would not answer the purposes of the preamble or which would go beyond them. To that extent the preamble is material"—per Lord Blackburn, in 8 A.C. at p. 338. Where the enacting part of the Statute is not exactly co-extensive with the preamble, the former, if expressed in clear and unequivocal terms, will override the latter; but if ambiguous or doubtful phraseology is

used in the body of the Act, the preamble may be referred to solve the difficulty, 104 Ind. Cas. 661 following 43 M. 529 (P.C.); 45 C. 343. The preamble to an Act may be referred to in a case of ambiguity or where it is necessary to interpret the Act itself so as to give effect to its purport but it is doubtful whether the meaning of definite and unambiguous words can be strained because their natural interpretation would seem to extend the alleged scope of the Act, 50 M L J. 301=23 L.W. 233.

Consolidate and Amend.—The term '*consolidate*' like the word '*Code*' implies an exhaustive treatment of all matters that fall within its view, 26 A. 594 at 596. The term '*consolidation*' as applied to statute law means the combination in a single measure of enactments relating to the same subject-matter, but scattered over different Acts. The object of consolidation is to collect the statutory law bearing upon a particular subject and to bring it down to date in order that it may form a useful Code applicable to the circumstances existing at the time the Consolidating Act is passed, 22 C. 788. The object of codifying a particular branch of law is that any point specifically dealt with, the law should thenceforth be ascertained by interpreting the language used in the enactment instead of as before searching in the authorities to discover what may be the law as laid down in the prior decisions. The language of the enactment must receive its natural meaning uninfluenced by any consideration derived from the previous state of the law, 23 C. 563 at 572 (P.C.). See also 23 C. 731 at 751; 28 C. 517 at 528; 20 M. 97 at 103; 1927 M.W.N. 53 at 54; 47 B. 843; 27 Bom. L R. 1023=89 Ind. Cas. 1031; 4 Lah. 367; 24 A.L.J. 945=97 Ind. Cas. 455. In a Code dealing with procedure it is the duty of the legislature to lay down in specific and clear language what the procedure is to be and not to leave it to the court and the litigant in doubt as to what it intends the procedure to be. 14 A. 226 at 229; 21 A. 391. It is a well-established principle of law that retrospective effect ought not to be given to a statute unless an intention to that effect is expressed in plain and unambiguous language, 31 C.W.N. 1007=103 Ind. Cas. 674. See also 53 M.L.J. 819 (P.C.); 1905 A.C. 369; 101 Ind. Cas. 284; 103 Ind. Cas. 662 (2). The result of consolidation is to substitute a single Code for many Acts and Regulations dealing with procedure.

Criminal Procedure.—The word '*Criminal*' is used in opposition to civil as also to ecclesiastical, political, or military. It comes from the latin *crimen* (judgment, accusation) and means generally and simply "of or belonging to an accusation"—Blackstone. The word '*procedure*' means the mode or manner of moving on, as for example in a trial from the close of a case for the prosecution to the judges summing up and applies as well to the mode in which the prosecution or the accused person is to take steps as to the mode in which the courts are to proceed in any trial or other investigation of a matter. Sir James Stephen remarked that this code is inadequately described by the name "*Code of Criminal Procedure*", inasmuch as it is a complete body of law in three distinct but closely related subjects—"the constitution of Criminal courts, the conduct of Criminal proceedings, and the prevention of crimes by interference beforehand." The essence of a Code is to be exhaustive on matters in respect of which it declares the law and it is not the province of a judge to disregard or to go outside the enactment according to its true construction, 29 C. 707 at 715, but where however there is no specific provision in the Code, the court is entitled and it would seem it is its duty to act according to justice, equity, and good conscience, 33 C. 927 at 931-32, 1 Lah. 339 at 341.

PART I.

PRELIMINARY.

CHAPTER I.

1. (1) This Act may be called the CODE OF CRIMINAL PROCEDURE, 1898; and it shall come into force on the first day of July, 1898.

Short title, Commencement

(2) It extends to the whole of British India; but, in the absence of any specific provision to the contrary, nothing
 Extent. herein contained shall affect any special or local law now in force, or any special jurisdiction or power conferred, or any special form of procedure prescribed, by any other law for the time being in force, or shall apply to—

(a) the Commissioners of Police in the towns of Calcutta, Madras and Bombay, or the police in the towns of Calcutta and Bombay;

(b) heads of villages in the Presidency of Fort St. George; or

(c) village police-officers in the Presidency of Bombay:

Provided that the Local Government may, if it thinks fit, by notification in the official Gazette, extend any of the provisions of this Code, with any necessary modifications, to such excepted persons.

British India—The expression "British India" is not defined in the Code, although it is frequently referred to in the Code. There are several such terms in the Code and these are defined in the General Clauses Act X of 1897. S. 3 (7) of that Act defines British India. It means "all territories and places within Her Majesty's dominions which are for the time being governed by Her Majesty through the Governor General of India or through any Governor or other Officer subordinate to the Governor-General of India." S. 15, I.P.C. defines British India thus. "British India denotes the territories which are or may become vested in Her Majesty by Statute 21 & 22 Victoria, Chapter 106 entitled an Act for the better Government of India." The Indian Legislature has given the words "British India" a much more extended meaning than at first sight they would appear to indicate. 9 B. 244 at 249. It excludes the territories of Native Princes and States in alliance with His Majesty inasmuch as the relation between the Crown and the Native Princes and States was and is, a political relation and the territories of such Princes and States are not part of British Dominions although from a political point of view, they may be subordinate to the British Crown as the paramount power, 1888 P.R. 499. So also lands assigned for the purpose of establishing a civil station in a Native State as it is not ceded with full Sovereignty to British Government, 14 Bom. L.R. 876 at 881. The Civil Military station, Bangalore, 12 M. 39, the British Cantonment of Secunderabad, 21 C. 177, the civil station of Wardhan, 14 Bom. L.R. 876, are no part of British India. So also Rajkot, 10 B. 186. The province of Kathiawar is no part of British India, 33 C. 219; 8 Bom. L.R. 129. So also Tributary Mahals, 29 C. 400. The island of Pem is part of British India, 10 B. 238. So also British Burma, 13 C. 221 at 223, but not Singapore (see Straits Settlement Act 1886, sec. 1). Any newly acquired territory is undoubtedly part of British India, 1 Boulnois, 161. As the Code extends to the whole of British India, it applies to the Scheduled Districts, unless by notification under S. 3 of Act XIV of 1874 it has been specially excluded. The Code is in force in the Scheduled Districts of Ganjam and Vizagapatam, in the Laccadive Islands, 13 M. 353, in the Andaman and Nicobar Islands, in the Sonthal Parganas, in British Baluchistan, and in Upper Burma including Shan States, but is no longer in force in the Garo, the Khasi, Jaintia, the Naga and Lusai Hills.

The Code regulates all proceedings of Criminal Courts in British India unless otherwise expressly provided. 1 B.L.R. (Or. Cr.) 1; 7 B.H.C.R. 89; 16 C. 238. The Code is also in force in places outside British India. It applies to the Hyderabad Assigned Districts, the Civil and Military Station of Bangalore, 12 M. 39, the Cantonments of Secunderabad and Quetta, and the lands occupied by certain railways passing through Native States, 23 C. 20 (P.C.); it also applies to the Persian Gulf, Zanzibar (now treated as a District in Bombay) and Muscat (Original Criminal Jurisdiction alone vests in the Bombay High Court), 24 B. 474.

Transfer of territory which formed part of British India to a Native State will not deprive British Courts of jurisdiction to hear pending cases, 33 A. 578; 34 A. 118.

It extends to the whole of British India—The Code applies to all trials held in British India subject to a saving of special or local law or any special form of procedure prescribed. For example the procedure for the trial of an offence committed on the high seas must be in accordance with the local law even though the offence charged and punishable is one under English law, 1 B.L.R. (Or. Cr.) 1; 7 B.H.C.R. (Cr. Ca.) 89; 25 B. 635, followed in 53 M.L.J. 101=38 M.L.T. 361=28 Cr. L.J. 543 (2)=102 Ind. Cas. 351 (2); similarly the trial of a seaman for an offence committed on board a British Ship on the high seas must be conducted under the Code, 21 C. 782. See also 16 C. 238.

In the absence of any specific provision to the contrary nothing herein contained shall affect special or local law.—The Code is in force in the Santhal Pergunnahs, S. 2 of Act XXXVII of 1855 vests the administration of criminal justice in that territory in an officer appointed by the Lieutenant-Governor of Bengal and all sentences in Criminal Cases passed by him under S. 4 (1) of the above Act shall be final. On a revision to the High Court against the sentence passed under the Act, the High Court held that it had no revisional jurisdiction under the Code, 12 C. 536.

Special or Local Law.—A 'Special law' is a law applicable to a particular subject S. 41, I.P.C.; a 'Local law' is a law applicable to a particular part of British India S. 42, I.P.C. The expression "special law" has reference to statutory enactments and not to a local or family law. The Coroners Act IV of 1871, which is a special enactment, as this section provides remains unaffected, 31 C. 1 at 6. The phrase covers laws such as the Opium Act or the Gambling Act and not a vast system like the English common law, 4 Bur. L.J. 147. The law for suppression of outrages in Malabar, Act XX of 1859 is a local law. But proceedings held by a magistrate under the Calcutta Municipal Act, in which the question whether certain sheds put up were new or old and were liable to be demolished are not governed by the provisions of the Code 54 C 532 where 30 C.W.N. 593; 43 C.L.J. 231 and 9 C.W.N. 18 are followed.

Special Jurisdiction—Under Madras Act XXIV of 1839, S. 9, the Agents to the Governor in Vizagapatam and Ganjam have special jurisdiction within the limits of the Agency tracts in respect of the administration of Criminal justice and in the exercise of this jurisdiction they are to be guided by such rules as the Government of Madras may prescribe. This enactment created a special jurisdiction and a special procedure, 15 M. 121 at 122. See 23 M.L.J. 670=12 M.L.T. 601. See Act I of 1878, (Cattle-trespass), Ss. 20 to 23, 23 C. 300; 34 C. 926 and Indian Army Act VIII of 1911.

Special Power.—For example (1) the power of the High Courts in India as Courts of Record to punish for contempts, 10 C. 109 (P.C.); 33 C. 927; 33 B. 240; 8 B. 380; 26 M. 404; 24 M. 523 at 549; 45 A. 711; 28 Cr. L.J. 727=103 Ind. Cas. 775; 6 Lah. 528; (2) the power of the Governor-General to make rules regulating Indian Marine Courts in the exercise of their ordinary original jurisdiction under Act XIV of 1887, S. 70; (3) the power of High Court to transfer criminal cases under S. 29 of the Letters Patent, 6 M. 32; (4) power of superintendence under S. 107 of the Government of India Act.

Special Form of Procedure.—See for example the procedure prescribed by the Indian Articles of War, Act V of 1869, for trial of military offences or by the Criminal Law Amendment Act XIV of 1908 for the speedy trial of certain classes of offences under the Indian Penal Code and under the Explosive substances Act.

Police and Commissioners of Police.—The Code does not apply unless it has been specially extended to the police or to the Commissioners of police in the towns of Calcutta and Bombay. See Ss. 83, 85 and 86, *infra* as to Commissioners of Police. But by various Acts, the Code has been extended to the Calcutta and Bombay police, 31 C. 557; the Code applies to the police in Madras but not to the Commissioner of police in the town of Madras. This section bars the application of the Code to the police in the Presidency towns, 5 Pat. 171.

Sections 42, 44, 54, 56, 69, 83 to 86, 127, 202 and Column 3 of Sch. II relating to arrests by the police with or without warrant under the Penal Code and other Laws, are made applicable to the police of Calcutta and Bombay, 15 C. 595 ; 21 B. 455.

Heads of Villages in Madras.—This section says *inter alia* that nothing contained in the Code shall apply to Heads of villages in the Presidency of Fort St. George which means that in their official capacity as Village Headmen, in proceedings as Village Magistrates, they are not governed by the Code. The conduct of proceedings in Village Courts should be "untrammelled by any special procedure, the weight of their authority being virtually dependent upon the fact that they sit *coram populo* and that their verdicts are supported by the common knowledge of the villagers." It was certainly never intended that the procedure of a Village Magistrate should be open to such criticism as would be appropriate in the case of higher courts, 53 M.L.J. 516 at 527=25 L.W. 555=39 M.L.T. 450 at 452 citing G.O. No. 283 (Jud.) dated 25-2-1907. This has nothing to do with their coming forward in any Criminal cases as complainants, 19 L.W. 30=(1924) M.W.N. 145=25 Cr. L.J. 221=76 Ind. Cas. 633. Under Regulation XI of 1816, Ss. 10 to 14 and Regulation IV of 1821, S. 6, Heads of villages are empowered to try cases of trivial nature, such as abusive language and inconsiderate assaults or affrays and petty thefts not attended with aggravating circumstances, and not committed by persons of notoriously bad character where the value of the property stolen does not exceed one rupee. The Code does not govern the village headman, Weir II, 1. But under S. 6 of Regulation XI of 1816, he has authority on a verbal examination either to dismiss the parties or if the offence is proved and deserves to be punished, to confine the accused in the village choultry for a period not exceeding 12 hours or if the accused belongs to any of the lower castes on whom it may not be degrading to be put in stocks, then that punishment for a period not exceeding 6 hours may be inflicted. The provisions of Ss. 480 and 482 *infra* do not apply to village headman, 15 M. 131 and the provisions of S. 528 are applicable to proceedings under the Regulations above referred to.

Village Police Officers in Bombay:—The Code does not apply to these officers, 19 B. 612. They are governed by Bombay Village Police Act, VIII of 1867 and Bombay Regulation XII of 1827.

2. Repealed by Act X of 1914 (The Repealing and Amending Act).

3. (1) In every enactment passed before this Code comes into force, in which reference is made to, or to any chapter or section of, the Code of Criminal Procedure, Act XXV of 1861 or Act X of 1872, or Act X of 1882, or to any other enactment hereby repealed, such reference shall, so far as may be practicable, be taken to be made to this Code or to its corresponding chapter or section:

References to Code of Criminal Procedure and other repealed enactments.

(2) In every enactment passed before this Code comes into force the expressions "Officer exercising (or 'having') the powers (or 'the full powers') of a Magistrate," "Subordinate Magistrate, first class," and "Subordinate Magistrate, second class," shall respectively be deemed to mean "Magistrate of the first class," "Magistrate of the second class" and "Magistrate of the third class," the expression "Magistrate

Expressions in former Acts.

of a division of, a district " shall be deemed to mean " Sub-divisional Magistrate," the expression " Magistrate of the district " shall be deemed to mean " District Magistrate," the expression " Magistrate of Police" shall be deemed to mean " Presidency Magistrate," and the expression " Joint Sessions Judge " shall mean " Additional Sessions Judge."

Act XXV of 1861 was the first Criminal Procedure Code which came into force on the 1st January 1862. Act X of 1872 was the second Code of Criminal Procedure but it was not applicable to the chartered High Courts and to Presidency Magistrates. To regulate the procedure of the High Court in the exercise of its ordinary Original Criminal Jurisdiction and that of the Presidency Magistrates Acts X of 1875 and IV of 1877 were passed. It was thought expedient to consolidate all the three Acts and to have a uniform law and so the third Criminal Procedure Code Act X of 1882 was enacted and it came into force on the 1st January 1882. After the Code 1882 no less than 16 amending Acts were passed from time to time and consequently it was thought expedient to consolidate and amend the law in the light of the interpretation of the code by the various High Courts and as a result, the present Code Act V of 1898 was passed which came into force on the 1st July 1898. This section enacts that all references to the Codes of 1861, 1872, and 1882 shall, so far as may be practicable, be taken to be made to this Code or to its corresponding chapter or section.

The effect of an interpretation clause is to give the meaning assigned by it to a word in all places in the Act in which the word occurs and to prevent a different meaning attached to it by any other Act of the Legislature being read into it, 12 C. 430; 30 C. 910; 32 C. 379; 40 C. 360; when the terms of an enactment admit of but one meaning, a Court is not at liberty to speculate on the intention of the Legislature and to construe them in accordance with its own notion of the subject of such enactment, 7 C. 127.

So far as may be practicable.—These words appear to limit the repeal to cases in which the provision is necessarily inconsistent with the provisions of another Act, 12 M. 94 (F.B.) at 97; see 25 C. 333.

Magistrate of Police.—This expression in S. 1 of Act XIII of 1859 (Workmen's Breach of Contract) means Presidency Magistrate, see 25 C. 637.

4. (1) In this Code the following words and expressions have the following meanings, unless a different intention appears from the subject or context :—
Definitions.

Definitions.—This section is an interpretation clause. Its legitimate function is to declare that certain words and expressions used in the Code shall wherever permissible not only have the meaning generally attached to them but such meaning as is assigned by the interpretation clause. It is not intended to annex to such words every incident which may seem to be attached to them by another Act, 91 Ind. Cas. 99. There is nothing more clear than that with respect to the Criminal Law, the construction is always to be strict..... We are not in any way to alter or construe differently the rules of Criminal Law in consequence of the supposed justice of a particular case. The rule is that such law is to be strictly construed, 7 M.I.A. 72, see also 50 B. 34; 5 Ran. 244; 8 Lah. 320; 25 A.L.J. 661 and 515; 27 Cr. L.J. 888=96 Ind. Cas. 152. "We cannot aid the Legislature's defective meaning of an Act, we cannot add and mend and by construction make up deficiencies which are left there," 6 Moore P.C. 9. "If the precise words used are plain and unambiguous

be pressed into a constructive limitation upon the exercise of the express powers under the Act, 42 B. 462 (P.C.). Headings are not to be taken into consideration if the language is clear, 48 M. 395.

Marginal Notes.—Marginal notes cannot be referred to for construing the Act, 25 A. 353 at 406 (P.C.); 47 A. 637; 21 A. 391; 25 C. 858; 20 C. 609; 26 L.W. 890; 3 Luck. 244. Though the marginal notes are not part of the sections there is no reason why they should not be consistent with the sections themselves, 52 C. 463. But it is permissible to refer to marginal notes to a section to explain the ambiguity in the section, 27 Cr. L.J. 1233=98 Ind. Cas. 47; relying on, 4 A. 387; 20 C. 609 at 628; 21 C. 732 at 758, see also 31 I.A. 132=8 C.W.N. 699; 96 Ind. Cas. 93. Marginal notes cannot be looked into to understand the scope of the section, 29 Bom. L.R. 418; 28 Cr. L.J. 340=100 Ind. Cas. 820. The question whether the marginal notes can be referred to for an exposition of the meaning of the section depends on whether the note has been inserted by or under the authority of the Legislature, 51 A. 408 following L.R. 3 C.P. 511 at 519; 3 Luck. 244.

Illustrations.—Illustrations to the sections do not strictly form part of the Act, 1 A. 34 at 36 (F.B.). They are not to be construed as limiting the right given by the section, 28 M. 57 at 61. They furnish some indication as to the intention of the legislature, 15 B. 491 at 496; 48 C. 388. Ordinarily illustrations cannot control the general words of the section, 30 Bom. L.R. 315 at 318. In 43 I.A. 256, the Privy Council held that illustrations are integral part of the section and that they should therefore be accepted if they can be done as being of relevance and value in construing the Act and should be rejected as repugnant to the section only as a last resort of construction. Illustrations to sections are helpful in the working and application of the Act and it is for the Court to accept them as being both relevant and valuable in construing the section. They should not be rejected because they do not square with the idea derived from another system of jurisprudence as to the law with which the other section deals, *ibid* at 263. See also 21 Bom. L.R. 553 (P.C.) to the same effect. The illustrations cannot control the wide words of the section, 29 Cr. L.J. 645=109 Ind. Cas. 481. When the Court has to interpret the provisions of an enactment which comprises both the substantive provision and an illustration of the same, the Court is not justified in rejecting the illustration as a guide in the interpretation of the substantive provision. Illustrations unlike marginal notes are part and parcel of the enactment. They do not stand on the same footing as marginal notes which may not be the notes enacted by the Legislature and they cannot be locked into in construing the enactment; on the other hand illustrations are part and parcel of the enactment, 3 Luck. 244. It is the duty of the Court to accept, if that can be done illustrations given under the section as being of value in construing the text and it would require a special case to warrant their rejection on the ground of repugnance, 55 C. 154.

Proviso.—A proviso to a section of an enactment cannot extend the operative effect or the substantive enactment, 53 C. 482.

Schedule.—"A schedule to an Act is as much part of the Act as the sections by which it is preceded and in the absence of special provisions can only be altered in like manner," *Illbert, Leg. Methods and Forms*, pp. 267, 268.

Proceedings of the Legislature.—Proceedings of the Legislative Council cannot be referred to, to interpret the language of a section, 50 A. 343. Proceedings of the Legislature in passing a statute are excluded from consideration on the judicial construction of Statutes, 22 C. 789 (P.C.) and 1017 (F.B.); 28 C. 17; 53 C. 929; 31 C. 628; 18 B. 133; 14 A. 145. A Court is not authorized to look into the proceedings of the Legislature to see what took place during the passing of a bill which became law or what was the reason which the Legislature had in mind in enacting a particular clause for the purpose of interpreting a statute, 53 C. 929 relying on 22 C. 789 (P.C.), see also 104 Ind. Cas. 661 following 43 M. 550 (P.C.); 69 Ind. Cas. 748. So also the statement of objects and reasons attached to a bill or to the report of a select

committee cannot be looked into, 31 C. 623 ; 9 Lah. 260 So also administrative despatches accompanying the proposed amendment of a statute cannot be looked into in construing an Act, 29 Bom. L.R. 498.

Where there is an inconsistency between a general Act and a special Act the provisions of the latter must override the former, 52 M. L. J. 474=101 Ind. Cas 396.

Unless a different intention appears from the subject or context.—The concluding paragraph of this section says that all words and expressions used in the Code and defined in the I.P.C., but not in the previous part of this section should be deemed to have the meaning attributed to them by the I.P.C., notwithstanding that the concluding paragraph of this section is separated by a full stop from the part of the section which contains these qualifying words, it is difficult to believe that the framers of the Code intended that paragraph was not to be taken subject to these qualifying words in the beginning, 20 M. 470 (F.B.) at 475.

Includes—The word is intended to be enumerative and not exhaustive. When it is intended to exhaust the signification of the word interpreted, the word 'mean' is used, 2 M. 5 at 7. The use of the word 'includes' suggests that persons included in the expression are persons over and above those to whom the word in its ordinary significance applied and who might but for the explanation have escaped out of the category, 1901 A.W.N. 10 ; 22 B. 235 ; 4 C. 433 (F.B.) at 493, 23 A.L.J. 545 at 552.

(a) "Advocate General" includes also a Government Advocate, or, where there is no Advocate General or Government Advocate, such officer as the Local Government may, from time to time, appoint in this behalf :

Advocate General.—The Advocate General is the chief law officer of Government whose duty it is to exhibit informations, S. 194 ; to enter *nolle prosequi*, S. 333. See 25 Cr. L.J. 317. It is undesirable that he should appear at the Criminal Sessions of the High Court either for the crown or for the complainant. The Advocate General is by law empowered to enter a *nolle prosequi* under S. 333 of the Code in any case if he thinks fit to do so. This is a function to be performed by him *qua* Advocate General without being induced thereto by the complainant or by the accused. He cannot be expected to discharge it in an impartial manner if he gets himself enlisted on one side beforehand. Again, having regard to the judicial function which the law assigns him when appealed to, to certify that the Judge at the Sessions has gone wrong on certain points of law he should be prohibited altogether from taking part in the trial as Counsel for the prosecution, 10 M.L.J. 341 (Jour.).

(b) "Bailable offence" means an offence shown as bailable in the second schedule, or which is made bailable by any other law for the time being in force ; and "non-bailable offence" means any other offence ;

Bail literally means either to carry or take away, deliver or give. In modern legal sense it means to deliver on trust on certain conditions. When it is said a man is let on bail, we mean he is released from the custody of the officers of law to the custody of private persons who as sureties are bound to produce him whenever called upon. The Code divides offences into two classes bailable and non bailable. See 14 A. 45 at 47 as to the necessity for granting bail. See chapter XXXIX *infra*, ss. 496 to 502 dealing with bail.

"Charge." (c) "charge" includes any head of charge when the charge contains more heads than one :

The word 'charge' is used in the Code both as indicating the whole series of counts or heads of charge and also as indicating a specific offence. In S. 237 *infra*, it is used in the

former sense, 8 B. 200. A charge is a precise formulation of the specific accusation made against a person who is entitled to know its nature at the earliest stage, 28 C. 434 at 437; 26 C. 786; 5 B.H.C.R. (Cr. Ca.) 100.

(d) *Repealed by Act XI of 1923, S. 3 and Sch. II.*

(e) "Clerk of the Crown" includes any officer specially appointed by the Chief Justice to discharge the functions given by this Code to the Clerk of the Crown :

Clerk of the Crown—For functions of the Clerk of the Crown, See Ss. 211, 216, 218, 226, 313, 314 and 539 *infra*.

(f) "cognizable offence" means an offence for, and "cognizable case" means a case in, which a police-officer, with-
 "Cognizable offence," in or without the presidency-towns, may, in accord-
 "Cognizable case." ance with the second schedule, or under any law,
 for the time being in force, arrest without warrant :

The Code divides offences into cognizable and non-cognizable but when it deals with procedure it speaks not of offences but of warrant cases and summons cases, 41 M. 727 at 730. The words 'a police officer may arrest' do not mean every or any police officer, and whenever the law provides that in a particular offence a police officer of a particular rank may arrest without a warrant then the offence is a cognizable one, 27 Cr L.J. 503=93 Ind. Cas. 967 following 27 C. 144 at 150. The power to arrest without a warrant according to the definition herein given is an absolute power of arrest referable to a power of arrest in respect of and on account of the offence alleged but the power to arrest say under S. 24 of the Opium Act XIII of 1857 is not an absolute power but only conditional upon the accused not giving the required security. That power is a different thing and the case is not cognizable but non-cognizable, 24 C. 691 at 694 See also 50 B 344

"Commissioner of Police." (g) "Commissioner of Police" includes a Deputy Commissioner of Police :

(h) "Complaint" means the allegation made orally or in writing to a Magistrate, with a view to his taking action
 "Complaint." under this Code, that some person, whether known or unknown, has committed an offence, but it does not include the report of a police-officer.

Complaint.—Ordinarily a complaint implies at least three persons, a person complaining, a person against whom a complaint is made and a third person to whom the complaint is made. The implication is contained in the definition in the Code, 53 C. 350. The essence of a complaint is the statement of facts relied on as constituting the offence charged. It is sufficient if the true facts are mentioned by the complainant in his own language and that it is for the Magistrate to apply the law to those facts even in a case where a wrong section of the I.P.C. is mentioned in the complaint. That would not render the complaint in any way invalid or illegal, 9 Lah 678 where 6 Lah. 375 is referred to. A complaint ought to contain particulars of the offence with which a man is charged. Though in the Indian Procedure, there is no such thing as a regular indictment as in the English Procedure, yet a complaint ought to contain sufficient particulars as to the offence with which a man is charged. A complaint should always contain sufficient materials to enable the trying court to proceed to trial without going through a lot of records for the purpose of finding whether certain statements made are true or false, (1925) M.W.N. 470. As a general rule any person

whatever can institute a complaint of an offence other than certain offences clearly specified in the Code, such as defamation, etc., 46 M. 88; 13 B. 600; 18 A. 465; 11 C.W.N. 170; 15 Cr. L.J. 369=23 Ind. Cas. 737; 41 C. 1013; 23 Cr. L.J. 117, 21 B. 636; 10 Cr. L.J. 18; 14 Cr. L.J. 409. It is an elementary principle that a criminal complaint can be brought by anybody, 30 Cr. L.J. 52=113 Ind. Cas. 63. Complaint is something anterior to and distinct from the examination on oath of a complainant by a Magistrate under S 200 *infra*, and such examination of the complainant cannot be regarded as part of the complaint for the purposes of S 190 *infra*, (1921) M.W.N. 514=13 L.W. 695. But for the purpose of ascertaining the real nature of the complaint in any particular case the sworn statement may be read with the complaint, 45 M.L.J. 543=(1323) M.W.N. 876=24 Cr. L.J. 837=74 Ind. Cas. 449. There is nothing in the Code to suggest that a complainant must have personal knowledge of the offence complained of, 21 C.W.N. 357=21 Cr. L.J. 435=61 Ind. Cas. 839; 21 Cr. L.J. 346=55 Ind. Cas. 652. A complaint which is otherwise proper cannot be treated as illegal because the complainant has no personal knowledge of the facts alleged in it nor is the naming of the accused imperative according to the definition herein given, 7 Pat. 561. A complaint can be made by a person who knows the commission of an offence but he need not necessarily be the injured party, 33 C.W.N. 576. The definition does not contain any limitation such as that the person lodging the complaint must have personal knowledge of the facts. If a complainant is not speaking from personal knowledge a Magistrate taking cognizance would exercise a wise discretion in making an inquiry under S 202 *infra* but he is not compelled to do so. The object of the examination under S 200 *infra* is that the facts constituting the offence may be well ascertained when in a written complaint they are not given, 25 C.W.N. 357=22 Cr. L.J. 455=61 Ind. Cas. 839. This clause does not prescribe that a complaint should be made to the Magistrate in person and that it may not be posted to him or that if it is posted it is not a complaint at all. If a complainant is not present to give a sworn statement under S. 200 *infra* the Magistrate may call upon him to appear before him for that purpose on a date to be fixed by him. For the purpose of vesting the Magistrate with jurisdiction to take cognizance on a complaint made to him, it is not essential that such complaint should be presented to him personally, 30 Cr. L.J. 732=117 Ind. Cas. 147. Letter from a Union Chairman to a Magistrate requesting him to take action against a person who, while drunk had used insulting language to him, was held to be a complaint, 17 C.W.N. 448. So also (1) a *Yadast* sent by a Revenue Officer to a Magistrate charging a person with disobedience of a summons issued by him, 11 M. 443 (2) a petition to a Magistrate in the course of a police inquiry questioning its propriety and praying for action being taken against persons who were alleged to have committed an offence, 33 C. 1; (3) the sending of records by an officer trying a rent suit to the Collector who was also a District Magistrate, for starting proceedings under S. 193, I.P.C.; against the plaintiff in the rent suit, 26 A. 514; (4) report by a District Judge against certain insolvents asking the Magistrate to take action for an offence under S. 421, I.P.C., 18 A L.J. 50. (5) A petition relating to a murder to the District Magistrate, under inquiry by the police impugning the police enquiry and to call for a charge sheet or to allow the petitioner an opportunity to prove the case by witnesses is a complaint within this section, 7 Pat 561. (6) The report of a police officer in a non cognizable offence containing allegations in writing to the Magistrate to take action under the Code will amount to a complaint, 49 M. 525 (F.B.); 51 B. 458; 23 Cr. L.J. 821=104 Ind. Cas. 437; 27 Cr. L.J. 405=93 Ind. Cas. 69; 9 Lah. 289. (7) The report of an excise officer is a complaint within the definition, 54 C. 374, but the following are held to be no complaints:—(1) a letter from a Civil Court Amin to the police containing allegations charging one of having committed an offence, 1804 A W N. 265=1 Cr. L.J. 1045; (2) a report from a peon who was obstructed in the execution of a warrant under the Cess Act stating what took place but contained no express or implied request to the Magistrate to take action, 17 C.W.N. 583; (3) a petition to the Collector as Agent of the Court of Wards against one of his subordinates praying for redress of grievances, 30 C. 415; (4) a petition presented to a Magistrate alleging that an offence had been committed but the petitioner did not desire to prosecute the offender, 6 C.W.N. 926; 26 M. 640; (5) a petition containing allegations

against a person with a request for an order on the police to warn the wrong-doer, 15 C.W.N. 1031; (6) an order under S. 196 *infra* sanctioning a prosecution, 35 C. 141 at 150; (7) a letter by an Assistant Collector to the District Magistrate in which the former did not ask any action to be taken according to law but only solicited orders, 40 A. 641; (8) an application to take action under S. 107 *infra* is not a complaint where there is merely an allegation that a breach of the peace is likely and such an application cannot be dismissed under S. 203, *infra*, 25 Cr. L.J. 89=76 Ind. Cas. 25; 25 Cr. L.J. 1149; 29 Cr. L.J. 866=111 Ind. Cas. 430. (9) An endorsement by a Police Superintendent for necessary action on a report made by a Police Inspector alleging a certain person committed an offence, 27 Cr. L.J. 899 (2)=96 Ind. Cas. 211 (2). Proceedings under S. 113 of the Railways Act against a person before a Magistrate to recover excess charges and fares are not a prosecution for a Criminal offence as Magistrate can only direct the passenger to pay the fare and excess charges and if he fails to pay, then to proceed to recover the same as if it were a fine, but he has no power to impose a fine or award imprisonment in default of payment, 6 Ran. 619. A Criminal Court is not bound by all the statements in a complaint. Its duty is to find out the truth in the midst of conflicting evidence and for a conviction it is not necessary to find that the complainant's case exactly as is stated by him was proved, 14 Bom. L.R. 135=13 Cr. L.J. 300=14 Ind. Cas. 704.

Oral Complaint.—A complaint need not be in writing but may be oral, 1 Ran. 549 and it need not quote any section of the I.P.C., but only must contain a statement of the facts relied on as constituting the offence and it is for the Magistrate to determine on the facts what offence has been *prima facie* made out, 6 Lah. 375; 9 Lah. 678. Where the name of a person against whom sanction was accorded under S. 196 *infra* appeared in the sanction order but did not find a place in the written complaint filed, it was held that a subsequent application to the trying Magistrate for the issue of process against the person named in the sanction order does not amount to an oral complaint, because such an application for issue of process presupposes a valid complaint, 15 C.W.N. 98. See also 20 C. 431 and 10 C.W.N. 1029; 30 C. 910 (F.E.).

With a view to his taking action under the Code.—One of the tests to decide whether an allegation amounts to a complaint is, whether it was made to the Magistrate with a view to his taking action, 27 M. 127; 19 B. 51 at 62. A complaint is not intended to give information to the accused. A summons or warrant issued to secure the attendance of the accused need not set out all the facts on which he is to be charged and if not in them, why in the complaint? 32 M. 3 at 11. The Magistrate must be empowered under S. 190 (i) (a) *infra* to take cognizance of offences; the definition of offence has now been extended by Cl. (1) (c) of this section to cover acts on which proceedings under S. 20 of the Cattle-trespass Act I of 1871 may be taken. The rulings in 9 M. 102 and 374 are no longer law; the examination of a complainant by a Magistrate after taking cognizance of the offence under S. 200 *infra* has been held not to form part of the complaint, 13 L.W. 695= (1921) M.W.N. 514. But for the purpose of ascertaining the real nature of the complaint in any particular case, the sworn statement may be read with the complaint, 45 M.L.J. 543, (1923) M.W.N. 876=24 Cr. L.J. 837=74 Ind. Cas. 943. But various petitions to Magistrates such as applications to start security proceedings under Chapter VIII, petitions to initiate proceedings under Chapter XII, petition under S. 488 claiming maintenance, do not fall within the definition. See 16 M. 234; 6 M.L.T. 251; 11 M. 199; 6 C.W.N. 163; 27 C. 662. The mere filing of a complaint invoking jurisdiction of a Magistrate does not invest him with jurisdiction if he is otherwise incompetent to try the offence and it is open to a complainant to object to the jurisdiction even in revision stage, 45 M. 843. It is not necessary that in a complaint the names of all the accused persons should be mentioned to make it a valid complaint, 13 Cr. L.J. 883=15 Ind. Cas. 1004.

Does not include the Report of a Police Officer.—The report referred to here does not refer to reports made under Chapter XIV only, but also includes any report by a police-officer or any written or verbal information by him as such, 1 Cr.L.J. 193; written information under S. 154 received with a police report cannot be treated as a complaint given by informant, 43 C. 1152, unless informant impugns the propriety of the police-report

sent to the Magistrate referring the case and claims a Magisterial inquiry, 20 Cr. L. J. 389. The report herein referred to not to be a complaint, must be some statement made by the police-officer in connection with or at least under the colour of the duty of the maker as a police officer, 32 M. 3 at 10. Thus the complaint of a Prosecuting Inspector in a non-cognizable offence, say, under S. 124 A, I.P.C., cannot be regarded as a report of a police-officer, as it is no part of the duty of a Prosecuting Inspector to make reports of such an offence, 32 M. 3 at 10. It was held in 35 C. 141, that the application of a police officer for warrants in respect of an offence under S. 124 A, I.P.C., coupled with his oral allegations not made on oath or reduced to writing amounted to a complaint. A complaint is nonetheless a complaint because it was filed by a police officer, 32 M. 3 at 10, 25 B. 150 and 22 B. 112. The Code does not prohibit a police officer from presenting a complaint in a non-cognizable case, 25 Cr. L. J. 1361=82 Ind. Cas. 753. See 47 M. 525 (F.B.) where it was held that a Magistrate may take cognizance of an offence upon a report in writing of facts which constitute such offence, made by any police officer in non-cognizable offences. Such report can be treated as a complaint by a public servant acting or purporting to act in the discharge of his official duties and S. 200 (a) provides that he need not be examined on oath by the Magistrate before taking cognizance of the offence. A police report in a non-cognizable offence if it contains an allegation to a Magistrate to take action under the Code against some person for having committed an offence would amount to a complaint under this clause, 51 B. 452, 49 M. 525 (F.B.); 9 Lab. 285. See also 29 Cr. L. J. 321=103 Ind. Cas. 437; 25 Cr. L. J. 1361=82 Ind. Cas. 753, 27 Cr. L. J. 405=93 Ind. Cas. 65, but the endorsement by a Superintendent of Police for necessary action on a report made by an Inspector of Police alleging that a certain person had committed an offence is no complaint, 27 Cr. L. J. 879=66 Ind. Cas. 211. A person cannot delegate to another the right to file a complaint. A District Magistrate cannot authorize the Public Prosecutor to file a complaint on his behalf, 16 Cr. L. J. 251; 31 B. 642 at 644. It is a principle of general application that criminal proceedings instituted by a private complainant abate on such person's death, 46 M. 88.

(i) "European British subject" means—

(i) *any subject of His Majesty of European descent in the male line born, naturalised or domiciled in the British Islands or any Colony, or*

(ii) *any subject of His Majesty who is the child or grandchild of any such person by legitimate descent :*

The definition, which is entirely new, was added by Act XII of 1923 *Racial Distinctions*. It is restricted to persons of European descent, and Colonials are also included in the definition. But persons of Indian descent have no longer any privilege by reason of their being born or domiciled in the British Islands. A person who claims the special privilege must prove (1) that he is a subject of his Majesty, (2) that he is of European descent answering the description herein given, (3) that he is a legitimate child or grandchild of such person.

Naturalised.—See 33 and 34 Vict. C. 14, S. 7, as amended by 33 and 34 Vict., C. 104 and also the Indian Naturalization Act XXX of 1852.

Domiciled.—Two things are essential to fix domicile. One is residence and the next is an intention to make it a permanent residence.

It is clear from the definition that certain rights and privileges which belong to the class are conferred upon *qua* such class irrespective of considerations of change of status owing to marriage. It will not be contended that a Native British Indian woman if she marries a European British subject would come under the definition although she may thereby be said to acquire his domicile nor will it be contended that a European British subject who marries a Native British Indian husband thereby ceases to be a European British subject as

defined in the Code. It cannot be contended that to come within the definition it is necessary not only the person should be a European British subject by birth but should be domiciled in the British Islands or any colony. The definition cannot so be restricted and if so restricted it would exclude from its operation all European British subjects who are domiciled in British India unless British India can be said to come within the definition of a colony. Such could not have been the intention of the Legislature. The use of a ' , ' after the word born in the definition indicates that the words naturalised or domiciled which follow it are the word disjunctive of and not conjunctive with what precedes and a European British subject does not cease to be such by his or her domicile in a native state in India, 53 B. 149 at 158. Apparently under the definition the *status* of a European British subject can, in certain cases, be acquired by domicile in the British Islands or any colony. The definition does not contemplate the loss of the status of a European British subject by change of domicile whether by marriage or otherwise. A European British subject marrying an Indian wife the latter would acquire the domicile of her husband but it would be ridiculous to suppose that she would fall within the definition of a European British subject and obviously this is so because the wife would not be a European British subject. And even a clearer case is that a European British subject born in England and coming out to India, who by choice acquires an Indian domicile as he is perfectly competent to do by reason of his change of domicile, he undoubtedly would not lose his right as a European British subject under the Code. The definition does not contemplate a change of domicile as involving a loss of status. The section does not say so and we cannot read in the section what is not there. We must be guided by the definition as framed and no amendment was made as regards the status of a married woman and in the absence of authority to the contrary, it must be assumed that it was not the intention of the Legislature that a woman who was an European British subject by birth should lose that status for the purposes of the Code by reason of her marriage with a non-British subject, 53 B. 149 at 161-62.

As to the special provisions relating to trial of European British subjects, see the new Chapters XXXIII and XLIV and Ss. 29A and 34A *infra*.

(j) "High Court" means, in reference to proceedings against European British subjects or persons jointly charged with European British subjects, the High Courts of Judicature at Fort William, Madras, Bombay, Allahabad, Patna, Lahore and Rangoon and the Chief Courts of Oudh and Sind and the Court of the Judicial Commissioner of the Central Provinces :

In other cases "High Court" means the highest court of criminal appeal or revision for any local area ; or, where no such Court is established under any law for the time being in force, such officer as the Governor-General in Council may appoint in this behalf.

High Court.—The definition in the first paragraph refers to "Special Proceedings," against European and Indian British subjects under Chapter XXXIII and does not refer to proceedings generally against Europeans including proceedings in which they waive their right under the Chapter. When in any particular case the special rules contained in Chapter XXXIII do not apply, the definition in the first paragraph has no application and the definition in the second paragraph prevails. See the decision 12 B. 561 where it was held that an appeal from a conviction, by an European British subject who had waived his right and was convicted by the City Magistrate of Karachi, lay to the Sind Sadar Court and not to the Bombay High Court. See the definition in S. 266 *infra*. The Judicial Commissioner's Court of the Central Provinces and the Chief Courts of Oudh and Sind are High Courts for both the subjects. But when an European British subject waives his special privilege, the High Court competent to deal with him would be the one indicated for "other cases," namely,

the highest Court of Criminal Appeal. It is only when an European British subject claims to be dealt with as such that the High Court for him will be the one indicated in the definition. The view taken in 12 B. 561 was followed in 45 M.L.J. 803=18 L.W. 895=(1924) M.W.N. 60=31 M.L.T. 194=25 Cr. L.J. 231=76 Ind. Cas. 695 and the contrary view of Walsh, J., in 21 Cr. L.J. 767=59 Ind. Cas. 331 was not followed. The High Court when exercising Original Criminal Jurisdiction is not a Court of Session within the meaning of the Code, 51 C. 890.

In other cases.—This includes the case of an European British subject who waives his right to be dealt with under Chapter XXXIII. See 12 B. 561; 12 Cr.L.J. 436=11 Ind. Cas. 620; 25 Cr.L.J. 231=76 Ind. C. 695.

Where no such court is established.—The Governor-General in Council, may appoint an officer to perform the functions of a High Court under this clause. For Upper Burma, the Judicial Commissioner is a High Court, *Reg. V of 1892, Sch. Art 1*. For Coorg, the Chief Commissioner is a High Court, *Reg. 1 of 1901, S. 16*; For Baluchistan the Chief Commissioner and agent to the Governor-General is a High Court, *Reg. VIII of 1901, S. 6 (1) (c)*. For purposes of revision against acquittals from proceedings had in Santal Parganas the Commissioner of Bhagalpore is the High Court under Santal Par. Reg. S. 4 (1). 6 Pat. 83.

(k) "inquiry" includes every inquiry other than a trial conducted under this Code by a Magistrate of Court :

"Inquiry "

Inquiry.—An inquiry under the Code does not merely mean an inquiry into an offence; its meaning is considerably wider and extends into matters which are not offences. Proceedings under S. 107 or S. 145 *infra* are inquiries, 13 C.W.N. 420=9 Cr.L.J. 278=1 Ind. Cas. 336; 22 C. 898; 23 C. 709. So also proceedings under Ss. 98, 117 and 183 *infra*. The definition is not exhaustive so as to include an inquiry under the Workmen's Breach of Contract Act, 45 A. 700. The term inquiry in Ss. 436 and 437 refers to proceedings *up to charge* and the word trial refers to proceedings *after charge*, 15 C. 603 (F.B.); 9 A. 52. The distinction between an inquiry and a trial becomes very important as the benefit of S. 403 *infra* is available only in case the proceedings have terminated after a trial and not after an inquiry. The scheme of the Code and also the general provisions of Chapter XXIV *infra* relating to inquiries and trials go to show that the word 'inquiry' is used to indicate a judicial proceeding as distinguished from investigation and trial, 23 Bom. L.R. 884=22 Cr.L.J. 728=64 Ind. Cas. 40. The object of the inquiry is to take evidence in the case and to determine *prima facie* the truth or falsity of certain facts in order to take further action thereon. For example a Magistrate holds an inquiry as to possession under Chapter XII of the Code for passing a final order as to possession upon the result of this inquiry; an inquiry under Chapter XVIII of the Code is held by a Magistrate for passing a final order of Committal under S. 213 *infra* or for cancelling the charge if no *prima facie* case is made out, 5 Pat. L. J. 47 at 53.

Other than a Trial.—There is no definition of the word 'Trial' in the Code, 27 M. 510. See the observations of Maclean, C.J., in 25 C. 863 at 845. "Now what is a trial? To my mind it means the proceedings which commence when the case is called on with the Magistrate on the Bench, the accused in the dock and the representatives of the prosecution, and for the defence if the accused be defended, are present in Court for the hearing of the case. That is I consider the proceeding which is intended by the term 'trial'." See also the observations of Subramania Iyer, Offg. C.J., in 27 M. 510 at 511, as to the meaning of trial. See also 38 M.L.J. 370 (F.B.)=11 L.W. 435. Trial includes security proceedings under S. 107 *infra*, 27 M. 510 but in 50 C. 985 it was held that proceedings under Chapter VIII of the Code do not constitute a trial nor is the person proceeded against an accused person who has committed any offence. As to when a trial begins. See 32 M. 220 at 234 (F.B.).

(l) "investigation" includes all the proceedings under this Code for the collection of evidence conducted by a police-officer or by any person (other than a Magistrate) who is authorized by a Magistrate in this behalf :

The definition herein given is not exhaustive. It would be placing an undue limitation on the simple meaning of the words to hold that a police-officer who obtains a warrant of arrest under the Gaming Act and arrested and seized their account books has not taken part in the investigation, 26 B. 533. Investigation and inquiry are two different things under the Code. The object of the investigation is confined to the collection of evidence. This is evident from the definition herein given. A local investigation is merely collection of evidence on the spot, 5 Pat. L.J. 47 at 52-53.

(m) "judicial proceeding" includes any proceeding in the course of which evidence is or may be legally taken on oath :

Scope of the Definition.—We have added the words "on oath" in this definition because the power to take evidence on oath (*oath* under S. 3 (36) of the General Clauses Act includes affirmation and declaration)—is the characteristic test of judicial proceedings. We have omitted the new words "and it also includes every other proceeding consequential thereon," providing for consequent proceedings which the Bill as introduced proposed to add to the definition as they appear too wide. On the other hand we have altered the word 'means' at the commencement of the definition into 'includes' and have thus given to the Courts a certain latitude of construction.—*Report of the Select Committee.*

Judicial Proceeding.—See 12 B. 36 for the distinction between judicial and administrative proceeding. The definition herein given is clearly not exhaustive, 37 C. 642 (F.B.). See in this connection Explanation II to S. 193, 1 P.C. The following have been held to be judicial proceedings.—(1) proceedings before a Magistrate to whom a complaint was referred for inquiry and report under S. 202 *infra*, 35 C. 72 and 2 Cr.L.J. 118; (2) inquiry held by a Magistrate before issuing an order under S. 144 *infra*, 19 M. 18; (3) a preliminary inquiry under S. 476 *infra* with a view to take action under that section, 37 C. 52; (4) inquiry conducted by a Magistrate into the truth of an allegation against a subordinate official in a petition presented to a Deputy Commissioner, 28 A. 88; (5) execution proceedings subsequent to the determination of the civil suit, 37 C. 642 (F.B.); 19 Cr.L.J. 153 = 53 Ind. Cas. 441, (6) proceedings under the Reformatory Schools Act, S. 8, 14 B. 331; (7) proceedings under Ch. XIV of the Code, 29 M. 89; 16 M. 521. But the following are *not* judicial proceedings:—(1) preliminary inquiry held by a Subordinate Magistrate at the direction of the District Magistrate in regard to a complaint against the police with a view to ascertain whether the District Magistrate should grant sanction under S. 197 *infra* or not, 23 M. 223; (2) proceedings of a Magistrate purporting to act under S. 86 *infra* taking bonds from an appellant in an appeal to appear (a) before the Sub Magistrate who was directed to take further evidence by the appellate Court; (b) before the appellate Magistrate to give evidence in connection with a departmental inquiry as to the charge of corruption against a Sub-Magistrate, 29 M. 100; (3) proceedings before a District Magistrate under S. 125 *infra* with a view to have a bond under S. 107 *infra* cancelled, 37 C. 72; (4) an order of a District Magistrate directing the prosecution of a *Mukhtar* on a perusal of the records submitted to him by a Sub-Divisional Officer relating to the conduct of the *Mukhtar* in a case tried before that officer, 15 C.W.N. 260; (5) proceedings with regard to a complaint to District Magistrate as head of the District Police to prevent police-officers acting high-handedly, 33 A. 102; (6) calling for records under S. 435 of the Code, 15 M.L.J. 489; (7) inquiries by District Magistrate secretly on information that a grave crime was being or about to be committed, 4 C.L.J. 181.

"Non-cognizable offence."

"Non cognizable case"

(n) "non-cognizable offence" means an offence for, and "non-cognizable case" means a case in, which a police-officer, within or without a presidency-town, may not arrest without warrant :

The expression police-officer is not defined in the Code or in the General Clauses Act, but only an officer in charge of a police station is defined in cl. (p) *infra*, see Sch. II, Col. 3 as to the offences under the I.P.C., which a police-officer could arrest without warrant and the last portion of Sch. II as to his powers of arrest under other laws. A police-officer cannot arrest a person for an offence under S. 9 of the Opium Act I of 1878 as the offence is a non-cognizable one, 24 C. 691. See Ss 153 and 163 as to his powers to investigate and search in non-cognizable cases.

"Offence."

(o) "offence" means any act or omission made punishable by any law for the time being in force ;

it also includes any act in respect of which a complaint may be made under S. 20 of the Cattle-Trespass Act, 1871 :

See the definition in S. 3 (37), General Clauses Act X of 1897 and S. 40, I.P.C. See also S. 4 I.P.C. *explanation* which says 'offence' includes every act committed outside British India which if committed in British India, would be punishable under this Code. An offence under S. 10 of *Musliman Waqf Act* 1923 is an offence within this definition and S. 3 (37) General Clauses Act and is therefore triable not by the District Judge but by any Magistrate under the provision of S. 29 *infra*, 23 Cr.L.J. 934-105 Ind Cas. 666.

The last clause was introduced on account of certain rulings (see 9 M. 102 & 374) which laid down that an act in respect of which complaint could be laid under S. 20 of the Cattle Trespass Act was not an offence and thus superseded those rulings and make such a complaint an offence within the definition given herein, 52 M.L.J. 251-25 L.W. 282-28 Cr.L.J. 301-100 Ind. Cas. 331. A Magistrate of the second class empowered under S. 190 *infra* to take cognizance of offences on receiving complaints, has power to take cognizance of complaints made under S. 20 of the Cattle Trespass Act, 44 B. 42 following 34 C. 926. The word *punishable* is not defined but S. 53, I.P.C., mentions every kind of punishment. The demolition of an unlawfully erected work under the Municipal Act by a Magistrate is not a punishment, 54 C. 532 at 533.

(p) "Officer in charge of a police-station" includes, when the officer in charge of a police-station is absent from the station-house or unable from illness or other cause to perform his duties, the police-officer present at the

"Officer in charge of a police-station"

station-house who is next in rank to such officer and is above the rank of constable or, when the Local Government so directs, any other police-officer so present :

See 42 M. 446 and (1911) 1 M.W.N. 231=9 M.L.T. 314=12 Cr. L.J. 110=10 Ind. Cas. 667, as to the meaning of the term. The aim of S. 4 (p) is to bring in more men, so that the duties of the officer may be performed without delay and not to include persons who are either permanent incumbents or who have been appointed to act for permanent incumbents. As to the powers of an officer in charge of a police station, see Ss 55, 56, 92, 94, 127, 128, 153, 154, 156, 157, 160, 173 to 175 *infra*. As to his duties see Ss 55, 62, 154, 160, 173, 174 and 175 *infra*. This clause is not applicable to the police in Calcutta and Bombay.

See S. 551 *infra*, which empowers superior police-officers to exercise all the powers of a station-house officer.

"Place," (q) "place" includes also a house, building, tent and vessel :

See the explanation to S. 133 *infra* as to the meaning of 'public place.' See 17 A. 166 as to what is a 'public place.'

(r) "pleader," used with reference to any proceeding in any Court, means a pleader or a *mukhtar* authorized under any law, for the time being in force, to practise in such Court, and includes (1) an advocate, a vakil and an attorney of a High Court so authorized, and (2) any other person appointed with the permission of the Court to act in such proceeding :

Under any Law.—See the Legal Practitioners Act XVII of 1879 as amended by Act IX of 1884, VI of 1900, I of 1908, XXIII of 1923 and XXXV of 1923

Practice—The Code gives every Magistrate a discretion to permit persons other than legal practitioners to practice and to act in proceedings before him. The discretion is to be exercised according to the circumstances of each individual case and in deciding whether permission is to be granted or not the character of the person is to be taken into consideration. A person of bad character or a person convicted of an offence or whose character or conduct is such that he would have been suspended or dismissed if he had been a regular practitioner, ought not to be allowed to practice. Allowing unlicensed persons to appear systematically and as a matter of course is reprehensible. Having regard to the large number of qualified practitioners now available, the discretion to permit private pleaders to appear and argue cases should be exercised as sparingly as possible and reasons for the permission should be recorded in writing. Permission is to be given only to prevent a possible miscarriage of justice. These provisions will not apply to persons practising as private pleaders prior to 18th October 1899. Rules 192—93 *Mad. Cr. R. of Pr.* A mere petition-writer cannot be said to practise, 18 W.R. (Cr.) 27; only those who are entitled to appear, plead or act in Court can be said to practise, 14 C. 555 at 565. The term "practitioner" in S. 32 of the Legal Practitioners Act does not connote the doing of acts habitually or often but signifies the performance of an act by a person as a professional man which could not be done by a private individual, 26 A. 330. It is the duty of a pleader accepting an engagement in a Court where he is not authorised to practise to inform the client that his appearance will be contingent on the Magistrate's permission to appear in the case and the better course is not to accept fee or engagement until the Magistrate's permission is obtained, 15 Cr.L.J. 388=23. Ind. Cas. 750. See also 12 Cr.L.J. 118=9 Ind. Cas. 717, 18 Cr.L.J. 345; 33 Ind. Cas. 729. A District Magistrate has no power in view of this sub-section to pass a general order prohibiting *Mukhtars* from practising in Criminal Courts and any such prohibitory order can be reviewed by the High Court under Ss. 435 and 439 *infra*, 29 Cr. L.J. 226=107 Ind. Cas. 56 relying on Ratanlal 1; 30 A. 66 and 38C. 488

Mukhtar.—This class of legal practitioners is recognized by the Legal Practitioners Act XVII of 1879 and S. 9 of the Act specially reserved the provisions of this Code in respect of *mukhtars*. They are licensed under the Act, 25 C. 735. By the new amendment (Act XXXV of 1923) they are entitled to practise in criminal Courts without special permission in each case. See 30 A. 66; 38 C. 488; 29 Eom. L.R. 1587; 29 Cr.L.J. 226=107 Ind. Cas. 56, as to their rights and *status*. In Madras, the position of private vakils is recognised in, 7 M.H.C.R. Appx. 37 and 6 M. 100; but in each case the Magistrate is to exercise a discretion before giving audience to the vakil and in deciding whether permission is to be granted or not. The Magistrate is to consider the private character of the vakil. A general circular prohibiting a private vakil from appearing in all cases was declared illegal in, 4 M.L.T. 91. See also the Full Bench ruling in, 12 M.L.J. 353, which refers to the previous circulars of the Madras High Court and recognized the right of private vakils to appear. Form No. 1

of Sch. V also contemplates an accused person appearing not necessarily in person but by a pleader, 50 B. 250 followed in 29 Cr. L.J. 226=107 Ind. Cas. 55.

Other persons appointed.—Parties to criminal proceedings are to have the fullest opportunity to employ whomsoever they please without reference to the mode or circumstance by which they may be influenced to do so, 1 B.H.C.R. (Cr. Ca. 16) When an accused is permitted to appear by pleader it is open to him to appoint a private person to appear for him in his stead and to do acts on his behalf and is equally open to the Court to permit the private person to represent the accused. This is a deviation from the ordinary rule that the accused should himself appear and plead personally. And when this is allowed there should really be on record something to show that the person representing the accused has been duly appointed and the Court gave its permission for the same. So it is open to an accused person to appoint his own estate manager to appear in his stead and plead for him, 50 B. 250. See S. 340 *infra* which recognizes the right of every accused person to be defended by a pleader as defined herein. See also S. 255 *infra* which gives a Magistrate discretion whenever he issues a summons to dispense with the personal attendance of the accused and permit him to appear by his pleader. A Magistrate has no power to appoint a *Mukhtar* to represent an accused when he was absent and did not ask for such permission, (1 23) Pat 239.

With the Permission of the Court.—The permission required is not a general one but a permission in each particular case. A private *vakil* would require such permission in each particular case and such permission should not be refused in an arbitrary manner, 7 C.W.N. 524; 38 C. 433; 30 A. 66; 4 M.L.T. 91, see 29 Bom. L.R. 1536 Where it was held following, 50 B. 250, that a *Mukhtar* in Bombay is a person appointed with the permission of the Court to act in a particular proceeding within the meaning of this sub-section and it is not competent to a District Magistrate to prohibit by a general order all *Mukhtars* from practicing in the Criminal Courts in the District.

(s) "police-station" means any post or place declared, generally or specially, by the Local Government to be a police-station, and includes any local area specified by the Local Government in this behalf :

"Police-station."

(t) "Public Prosecutor" means any person appointed under S. 492, and includes any person acting under the directions of a Public Prosecutor and any person

"Public Prosecutor."

conducting a prosecution on behalf of Her Majesty in any High Court in the exercise of its original criminal jurisdiction :

Public Prosecutor.—See Ss. 492, 495 and 270 *infra* as to the appointment, duties and powers of a Public Prosecutor. See also 42 C. 422. A private complainant may retain a pleader and the Public Prosecutor may avail himself of his services, but in doing so the Public Prosecutor does not deprive himself of the management of the case, 11 B.H. C.R. 102.

"Sub-division."

(u) "sub-division" means a sub-division of a district :

See S. 8 *infra* as to the power to divide district, outside Presidency-Towns into sub-divisions.

"Summons-case."

(v) "summons-case" means a case relating to an offence, and not being a warrant-case : and

"Warrant-case."

(w) "warrant-case" means a case relating to an offence punishable with death, transportation or imprisonment for a term exceeding six months.

Words referring to acts.

(2) Words which refer to acts done, extend also to illegal omissions; and

Words to have same meaning as in Indian Penal Code.

all words and expressions used herein and defined in the Indian Penal Code, and not hereinbefore defined, shall be deemed to have the meanings respectively attributed to them by that Code.

The Code does not give definitions of words like 'Judge' etc., and this section adopts the definition of words given in the Indian Penal Code when they are not expressly defined in this Code, 5 Pat. 110 at 115, see Ss. 6 to 33 I.P.C. in this connection. In 20 M. 470 (F.B.) it was held that the word adultery, 'occurring in S. 483 *infra* should not be construed with regard to the definition in the Penal Code which may not justify a conviction under S. 497 I.P.C. but may be sufficient for the purpose of S. 488 *infra*. The concluding words of the section enact that any word used but not defined in that Code shall be deemed to have the meaning attributed to it in the I.P.C., but the provision is subject to the opening words of the section which say 'unless a different intention appears from the subject or context.' This limitation seems to have been overlooked by the learned Judges in 17 M. 260—*per* Benson, J. in 20 M. 470 at 475.

Trial of offence under Penal Code,

5. (1) All offences under the Indian Penal Code shall be investigated, inquired into, tried and otherwise dealt with according to the provisions hereinafter contained.

Trial of offences against other laws

(2) All offences under any other law shall be investigated, inquired into, tried and otherwise dealt with according to the same provisions, but subject to any enactment for the time being in force regulating the manner or place of investigating, inquiring into, trying or otherwise dealing with such offences.

Scope of the Section.—sub-section (1) provides for the trial under the Code of offences under the Penal Code, and sub-section (2) goes on to say that all offences under any other law, *i.e.*, any law other than the Penal Code, shall be investigated, and inquired into according to the same provisions, that is, the provisions of the Criminal Procedure Code. That states the general principle that the appropriate procedure for the trial of offences is to be found in the Criminal Procedure Code and a saving clause however follows to the effect that it must be subject to any enactment for the time being in force, regulating the manner or place of investigation, inquiry or trial of such offences. Then follows the next section which recognizes other Courts having jurisdiction to try criminal offences besides the High Court and the five classes of Criminal Courts mentioned therein. If any rule framed under any enactment is covered by the saving clause in sub-section (2), then there is no inconsistency between that rule and the Code, but the rule will not be an "enactment" within the meaning of sub-section (2), 48 C. 955. Under various English Statutes like 12 and 13 Vict., C. 96, Ss. 1, 23 and 24 Vict., C. 38, Ss. 1, 38 Vict. C. 27, S. 3, the Merchant Shipping Act of 1883, S. 6 and Act X of 1889, S. 55, a Magistrate in India is empowered to try an accused for an offence committed on board a British ship on the high seas. The trial shall be conducted according to the provisions of this Code and the offence charged should be one under the Indian Penal Code and conviction and the punishment should be under the

Penal Code, 25 B. 635 See also notes to S. 1 *supra*, but a conviction both under the Penal Code and under a special law in respect of the same offence is illegal, 5 N.W.P.H.C.R. 49; 6 M. 249. See S. 26 of the General Clauses Act X of 1907. This section read with S. 520 *infra* gives the High Court Jurisdiction to transfer cases from the file of the village Panchayats, 49 A. 168.

All offences under the Indian Penal Code.—A contempt of the High Court by a libel published out of Court when the Court is not sitting is not included in these words, although the contempt may include defamation. Such an offence is something more than mere defamation and is of different character. It is an offence which by the Common Law of England is punishable by the High Court in a summary manner by fine or imprisonment or both. That part of the Common Law of England was introduced into the Presidency Towns when the 1st Supreme Courts were established by the Charters of Justice and the offence of contempt of the powers of the High Court for punishing it are the same as in this country, not by virtue of the Penal Code and the Criminal Procedure Code in British India but by virtue of the Common Law of England, 10 C. 109 (P.C.) at 131; 6 Lah. 529; 48 A. 711; 21 M.L.J. 832 at 833—28 Cr. L.J. 727—103 Ind. Cas. 775. The High Court has similarly Common Law jurisdiction to deal with contempts committed before an inferior Court but not under the Charter Act. Doubts having arisen as to the powers of the High Court to punish contempts of subordinate Courts, to remove that doubt, Act XII of 1926 was passed empowering the High Courts and Chief Courts to punish such contempts except when such contempt is an offence punishable under the Indian Penal Code. The jurisdiction in contempt is part of the legal system of this country and "we are as much bound to execute this part of the system as any other," 27 Cr. L.J. 1231 at 1243—98 Ind. Cas. 57.

Sub-Section (2).—This sub-section controls Chap. XIV of the Code. The police are not entitled to file a charge sheet for an offence under S. 55 of the Madras Abkari Act and on such a charge sheet a Magistrate cannot take cognizance of the case and proceed with it as by the filing of the charge sheet no valid proceedings are instituted before the Magistrate, 44 M.L.J. 231—17 L.W. 308—24 Cr. L.J. 335—72 Ind. Cas. 175 following 25 M.L.J. 577—1913 M.W.N. 1000—14 Cr. L.J. 637—21 Ind. Cas. 685. The summary process for contempt is not under any special or local law within the meaning of this section nor is it under any enactment regulating the manner or place of investigating inquiring into or trying such offence. The Code is therefore applicable to this offence not being excluded by its own provisions, 10 C. 109 (P.C.) at 127.

All offences under any other law.—These words cannot be intended to include a contempt of Court by libel published out of Court for which no provision is made by the Code and it is therefore unnecessary to consider what is the true construction of the words "any special jurisdiction or power conferred by any other law now in force" in S. 1 *supra*, 10 C. 109 (P.C.) at 132.

Subject to any enactment.—The Criminal Procedure Code cannot be invoked to justify any departure where a special procedure is prescribed for in a Special Act like the Bombay Gambling Act IV of 1887, S. 6. Where the Special Act is silent, the provisions of the Code would be applicable, 31 B. 439. Where a violation of a Special law is not an offence, the rule in S. 5 (2) will not apply, 37 C. 287. An Ordinance is not an Act of the regular Legislature but is nevertheless law enacted by authority with power to enact and is none the less a law because in order to distinguish it from the Acts of the Legislature it is described as an Ordinance and any infringement of its provisions is an offence. In the absence of special rules made under the powers conferred by the Ordinance, an inquiry into such an offence should be conducted in accordance with the provisions of the code, 17 Cr. L.J. 225—34 Ind. Cas. 641.

Shall be otherwise dealt with.—See S. 549 *infra* as to trial of military offences by a Court martial; sub-S. (2) controls Chap. XIV of the Code, 44 M.L.J. 231—17 L.W. 308—24 Cr. L.J. 335—72 Ind. Cas. 175.

PART II.

CONSTITUTION AND POWERS OF CRIMINAL COURTS AND OFFICES.

CHAPTER II.

OF THE CONSTITUTION OF CRIMINAL COURTS AND OFFICES.

A.—Classes of Criminal Courts.

6. Besides the High Courts and the Courts constituted under any law other than this Code for the time being in force, there shall be five classes of Criminal Courts in British India, namely :—

Classes of Criminal Courts.

- I. Courts of Session :
- II. Presidency Magistrates :
- III. Magistrates of the first class :
- IV. Magistrates of the second class :
- V. Magistrates of the third class.

The classes of Courts here given refer to col 8 of Sch. II and the Code does not recognize any Courts other than the classes of Courts provided by this section. Thus District Magistrate's Court will, for purpose of an ordinary criminal trial, be a Court of the Magistrate of the first class, see 30 Cr. L.J. 550 at 551=116 Ind. Cas. 77. The title 'Deputy Magistrate' and 'General Deputy Magistrates' are titles unknown to the Code, 23 M.L.J. 670 at 673 =13 Cr. L.J. 850=17 Ind. Cas. 785.

High Court.—See S. 4 (4) (*j*) *supra* and notes thereunder.

Courts of Session.—This expression includes the Court of an Additional Sessions Judge and an assistant Sessions Judge. See S. 9 (3) *infra*; under this section Courts of Session belong to a different class of Courts from the High Court. The High Court when exercising original criminal jurisdiction is not a Court of Session within the meaning of the Code. The original criminal jurisdiction of the High Court is regulated by the Letters Patent and a distinction is maintained throughout the Code between the High Court and Court of Session, 51 C. 880.

Magistrate.—There is no definition of the term Magistrate given in the Code. The terms 'Magistrate' and 'Court' are generally, if not always, convertible, 39 C. 953 (P.C.) at 965; S. 3 (31) of Act X of 1897 (General Clauses) defines a Magistrate as including every person exercising all or any of the powers of a Magistrate under the Code of Criminal Procedure for the time being in force. See S. 10 *infra* for the definition of 'District Magistrate.' The Code does not recognise any particular Court as being the Court of a District Magistrate. This section and S. 32 *infra* show that the Magistrate's Court other than those in the Presidency Towns consist (1) Courts of Magistrate of the first class; (2) Courts of Magistrate of the second class; (3) Courts of Magistrate of the third class, 1906 A.W.N. 201=3 A L.J. 828 at 827=4 Cr. L.J. 140. A Sub-Divisional Magistrate is not mentioned as one of the Courts. He may either be a second or first class Magistrate, S. 19 *infra*. See 42 A. 649 at 654. There is no definition of a first class Magistrate but it is used to mean a Magistrate exercising within a particular jurisdiction the highest Magisterial powers conferred ordinarily on Magistrates, 31 B. 511.

Presidency Magistrate.—This Section differentiates Presidency Magistrates from Magistrates of the first class, 25 C. 551 and Ss. 10 and 12 show that District Magistrates and

Magistrates of the first class are appointed only in districts outside the presidency-towns, 32 M. 303. A Presidency Magistrate belongs to what is generally speaking the highest class of Magistrates, 31 B. 611 at 623. See also 32 B. 10.

Courts constituted under any law other than this Code.—For example, Forest Courts under S. 71 of Act VII of 1878, Indian Marine Courts under Act XIV of 1867, Court Martial under Act V of 1869 as amended by Act XII of 1891, Courts of Cantonment Magistrate under S. 7 of Act XIII of 1889, Courts of heads of villages in Madras under Reg. XI of 1816 and IV of 1821. This section appears to recognize, that besides the High Court and the five classes of criminal Courts constituted by the Code there may be other Courts constituted under other laws meaning presumably other Courts having jurisdiction to try criminal offences, 43 C. 855. A Municipal Magistrate appointed to deal with offences against Municipal Act is a Court constituted under a law other than the Code for the time being in force and comes within this section and consequently the provisions of Ss. 435 and 439 *infra* apply to those proceedings, 52 C. 862 at 868.

B.—Territorial Divisions.

7. (1) Every province (excluding the presidency-towns) shall be a sessions division, or shall consist of sessions divisions: and every sessions division shall, for the purposes of this Code, be a district or consist of districts.

Sessions divisions and districts.

Power to alter divisions and districts.

(2) The local Governments may alter the limits or the number of such divisions and districts.

Existing divisions and districts maintained till altered.

(3) The sessions divisions and districts existing when this Code comes into force shall be sessions divisions and districts respectively, unless and until they are so altered.

Presidency-towns to be deemed districts.

(4) Every presidency-town shall, for the purposes of this Code, be deemed to be a district.

Province.—S. 3 (43) of the General Clauses Act defines a Province as meaning the territories for the time being administered by any Local Government.

Local Government.—S. 3 (29) of the General Clauses Act defines the term as meaning the person authorized by law to administer Executive Government in the part of British India in which the Act or Regulation containing the expression operates and shall include a Chief Commissioner.

Presidency-town—S. 3 (41) of the General Clauses Act defines the term as meaning the local limits for the time being of the ordinary original jurisdiction of the High Court of Judicature at Fort William, Madras or Bombay, as the case may be. The Presidency-town of Madras is divided into two divisions and a Presidency Magistrate's Court established for each division. Fort St. George Gazette Pt. I. p. 2377, dated 1—5—1877.

Local Government may alter the limits or number of such divisions.—Section 7 of the Code assumes the existence of a sessions division in every part of British India where the Code is in force outside the presidency-towns. It does not contemplate the constitution of sessions divisions by the Local Governments which can alter the limits of divisions or the number of divisions. Every Province is, by operation of law, a sessions division or consists of sessions divisions. There is no place, therefore, which escapes the pervading force of the section, 10 B. 274 at 282—83.

Sub-Section (2).—Under this section as amended by the Devolution of Powers Act, 1920, the Local Government with effect from and after 16th October 1923 has notified that the Agency Sessions division be abolished and in lieu thereof the old Agency Sessions division of Ganjam, Vizagapatam and Godavery be re-established. The Local Government has further notified establishing from the same date a Court of Session for each of the sessions divisions and direct that the said Courts do hold there sitting in the Towns of Chatrapur, Waltair and Coconada or in any such place within the respective Sessions Divisions and further that the Agents to the Governor in Ganjam and Vizagapatam and Government Agent Godavery are appointed Sessions Judges of the respective Courts of Sessions.

Districts existing when this Code comes into force.—"The existence of two Sessions Divisions in the same District cannot be treated as unwarranted, for the same was the case when the Code of Criminal Procedure was passed and paragraph 3 of S. 7 recognizes the legality of the existing Sessions Divisions and Districts, unless and until altered" 30 M. 136 at 137. See 28 M.L.J. 670 where it was held that the Sessions Court of Ganjam Division was not competent to hear an appeal from a Magistrate who had jurisdiction over the Agency and non-Agency tracts when the case arose in the Agency tracts but the appeal lay to the Agency Sessions Division, i.e., the District Magistrate of Ganjam.

8. (1) The Local Government may divide any district outside the presidency-towns into sub-divisions, or make any portion of any such district a sub division and may alter the limits of any sub-division.

Power to divide districts into sub-divisions.

(2) All existing sub-divisions which are now usually put under the charge of a Magistrate shall be deemed to have been made under this Code.

Existing sub-divisions maintained

A cantonment Magistrate under S. 7 of Act XIII of 1889 is to be deemed a Magistrate in charge of a division of a District, i.e., a Sub-division when appointed under S. 12 *infra*. Cantonment Magistrate shall be subordinate to the District Magistrate.

C.—Courts and Offices outside the Presidency towns.

9. (1) The Local Government shall establish a Court of Session for every sessions division, and appoint a Judge of such Court.

Court of Session.

(2) The Local Government may, by general or special order in the official Gazette, direct at what place or places the Court of Session shall hold its sitting; but, until such order is made, the Courts of Session shall hold their sittings as heretofore.

(3) The Local Government may also appoint Additional Sessions Judges, and Assistant Sessions Judges to exercise jurisdiction in one or more such Courts.

(4) A Sessions Judge of one sessions division may be appointed by the Local Government to be also an Additional Sessions Judge of another division, and in such case he may sit for the disposal of cases at such place or places in either division as the Local Government may direct.

(5) All Courts of Session existing when this Code comes into force shall be deemed to have been established under this Act.

Court of Session.—The term Court of Session wherever it is used in the Code means a Court established under the section. The scheme of the Code is to regard the High Court when exercising its original criminal jurisdiction as a Court of an entirely different class and character from a Court of session and the two expressions are used in the Code not as interchangeable terms and the High Court when exercising its original criminal jurisdiction is not a Court of Session as defined in this section and as understood in the Code, 51 G. 880.

Sessions Judge.—Jurisdiction is restricted to his Sessions division, 26 M. 137, but he may be appointed by the Local Government to be an Additional Sessions Judge of another division. He may pass any sentence authorized by law S. 31 (2), but any sentence of death shall be subject to the confirmation of the High Court.

Additional Sessions Judge.—The appointment of an Additional Sessions Judge does not thereby constitute an Additional Sessions Court, 1 M.L.J. 397 at 400. An Additional Sessions Judge exercises powers co-ordinate with those of a Sessions Judge, but he can exercise the powers of a Sessions Judge as a Court of revision under Ch. XXXII only in cases which may be transferred to him, S. 438 (2). A Sessions Judge under S. 17 (4) may delegate his powers to an Additional Sessions Judge. When a Sessions Judge had made over a particular appeal to be heard by an Additional Sessions Judge, but before it was dealt with by him the Sessions Judge called up the appeal to his own file and disposed of it himself, it was held that the Sessions Judge acted within his jurisdiction, 44 A. 157. He may pass any sentence authorized by law but a sentence of death is subject to the confirmation of the High Court. As to his powers to try original cases see S. 193 (2), and as to appeals to him and from his conviction, see Ss. 409 and 410 *infra*.

Assistant Sessions Judge.—All Assistant Sessions Judges are subordinate to the Sessions Judges in whose Court they exercise jurisdiction, and the Sessions Judge may make rules as to distribution of business among Assistant Sessions Judges, S. 17 (3). The Sessions Judge under cl. (4) of S. 17 may delegate his powers when he is unavoidably absent to an Assistant Sessions Judge. S. 31 (3) *infra* speaks of the sentence which may be passed by an Assistant Sessions Judge and S. 193 (2) speaks of his powers to try original cases. Appeals from the conviction of an Assistant Sessions Judge ordinarily lie to the Sessions Court, but when he is specially empowered under S. 30 and passes a sentence exceeding four years an appeal lies to the High Court. When an Assistant Sessions Judge sentences one of several accused to more than four years, and the others to lesser terms the appeal of all shall lie to the High Court even though the accused who had been sentenced to more than four years does not appeal, 37 A. 471. See S. 415-A, *infra*. See S. 538 (1) which empowers a Sessions Judge to withdraw cases which he had made over to an Assistant Sessions Judge. A Sessions Judge has no power to transfer an appeal filed in his Court to an Assistant Sessions Judge to hear and dispose of the same. He can only transfer cases which will not include appeals, 37 A. 236, where, 9 B. 174 and 23 A. 98 are followed.

10. (1) In every district outside the presidency-towns the Local District Magistrate. Government shall appoint a Magistrate of the first class, who shall be called the District Magistrate.

(2) The Local Government may appoint any Magistrate of the first class to be an Additional District Magistrate and such Additional District Magistrate shall have all or any of the powers of a District

Magistrate under this Code or under any other law for the time being in force, as the Local Government may direct.

(3) For the purposes of sections 192, sub-section (1), 407, sub-section (2), and 528, sub-sections (2) and (3), such Additional District Magistrate shall be deemed to be subordinate to the District Magistrate.

Amendment.—In sub-section (2) "for a period not exceeding six months" is omitted and the words "under any other law for the time being in force" are added. "At present an Additional District Magistrate can only be appointed for a period not exceeding six months and it is doubtful whether such a Magistrate can exercise the powers of a District Magistrate under any law except the Code. Experience has shown that the assistance of an Additional District Magistrate is not infrequently required for a longer time and the limit of six months is therefore removed."—*Statement of objects and Reasons*. Sub-section (3) is new and renders obsolete, 35 C. 918, where it was held that a District Magistrate has no power to transfer a case under S. 523 *infra* from the file of the Additional District Magistrate to any other Magistrate. "The powers of such an officer are extended and his position vis à vis of the District Magistrate in respect of Ss. 192, 407 and 528 of the Code is defined".—*Statement of Objects and Reasons*

Every district outside the Presidency-Towns.—The Scheme of criminal administration embodied in the Code regards the 'District' as the general unit for purposes of Magisterial jurisdiction. Under Ss. 7 to 10 every Province must consist of a District or Districts and in every District there must be a District Magistrate. Under S. 12 *infra* as many Magistrates as it considers fit may be appointed in each District and unless the jurisdiction and powers of such Magistrates are specially limited, they extend throughout the District in which they are appointed 1901 P.L.R. (Gr. J.) 96 at 305 (F.B.). S. 7(4) *supra* says that every presidency-town shall be deemed to be a district but this section applies only to districts outside the presidency-town. So a Presidency Magistrate can never be a District Magistrate as was contended for in 24 C. 551 at 553.

District Magistrate—As defined in this section a District Magistrate is a Magistrate of the first class who is so appointed by the Local Government, and on account of his appointment under this section, he exercises certain powers which are given to him in the Code but his Court is not a Court of a District Magistrate but is only a Court of a first class Magistrate. Being a first class Magistrate he can pass a sentence of imprisonment for a term not exceeding two years under S. 32 *infra* and if invested with powers under S. 30 *infra*, he can try all offences not punishable with death but can only pass a sentence under S. 54 *infra* of transportation or imprisonment for a term not exceeding 7 years. Under S. 407 *infra* a District Magistrate hears appeals and according to S. 408 *infra*, a person convicted on a trial held by a District Magistrate may appeal to the Sessions Judge except in the case where he exercises powers under S. 30 *infra* and when he passes a sentence exceeding four years or any sentence of transportation the appeal lies to the High Court. This shows clearly that District Magistrate as such is not a Court and is only a first class Magistrate who exercises special powers with which he is invested either by the Code or by the local Government. His Court is that of a Magistrate of the first class and appeals from the appealable sentence of his Court lie to the Court of Session, 30 Gr. L.J. 550 at 551=116 Ind. Cas. 77. The ordinary powers of a District Magistrate are enumerated in Sch. III and he is empowered to invest Magistrates subordinate to him with certain powers specified in Sch. IV. A District Magistrate may also make rules or give special orders consistent with this Code as to distribution of business among Magistrates and Benches in his District, S. 17 (1) *infra*. An Additional District Magistrate though he may have all the powers of a District Magistrate is a Magistrate other than the District Magistrate within S. 406 *infra*, 43 C. 875. The powers of a District Magistrate in respect of sentences are the ordinary powers of a District Magistrate, S. 32 *infra*, but he may be invested with special power under S. 30

infra, by which he may pass any sentence authorized by law except a sentence of death or transportation for a term exceeding seven years or imprisonment for a term exceeding seven years, S. 30 *infra*. Ordinarily, the terms "District Magistrate" or "First Class Magistrate" would not include a Presidency Magistrate, 32 M. 303; 24 C. 551. For purposes of S. 476 *infra* a Presidency Magistrate is deemed to be a First Class Magistrate. See Act II of 1926, S. 6 (b) which omits the word 'Chief.'

Sub-Section (2).—The scope of the powers conferred under this sub-section is not limited to the ordinary powers of a District Magistrate set out in Sch. III (v) but extends to all the powers which the District Magistrate is empowered to exercise at the date of a particular notification appointing an Additional District Magistrate and conferring on him all the powers of a District Magistrate, *e.g.*, power to grant sanction under S. 197 *infra*, 1923 M.W.N. 77=17 L.W. 226=24 Cr. L.J. 116=71 Ind. Cas. 244.

Sub-Section (3).—All Magistrates of whatever class within the District are subordinate to the District Magistrate, 9 B. 100; 12 C. 473 (F.B.) and the ruling in, 34 C. 918 is no longer law. It is now made clear that an Additional District Magistrate is subordinate to the District Magistrate for the purposes of Ss. 192 (1), 407 (2) and 528 (2) and (3), *infra*.

11. Whenever, in consequence of the office of a District Magistrate becoming vacant, any officer succeeds temporarily to the chief executive administration of the district, such officer shall, pending the orders of the Local Government, exercise all the powers and perform all the duties respectively conferred and imposed by this Code on the District Magistrate.

Officers temporarily succeeding to vacancies in office of District Magistrate.

A Magistrate of the first class while officiating for the District Magistrate commenced to try a case and continued the trial after he reverted as joint Magistrate in the same District, it was held that he had jurisdiction to do so and the trial was good, 1906 A.W.N. 201=3 A.L.J. 826=4 Cr. L.J. 140. See also 10 C.W.N. 1095. When an officer is absent on casual leave the next senior officer remains in charge of the current duties but there is no vacancy and no temporary succession within the meaning of the section, 22 Cr. L.J. 713=63 Ind. Cas. 873.

12. (1) The Local Government may appoint as many persons as it thinks fit, besides the District Magistrate, to be Magistrates of the first, second or third class in any district outside the presidency-towns; and the Local Government or the District Magistrate, subject to the control of the Local Government, may, from time to time, define local areas within which such persons may exercise all or any of the powers with which they may respectively be invested under this Code.

Subordinate Magistrates.

Local Limits of their jurisdiction.

(2) Except as otherwise provided by such definition the jurisdiction and powers of such persons shall extend throughout such district.

Local Areas.—The expression "Local area" includes sessions division, district or sub-division and cannot be restricted to mean the scene of an alleged occurrence only, 25 C. 838. "It is sufficiently clear from the language of the section that in the absence of any express enactment to the contrary the Code does not contemplate an exercise of jurisdiction outside the limits of the area called a district," 9 B. 30.

Sub-Section (2).—This sub-section declares that except as otherwise provided by such definition, that is, without an order restricting the power of any Magistrate appointed by the Local Government, *the jurisdiction and powers of such persons shall extend throughout such district*. Consequently unless the powers of the Magistrate had been restricted to a certain local area he has jurisdiction over the entire district, 29 C. 389; 10 C.W.N. 1095. A sub-divisional Magistrate whose jurisdiction is defined by order of the District Magistrate under this section cannot take cognizance of matter outside such local area, 19 A.L.J. 77=22 Cr. L.J. 122=59 Ind. Cas. 554, where 1906 A.W.N. 201=3 A.L.J. 826=4 C.L.J. 140 is distinguished see also 29 Cr. L.J. 124=105 Ind. Cas. 716; 21 Cr. L.J. 321 at 325=55 Ind. Cas. 593, but if the jurisdiction is not so defined under the section his jurisdiction and power would extend under sub-section (2) of this section throughout the district 22 Cr. L.J. 713=63 Ind. Cas. 873. Where a sub-divisional Magistrate in a district initiated security proceedings under S. 107 *infra* against one in his division, the District Magistrate transferred the case to a Deputy Magistrate of the first class at the headquarters, the Deputy Magistrate had jurisdiction to try the case or institute fresh proceedings, 29 C. 389. See also 10 C.W.N. 1095; Ratanlal 838. Where a subordinate Magistrate tried an offence committed beyond the local limits of what was regarded as his jurisdiction, it was held that as a Magistrate in the division in which the offence occurred and as a Magistrate whose powers had not been formally limited to any particular portion of the division he had jurisdiction to try the case, Weir II, 13. A Magistrate of the first class while acting as District Magistrate commenced a trial and during the pendency of the trial, he reverted as Joint Magistrate but continued the trial without any objection and concluded the case, held that he had jurisdiction to conclude the trial and his decision is valid, 1935 A.W.N. 201=3 A.L.J. 826=4 Cr. L.J. 140; 22 M. 47; 10 C.W.N. 1095; 21 Cr. L.J. 321 (2)=55 Ind. Cas. 593 Cases on the file of one Magistrate do not pass automatically to his successor in the local area merely because the former has been transferred to another local area in the same district; there is nothing in this section which supports such a procedure, 9 A.L.J. 413=13 Cr. L.J. 203=13 Ind. Cas. 203, following 42 A. 649 at 654. A Magistrate has no jurisdiction to try a case after having made over charge of his duties to his successor, 14 Cr. L.J. 239 (2) 19 A. 114; 3 A. 563 (F.B.); 50 C. 664. A Magistrate appointed for a whole district but put in charge of particular *Taluks* only, is not without jurisdiction if he inquires into and tries a case in another *Taluk* of the same district, Ratanlal 177; 21 Cr. L.J. 321=55 Ind. Cas. 593. See also Weir II, 13. The transfer of a Magistrate to another station in the same district does not take away his jurisdiction, 22 M. 47.

Power to put
Magistrate in charge
of sub-division.

13. (1) The Local Government may place any Magistrate of the first or second class in charge of a sub-division, and relieve him of the charge as occasion requires.

(2) Such Magistrates shall be called Sub-divisional Magistrates.

Delegation of
powers to District
Magistrate.

(3) The Local Government may delegate its powers under this section to the District Magistrate.

Sub-Division.—See the definition in S. 4 (1) (u), *supra*.

Sub-Divisional Magistrate.—For ordinary power see Sch. III (iv) and for additional powers see S. 37, *infra*.

The Local Government may delegate its powers.—In Bengal, Madras, Bombay and the Punjab, the Local Government has delegated its powers. See *Cal. Gas.*, 1873, Pt. I, p. 236; *Fl. St. George Gas.*, 1873, p. 717; *Punjab G.O.* 907, dated 8-6-1874; *Bom. Gas.*, 1873, p. 473.

14. (1) The Local Government may confer upon any person all or any of the powers conferred or conferrable by or under this Code on a Magistrate of the first, second or third class in respect to particular cases or to a particular class or particular classes of cases, or in regard to cases generally in any local area outside the presidency-towns.

(2) Such Magistrates shall be called Special Magistrates, and shall be appointed for such term as the Local Government may by general or special order direct.

(3) The Local Government may delegate, with such limitations as it thinks fit, to any officer under its control the powers conferred by sub-section (1).

(4) No powers shall be conferred under this section on any police officer below the grade of Assistant District Superintendent, and no powers shall be conferred on a police-officer except so far as may be necessary for preserving the peace, preventing crime and detecting, apprehending and detaining offenders in order to their being brought before a Magistrate, and for the performance by the officer of any other duties imposed upon him by any law for the time being in force.

In respect of particular cases.—The order of Government appointing a special Magistrate to try the "case" could not necessarily refer to a single charge. It will comprise all charges or classes of charges. In construing the order, a reasonable construction must be placed and the question asked, what was the intention of the person responsible for the order, how far that intention clearly appears, and whether there is any real ambiguity such as to mislead or prejudice any of the parties concerned. This section expressly authorises the Magistrate to try cases or classes of cases. The Magistrate had ample authority to include in the case the three charges which were legally comprised within that case. The fact that Government appointed no other Magistrate and appointed Mr. W to try the case relating to the prosecution of Mr. C. shows that Government intended that Mr. W. should try the charges against Mr. C and expressed themselves to that effect, 29 Bom. L R 556 at 1000.

Local Area.—The term "local area" is intended to include a sessions division, district or sub-division, 25 C. 853 at 862; see S. 531, *infra*. The term is not restricted to a local area within a specified district or sessions division but extends even to a whole Province, 19 Cr. L J 310=44 Ind. Cas. 326; 1601 P.L.R. (Cr. J.) 96 at 305 (F.B.).

Sub-Section (2)—This sub-section enables special Magistrates to be appointed for a term only. The appointment may be on probation and may be for meeting temporary emergencies.

Powers to be conferred on Police Officers.—(1) The Inspector-General of Police in Madras has been empowered under S. 7 of Act XXIV of 1859 (Madras Police) with full powers of a Magistrate throughout the Madras Presidency except the Scheduled Districts, but exercises these powers subject to the orders of the Governor-in-Council; (2) under Bombay District Police Act, VII of 1867, every Commissioner is a Magistrate of the first class throughout the district under his control and exercises his powers subject to the limitations imposed by the Governor. In Madras the term of office of Honorary Magistrates shall be five years. Rule 22 of Mad. Cr. R. of Pr.

15. (1) The Local Government may direct any two or more Magistrates in any place outside the presidency-towns to sit together as a Bench, and may by order invest such Bench with any of the powers conferred or conferrable by or under this Code on a Magistrate of the first, second or third class, and direct it to exercise such powers in such cases, or such classes of cases only, and within such local limits, as the Local Government thinks fit.

(2) Except as otherwise provided by any order under this section, every such Bench shall have the powers conferred by this Code on a Magistrate of the highest class to which any one of its members, who is present taking part in the proceedings as a member of the Bench, belongs, and as far as practicable shall, for the purposes of this Code, be deemed to be a Magistrate of such class.

Benches of Magistrates.

Powers exercisable by Bench in absence of special direction.

Scope of the Section.—The true meaning to be attached to this section is that it is open to Government to invest a Bench composed of Magistrates of a lower class with all the powers of a Magistrate of a higher class and also if it thought fit, to invest such Bench with powers conferrable on a Magistrate of such higher class, that is to say, a Bench exercising third class Magisterial powers may be invested with ordinary or additional powers of a second class Magistrate 23 Cr.L.J. 913 at 918=105 Ind. Cas. 433. The wording of this section is very wide. If this section is compared with S. 37 *infra*, a wider discretion appears to be given to local Government with regard to Benches than with regard to individual Magistrates and the phrase "as far as practicable" is an indication that it was not the intention of the Legislature that the local Government when empowering Benches should be obliged to adhere strictly to the provisions relating to conferring of powers on individual Magistrates, 23 Cr.L.J. 913 at 925=105 Ind. Cas. 433 (F B). The object of constituting a Bench is that the Magistrates concerned should be individually and collectively give their attention and apply their minds in the hearing of the evidence and the determination of the points at issue and arrive at an independent judgment in regard to the merits of the charge, 29 Cr. L.J. 310 at 311=107 Ind. Cas. 875.

A Bench of Magistrates is empowered to try summarily offences under I.P.C., ss. 277, 278, 279, 285, 286, 289, 290, 323, 334, 336, 341, 352, 426, 447, and 504 offences under Municipal Acts and the Conservancy clauses of Police Acts punishable only with fine or with imprisonment not exceeding one month and abetment and attempts to commit the foregoing offences when such attempts are offences and to try offences under ss. 137 and 193 of the Mad. Local Boards Act and S. 18 of Madras Registration of Births and Deaths Act and under the Madras Hackney Carriage Act. *Rule 16 of Mad. Cr. R. of Pr.*

As a Bench, i. e., as an aggregate body. A case triable by a Magistrate exercising the power of the first class came before a Bench of Magistrates neither of whom individually exercised those powers but sitting together the Bench was so invested. At the adjourned trial only one of those Magistrates was present, *held* he alone was not competent to try the case and the orders passed by him were set aside as illegal, 2 C.L.R. 343; 29 C. 483. An Honorary Magistrate is not entitled to give judgment and pass sentence in a case unless he has been a member of the Bench during the whole hearing of the case, 20 C. 870; 18 M. 394.

Such cases or classes of cases.—There is nothing in the Code which prescribes that any particular class of cases should be tried by Honorary Magistrates, 25 Cr.L.J. 556=

51 Ind. Cas. 44. A complicated and somewhat difficult case is by no means one which it is desirable to place before a Bench of Magistrates, 2 C. 23 at 32. "It is extremely undesirable that cases of this description (a complicated case under the District Municipalities Act) involving difficult questions of fact or of law should be directed to be tried by a Bench of Honorary Magistrates. They cannot ordinarily be expected to deal satisfactorily with the questions that are involved in such cases and I have had not a little amount of difficulty in understanding the judgment in the present case," 47 M. 716 at 722. While the services of Honorary Magistrates are to be highly valued there can be no gain-saying the fact that cases which are likely to be keenly contested and intricate in nature are, on the whole, likely to be more efficiently disposed of by stipendiary Magistrates than by Honorary Magistrates or at least the accused persons concerned will believe this to be the case. The former Magistrates have had a more specific and detailed technical training and, as a rule, have much more experience in the conduct of criminal cases, 23 Cr. L.J. 893=106 Ind. Cas. 216. Having regard to cl. (2) of this section, Benches have power to deal with all matters. Under the Code of 1872 a Bench had no powers to deal with miscellaneous matters, other than trials, e.g., proceedings under S. 145, *infra*. Unless its powers are specially restricted, power to deal with such matters exists under sub-Section (2).

See the decision in 33 M. 717 as to the legality of a conviction where all the members of a Bench which began a trial did not take part in the recording of evidence and pronouncing judgment. See also 21 M. 246; Weir II, 18; 15 A.L.J. 463; 16 A.L.J. 854=19 Cr. L.J. 1004=43 Ind. Cas. 344. But it has been held in, 33 M. 304 that where an accused was convicted by a Bench of five Magistrates, one of whom had not heard all the evidence, the conviction was held bad and a re-trial was ordered. See also 2 Lah. 237. This decision was followed in 10 L.W. 386; see also 23 Bom L.R. 832=22 Cr.L.J. 615=63 Ind.Cas. 151, S.950A has been newly introduced to legalize conviction by Benches properly constituted.

Right of Appeal.—This depends upon the class of powers vested in the Bench which tried and convicted the accused. It was held in 9 M. 36 that an appeal under S. 407 *infra* lay from a conviction by a Bench of Magistrates invested with second or third class powers, but no appeal lay from a summary conviction by a Bench of Magistrates. See S 414, *infra*.

16. The Local Government may, or, subject to the control of the Local Government, the District Magistrate may, from time to time, make rules consistent with this Code for the guidance of Magistrates' Benches in any district respecting the following subjects:—

Power to frame rules for guidance of Benches.

- (a) the classes of cases to be tried;
- (b) the times and places of sitting;
- (c) the constitution of the Bench for conducting trials;
- (d) the mode of settling differences of opinion which may arise between the Magistrates in session.

Scope of the Section.—This section authorizes the Local Government and the District Magistrate with the former's control to make rules for the constitution of Benches, to regulate time and place of sitting, but the constitution of the Bench cannot be changed during the course of the trial except under the provisions of S. 350, *infra* and at least so many of the Magistrates forming a *quorum* who commenced the hearing must continue on the Bench till the conclusion of trial and failure to have a *quorum* vitiates a trial 23 Cr L J 198=76 Ind. Cas. 566. Where the rules regulating a Bench of Magistrates provide a *quorum* of two and two Magistrates were not present when evidence was recorded, the evidence so recorded is not recorded by a competent Court and merely reading over that

evidence in a Court properly constituted would not render that evidence admissible so as to justify its being acted upon, 27 Cr. L.J. 542 (2) ; 93 Ind. Cas. 1038 (2).

The Local Government may make Rules :—

For Madras, See G.O., dated 5-4-1899, 18-7-1889, 30-7-1890 and 27-8-1891, 8-3-1917, 22-10-19, 5-1-20, 27-7-23, 9-4-24.

For Bengal, See Cal. Gaz. 1889, Pt. I, p. 1071 ; 1906 Pt. I, p. 980.

For Bombay, Govt. Notn, No 5848, Bom. Gaz. 1885, Pt. I, p. 1262.

Magistrates' Benches.—The legislature has ordained that Benches of Honorary Magistrates shall be constituted for the decision of Criminal Cases in India. Once those Benches have been constituted, it is the duty of the superior Courts to regulate their proceedings and to prevent abuses of the law. But while exercising this power the superior Courts should keep in mind the fact that in dealing with the members of an unpaid judiciary who in many cases have had no Judicial learning and little judicial knowledge, it is not practical to set up a standard of compliance with procedure such as would be reasonably expected from stipendiary Magistrates. If too much is expected, the work of such Benches would be often at a stand still. In the trial of a large number of cases before them slight defect of procedure will be found and if on every occasion that a slight defect in procedure is discovered their proceedings be set aside, their activities will be seriously hampered and the object of the legislature in permitting the creation of such Benches will be thwarted. 15 Cr.L.J. 516 at 518=24 Ind.Cas. 604. When there is an irreconcilable difference of opinion between members of a Bench of two Honorary Magistrates, as to the guilt of the accused, they should follow the principle laid down by the Local Government for guidance of Benches though not formally issued by the Magistrate of the District under the section. A reference therefore by the Bench to the District Magistrate is not warranted by the provisions of the Code. The Code does not prescribe that any particular classes of cases alone should be tried by Benches of Magistrates. The fact that for administrative purposes the District Magistrate has allotted any particular area to a particular Bench of Magistrates does not render proceedings invalid if they try a case falling outside the area allotted to them, 25 Cr.L.J. 556 (2)=81 Ind. Cas. 34 (2) ; 16 Cr.L.J. 113=27 Ind. Cas. 177 ; 18 A.L.J. 237. In cases where the view of the Chairman of the Bench of Magistrates is opposed to that of the majority and he is not prepared to write a judgment for the majority one of the Magistrates ought to be asked to write the judgment, otherwise the chairman if he happens to differ from the majority would write only his view of the case whether it be for acquittal or conviction and the rest of the Magistrates would not be in a position to place on record the reasons for their opinion. In such cases the rule ought to be that one of the majority should be asked to write the judgment which should form part of the record to enable the High Court in revision to know the reasons for the opinion of the majority, 23 L. W. 537=27 Cr. L. J. 90=91 Ind. Cas. 394. The President of a Bench of Magistrates who thought the accused was not guilty but the majority of the Bench found the accused guilty is competent to give his casting vote, on the question of sentence, 28 Cr.L.J. 310=100 Ind. Cas. 531 (1). In a case where the President is in the minority as to conviction or acquittal, the judgment should be written by some member of the majority, 51 M 338. Differences of opinion shall be settled by votes of the majority of the Magistrates present, the chairman having the casting vote Rule 18. *Mad. Cr. Ruls of Pr.* Where the rules provided for a quorum of two Magistrates sitting in a Bench and in recording evidence only one Magistrate sat and the other was absent, such evidence recorded is inadmissible and cannot be acted upon, 27 Cr.L.J. 542 (2)=93 Ind. Cas. 1038 (2). Constitution of benches cannot be changed during trial except in cases falling under S. 350 *infra*, 25 Cr.L.J. 198=76 Ind. Cas. 566.

A Bench may be empowered under S. 190, *infra* to take cognizance of offences, or it may try such cases only as may be made over to it under S. 192, *infra*, or under S. 17, *infra*, the District Magistrate may make rules or give special orders consistent with this Code as to the distribution of business among Benches. In a case tried by two Bench Magistrates

who are divided in opinion the benefit of doubt should be given to the accused, 9 Cr. L. Rev. 84. A reference should not be made to the District Magistrate, 16 Cr. L. J. 113=27 Ind. Cas. 177; the rule framed by Government that the view of the chairman shall prevail is *ultra vires*. See also 10 C.W.N. 442=3 C.L.J. 492 (F.B.)=3 Cr. L.J. 409; 3 C.W.N. 862; 16 Cr. L. J. 113=27 Ind. Cas. 177; 15 A.L.J. 463=18 Cr. L.J. 749=40 Ind. Cas. 749; 20 C. 870. To meet the decisions in 44 B. 400; 16 M. 410, a new S 350A has been added with a view to legalise conviction by Benches properly constituted.

17. (1) All Magistrates appointed under Ss. 12, 13 and 14, and all Benches constituted under section 15, shall be subordinate to the District Magistrate, and he may, for time to time, make rules or give special orders consistent with this Code as to the distribution of business among such Magistrates and Benches; and

Subordination of
Magistrates and
Benches to District
Magistrate.

(2) Every Magistrate (other than a Sub divisional Magistrate, and every Bench exercising powers in a sub-division shall also be subordinate to the Sub-divisional Magistrate, subject, however, to the general control of the District Magistrate.

to Sub-divisional
Magistrate.

(3) All Assistant Sessions Judges shall be subordinate to the Sessions Judge in whose Court they exercise jurisdiction, and he may, from time to time, make rules consistent with this Code as to the distribution of business among such Assistant Sessions Judges.

Subordination of
Assistant Sessions
Judges to Sessions
Judge.

(4) The Sessions Judge may also, when he himself is unavoidably absent or incapable of acting, make provision for the disposal of any urgent application by an Additional or Assistant Sessions Judge or, if there be no Additional or Assistant Judge, by the District Magistrate and such Judge or Magistrate shall have jurisdiction to deal with any such application.

(5) Neither the District Magistrate nor the Magistrates or Benches appointed or constituted under sections 12, 13, 14 and 15, shall be subordinate to the Sessions Judge, except to the extent and in the manner hereinafter expressly provided.

Scope of the Section—This section enacts that all Magistrates and Benches in any district shall be subordinate to the District Magistrate who is empowered to make rules and give special orders. Rule 122, *Criminal Rules of Practice*, dealing with powers of supervision suggests very wide powers of superintendence over subordinate Magistrates justifying the stopping of or going on with the trial of any particular proceeding before them. But where a District Magistrate ordered stay of trial pending the disposal of a Civil suit when the complaint was one of rioting and mischief it is liable to be set aside by the High Court. 41 M.L.J. 642=17 L.W. 570=(1923) M.W.N. 276=25 Cr. L.J. 280=76 Ind. Cas. 872.

All Magistrates appointed, etc.—(1) The three classes of Magistrates appointed under S. 12, viz., Magistrates of the first, second and third class; (2) Sub-divisional Magistrates under S. 13; (3) Special Magistrates under S. 14; (4) Benches of Magistrates under S. 15 are to be subordinate to the District Magistrate.

May make rules consistent with this Code.—The rule framed by the Local Government that when the members of a Bench of Magistrates are equally divided in opinion the view of the chairman shall prevail was held not inconsistent with this Code although the Court disapproved the rule. 10 C.W.N. 642 (F.B.) = 3 C.L.J. 492 = 3 Cr.L.J. 400.

Shall be subordinate to the District Magistrate.—"It appears that the District Magistrate is clothed with superiority in respect of not only his executive but also judicial functions. Being subordinate, it is necessarily 'inferior' but it is inferior also as being statuetably incompetent to hold or exercise equal powers with the latter Court in many respects. There may be 'inferiority' without subordination, but there cannot be subordination without inferiority, as 'subordinate' means, inferior in rank"—per West, J., in 9 B. 100 at 103. "In a District all other Magistrates are by S. 17 of the Code subordinate to the Magistrate of the District and consequently inferior to him," 12 C. 473 at 476. See also 8 M. 18; 7 A 853 (F.B.). A Deputy Magistrate attached to a sub-division is subordinate to the sub-divisional officer of that sub-division, 19 Cr. L.J. 126 = 43 Ind. Cas. 414. In 14 M. 369 it was held that a Magistrate who is subordinate to a sub-divisional Magistrate is also subordinate to the District Magistrate for purpose, of S. 529 and that neither this section nor Sch II can be so construed so as to take away the Special power conferred by S. 528 *infra*. Under S. 435 *infra*, the District Magistrate has power to call for the records of any proceeding before any Magistrate in his district. As to distribution of work by the District Magistrate under this section. See 35 A. 431 where it was held that an order by the District Magistrate directing that the senior Honorary Magistrate should distribute work among other Honorary Magistrates was held to be *ultra vires*. There is no provision in the Code which would give the District Magistrate the power to stay proceedings in a Criminal Court subordinate to him and the High Court's power to stay such proceedings can only be exercised under its general powers of superintendence, 44 M.L.J. 642 = (1923) M.W.N. 276 = 17 L.W. 570 = 25 Cr. L.J. 280, where 23 C. 610 and 30 M. 216 are referred to, see also 5 Cr. L.J. 237 (2) = 76 Ind. Cas. 869 (2). A District Magistrate has very wide powers of superintendence over all Magistrates of his District, 23 Cr.L.J. 237 = 75 Ind. Cas. 872. For the purposes of the Code unless it is shown that there is some express provision to the contrary all Magistrates are subordinate to District Magistrates and their proceedings, e.g., taking action under 188 I.P.C. can be quashed not by the Sessions Judges but by the District Magistrates only, 6 Lat. 32.

Sub-Section (2).—This sub-section makes all Magistrates other than Sub-Divisional Magistrates and every Bench in a sub-Division also subordinate to the Sub-Divisional Magistrate subject to the general control of the District Magistrate. For definition of Sub-Divisional Magistrate, See S. 13 *supra*. See also 19 Cr. L.J. 126 = 43 Ind. Cas. 414.

Sub-Section (3).—This sub-section makes Assistant Sessions Judges subordinate to the Sessions Judge but not Additional Sessions Judges.

Sub-Section (4).—This sub-section provides for the disposal of urgent applications by Additional Sessions Judge or by Assistant Sessions Judge or even by the District Magistrate during the unavoidable absence or incapacity to act on the part of the Sessions Judge.

Additional and Assistant Sessions Judges.—See notes under S. 9 *supra* at page 37.

Sub-Section (5).—According to this section a District Magistrate is not subordinate to the Sessions Judge except to the extent and in the manner expressly provided in the Code but as a Court, a District Magistrate's Court is only a Court of a Magistrate of the first class and is subordinate to the Sessions Judge for the purposes of S. 195 (3) *infra* and an appeal from an order passed by a District Magistrate under S. 476A *infra* will lie to the Sessions Judge 20 C. L.J. 550 = 115 Ind. Cas. 77. Except as provided by the Code the District Magistrate or other Magistrates subordinate to him are not subordinate to the Sessions Judge, 26 M. 656;

7 A. 853 (F.B.). See Ss. 435 and 436 *infra*. A District Magistrate should comply with the requisitions made by the Sessions Judge in appealable cases and also in references to the High Court and is also bound to submit any explanations called for by the Sessions Judge. See Ss. 123, 193, 195 (3), 408, 435 to 437, where express provisions are made as to subordination of Magistrates to the Sessions Judge. The Magistrates are subordinate to the Sessions Judge for reference to the High Court in cases in which revision is required. The duty of criticising the proceedings of the Magistrates is the duty of the superior Magistrate and not of the Sessions Judge, 7 M.H.C.R. Appx. 27. The subordination of Magistrates to the Sessions Judge is strictly limited to the cases specially provided by the Code. An order therefore under the Legal Practitioners Act by the Sessions Judge declaring certain persons as touts and extending the operation of his order to the Criminal Courts in the District other than his own Sessions Court is illegal, 26 M. 596.

D.—Courts of Presidency Magistrates.

18. (1) The Local Government shall, from time to time, appoint a sufficient number of persons (hereinafter called Presidency Magistrates) to be Magistrates for each of the presidency-towns, and shall appoint one of such persons to be Chief Presidency Magistrate for each such town.

Appointment of Presidency Magistrates.

(2) The powers of a Presidency Magistrate under this Code shall be exercised by the Chief Presidency Magistrate, or by a salaried Presidency Magistrate, or by any other Presidency Magistrate empowered by the Local Government to sit singly, or by any Bench of Presidency Magistrates.

(3) *A Presidency Magistrate may be appointed under this section for such term as the Local Government may, by general or special order, direct.*

(4) *The Local Government may appoint any person to be an Additional Chief Presidency Magistrate, and such Additional Chief Presidency Magistrate shall have all or any of the powers of a Chief Presidency Magistrate under this Code or under any other law for the time being in force, as the Local Government may direct.*

Amendment.—Sub-S. (3) and (4) are newly added.

Presidency Magistrate.—The expression 'Magistrate of Police' in S. 1 of Act XIII of 1859 means a Presidency Magistrate. Under Act III of 1898 S. 7, the Commissioner of Police for the town of Madras is *ex-officio* Presidency Magistrate. A Presidency Magistrate has authority to convict a person for an offence under the Penal Code, the said offence having been committed in a British ship during her voyage on the high seas. The charge should be framed with reference to the Indian Penal Code, and in case of conviction the punishment should be awarded under that Code, 25 B 636 at 638.

Any Bench of Magistrates.—Since sub-S. (2) confers on a Bench of Magistrates the full powers of a Presidency Magistrate the Bench is competent to take action under S. 106 *infra*, 7 Bom. L.R. 833=2 Cr. L.J. 770.

Sub-Ss (3) and (4) are new. "Power is given to define the term for which a Presidency Magistrate may be appointed and provision is made for the appointment of an Additional Chief Presidency Magistrate to meet the contingency of such an officer being needed, which has been actually experienced in Calcutta"—*Statement of Objects and Reasons*.

Madras rules see *Fort St. George Gazette*, dated 3rd January, 1911, Pt. I, p. 7 and for Bengal rules see *Calcutta Gazette*, dated 2nd May, 1906, Pt. I, p. 80. For Bombay rules see *Bom. Notification No. 2536*, dated 19th May, 1901. In sub-S. (2) after the words "Presidency Magistrates" the words including *Additional Chief Presidency Magistrates* are newly added in consequence of the addition to S 18, *supra*, so as to permit the definition of the position of an Additional Chief Presidency Magistrate *vis a vis* the Chief Presidency Magistrate. For Madras rules for the guidance of stipendiary Magistrates see *Fort St. George Gazette*, 6th August, 1901, Pt. I, pp. 1414-1415.

May define the extent of their subordination.—The powers of a Chief Presidency Magistrate are the same as those of an ordinary Presidency Magistrate both as to the entertainment and disposal of cases. Both are empowered to dispose of the same class of cases and inflict the same punishments. The procedure before both is identical and each has territorial jurisdiction over the whole Presidency Town. Appeals from both lie to the same Court and under similar condition. The extent of the subordination under the subsection is to be defined by the Local Government. G. O. No. 168 dated the 2nd February 1900, directed that the subordination shall be limited to the purposes of Ss. 124 (1), 144 (4), 192 and 528 of the Code. In all other respects the Chief Presidency Magistrate and a Presidency Magistrate are of equal jurisdiction, 10 M.L.T. 518=(1911) 2 M.W.N. 59.

E.—Justices of the Peace.

22. Every Local Government, so far as regards the territories subject to its administration may by notification in the official Gazette, appoint such *persons resident within British India and not being the subjects of any foreign State* as it thinks fit to be Justices of the Peace within and for local area mentioned in such notification.

Justices of the Peace
for the mufassal.

Scope of the section.—Before the amendment only an European British subject can be appointed a Justice of the Peace outside the Presidency-towns. Now by the amendment by repeal of S. 23, Indian British subjects are qualified to be appointed Justices of the Peace. To be appointed a J. P. it is not necessary to be an European British subject. The powers conferred on Justices of the Peace are the ordinary powers conferred on Magistrates of the first class. They do not include powers with which by virtue of S. 37 a Magistrate of the first class may be invested by one or other of the authorities mentioned in that section, 34 M. 343.

23. [*Justices of the Peace for the Presidency-towns.*] Repealed by Act XII of 1923, S. 4.

24. [*Present Justices of the Peace.*] Repealed by Act XII of 1923, S. 4.

25. In virtue of their respective offices, the Governor-General, Governors, Lieutenant-Governors and Chief Commissioners, the Ordinary Members of the Council of the Governor-General, and the Judges of the High Courts are Justices of the Peace within and for the whole of British India, Sessions Judges and District Magistrates are Justices of the Peace within and for the whole of the territories administered by the Local Government under which they are serving, and the

Ex-officio Justices
of the Peace.

Presidency Magistrates are Justices of the Peace within and for the towns of which they are respectively Magistrates.

This section specifies who are *Ex-officio* Justices of the Peace.

F.—Suspension and Removal.

26. All Judges of Criminal Courts other than the High Courts established by Royal Charter, and all Magistrates may be suspended or removed from office by the Local Government :

Suspension and removal of Judges and Magistrates.

Provided that such Judges and Magistrates as now are liable to be suspended or removed from office by the Governor-General in Council only shall not be suspended or removed from office by any other authority.

The term 'removed' is used in a technical sense and implies dismissal from the Bench and does not include such administrative measures as transfers of officers from one place to another. Madras Government Notification, dated 10th August, 1874. See Act XXXVII of 1850 as amended by Act I of 1897 as to suspension and removal of Judges and Magistrates.

The appointment of Sub-Magistrates is by the Local Government under S. 12, *supra*, and they may be suspended or removed from office by the Local Government only under this section. The Collector of a District therefore has no power to suspend a Sub-Magistrate from his office, 30 Bom L.R. 1050 at 1068.

Suspension and removal of Justices of the Peace.

27. The Local Government may suspend or remove from office any Justice of the Peace appointed by it.

In the Code there is no special provision for judicial officers retiring from or resigning their office, 44 M.L.J. 423.

CHAPTER III.

POWERS OF COURTS.

A.—Description of Offences cognizable by each Court.

28. Subject to the other provisions of this Code any offence under the Indian Penal Code may be tried—

Offences under Penal Code.

(a) by the High Court, or

(b) by the Court of Session, or

(c) by any other Court by which such offence is shown in the eighth column of the second schedule to be triable.

ILLUSTRATION.

A is committed to the Sessions Court on a charge of culpable homicide. He may be convicted of voluntarily causing hurt, an offence triable by a Magistrate.

Madras rules see *Fort St. George Gazette*, dated 3rd January, 1911, Pt. I, p. 7 and for Bengal rules see *Calcutta Gazette*, dated 2nd May, 1906, Pt. I, p. 80. For Bombay rules see *Bom. Notification No. 2536*, dated 19th May, 1904. In sub-S. (3) after the words "Presidency Magistrates" the words including *Additional Chief Presidency Magistrates* are newly added in consequence of the addition to S 18, *supra*, so as to permit the definition of the position of an Additional Chief Presidency Magistrate *vis a vis* the Chief Presidency Magistrate. For Madras rules for the guidance of stipendiary Magistrates see *Fort St. George Gazette*, 6th August, 1901, Pt. I, pp. 1414-1415.

May define the extent of their subordination.—The powers of a Chief Presidency Magistrate are the same as those of an ordinary Presidency Magistrate both as to the entertainment and disposal of cases. Both are empowered to dispose of the same class of cases and inflict the same punishments. The procedure before both is identical and each has territorial jurisdiction over the whole Presidency Town. Appeals from both lie to the same Court and under similar condition. The extent of the subordination under the subsection is to be defined by the Local Government, G. O No. 168 dated the 2nd February 1900, directed that the subordination shall be limited to the purposes of Ss. 124 (1), 144 (4), 192 and 523 of the Code. In all other respects the Chief Presidency Magistrate and a Presidency Magistrate are of equal jurisdiction, 10 M L.T. 518=(1911) 2 M.W.N. 50.

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Provided that such Judges and Magistrates as now are liable to be suspended or removed from office by the Governor-General in Council only shall not be suspended or removed from office by any other authority.

The term 'removed' is used in a technical sense and implies dismissal from the Bench and does not include such administrative measures as transfers of officers from one place to another. Madras Government Notification, dated 10th August, 1874. See Act XXXVII of 1850 as amended by Act I of 1897 as to suspension and removal of Judges and Magistrates.

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Suspension and removal of Justices of the Peace.

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Offences under Penal Code.

(a) by the High Court, or

(b) by the Court of Session, or

(c) by any other Court by which such offence is shown in the eighth column of the second schedule to be triable.

ILLUSTRATION.

A is committed to the Sessions Court on a charge of culpable homicide. He may be convicted of voluntarily causing hurt, an offence triable by a Magistrate.

Scope of the Section.—"This section is a general section which, subject to the other provisions of the Code, gives power to the High Court and the Court of Sessions to try offences under the Indian Penal Code, and it also enacts that any offence under the Indian Penal Code may be tried by any other Court by which such offence is shown in the eighth column of the second schedule to be triable. This provision as to the other Courts does not cut down or limit the jurisdiction of the High Court or Court of Sessions"—*per Edge, C.J.*, in 8 A. 665 at 667. Offences are elaborately scheduled within the powers of the various Magistrates precisely for the reason that the graver offences should be tried by better qualified Magistrates, 25 L.W. 86; 28 Cr. L.J. 164=99 Ind. Cas. 596. The schedule to the Code must be read along with the Code itself, 24 C. 429. The illustration to the section is intended to show that although an offence according to Sch. II appears as one triable by a Magistrate only if the case is committed to the Court of Session for a more serious offence, the Sessions Court has jurisdiction to convict the accused for a minor offence triable by the Magistrate. But see the case in 19 A. 465 where a commitment to the Court of Session by a Magistrate for an offence punishable under *Opium Act I of 1878* was quashed by the Court on the ground that the offence is made punishable under the *Opium Act* by a Magistrate, and not by a Court of Session which is not empowered to pass sentence. Where a Magistrate and the Sessions Court have concurrent jurisdiction, the Magistrate should use his own discretion according to the circumstances, *Weir II*, 19. It is illegal for a Magistrate to commit even though he is empowered to try the case, 24 C. 429. Where there are aggravating circumstances the inferior Courts should not try, 7 Cr. L.J. 319 at 320, *Weir II*, 21. See also *Weir II*, 20 and *Weir I*, 448. No Court can clutch at jurisdiction by ignoring facts of aggravation which make the offence really cognizable by a higher tribunal, 24 M. 675; 12 M. 54; *Weir II*, 21; 1910 M.W.N. 852; 25 L.W. 86=28 Cr. L.J. 164=99 Ind. Cas. 596. No Court can ignore the effect of aggravation and split up a grave charge into its component parts and try the cases so split up, as by doing so it is clutching at jurisdiction and doing something not empowered by this section and Sch. II of the Code. If it exceeds its power in good faith S. 529 *infra* allows it a certain latitude but that section will not allow it to try an offence which it is not empowered to try. On the contrary S. 530 *infra* definitely avoids such proceeding, 25 L.W. 86=28 Cr. L.J. 164=99 Ind. Cas. 596.

Subject to the other provisions of the Code.—For example, except in certain cases of contempt committed in its view or presence, S. 460, *infra*, or of certain offences against public justice, such as perjury, forgery and other similar offences committed before himself or in contempt of his authority or is brought under his notice as such Judge or Magistrate in the course of a judicial proceeding in Court, S. 487, *infra*, no Court of Session can take cognizance of any offence as a Court of Original jurisdiction unless upon commitment by a competent Magistrate, S. 193, *infra*.

Any offence may be tried by the High Court.—For definition of High Court, see p. 4 (1) (j) *supra*. The High Courts are constituted by Royal Charter. A High Court may take cognizance of an offence upon a commitment to it, S. 194, *infra*. Such commitment in the presidency towns is to be made by a Presidency Magistrate and the accused may be an European British subject, or an Indian British subject or any subject of any country outside British India or of any State in alliance with His Majesty. The provisions of this section as to other Courts do not restrict the powers of the High Court, 8 A. 665.

By any other Court by which such offence is shown to be triable.—This section read with col. 8 of Sch. II of the Code defines the powers of each class of Magistrates to try particular offences. The powers of Magistrates under the Code may be classified as follows. (1) power to take cognizance of and try offences within certain local limits vested in Magistrates according as they are Magistrates of the first, second or third class as defined in Ss. 12 and 28 read with col. 8 of Sch. II of the Code, (2) certain incidental powers inherently vested in the several classes of Magistrates which are known as "ordinary powers" and which are set out in S. 36 read with Sch. III of the Code, (3) certain additional powers set out in Sch. IV of the Code which may expressly be

conferred on any particular Magistrate according to the class to which he belongs, e.g., power to try summarily under S. 200 *infra*; power to pass orders under S. 562 (1) *infra*. The powers under classes (2) and (3) are accessory to the power under class (1) which may be called principle powers, 28 Cr. L.J. 913 at 926 (F.B.)=103 Ind. Cas. 433.

29. (1) Subject to the *other provisions of this Code*, any offence under any other law shall, when any Court is mentioned in this behalf in such law, be tried by such Court.

Offences under other laws.

(2) When no Court is so mentioned, it may be tried by the High Court or *subject as aforesaid* by any Court constituted under this Code by which such offence is shown in the eighth column of the second schedule to be triable.

Offences against other Laws.—Where a special enactment provides a special tribunal for the trial of certain offences recourse must be had to that tribunal and no other, 18 Cr. L.J. 927=42 Ind. Cas. 159. This section determines the Court by which the offence provided by S. 10 of the *Musalman Wakf Act* 1923 is to be tried as there is nothing which is repugnant to the definition of the offence given herein and in General Clauses Act S. 3 (37). The *Wakf Act* contains no provision regarding the Court by which the offences under S. 10 of the Act are to be tried and so the provisions of this section prevail and Sch. II of the Code col. (8) shows that the offences are triable by a Magistrate, 28 Cr. L.J. 954=125 Ind. Cas. 666. The last portion of Sch. II deals with offences against other laws. The schedule must be read along with the Code itself, 24 C. 429.

When any Court is mentioned, be tried by such Court.—"It is within the power of the legislature when creating a new offence to make it cognizable only by a particular tribunal, and mode of procedure and the intention of the legislature that this offence should be tried in a summary manner and punished by a Magistrate and by no other tribunal appears to be clear from the words of the section. The offence and the specifically prescribed mode of conviction and punishment to which alone the offender is liable are inseparable. Many English authorities have established the rule that where a statute makes unlawful that which was lawful before, and inseparably connects with the prohibition of offence a specific remedy, that remedy must be pursued and no other," 5 M.H.C.R. 277 at 279. Therefore a conviction at a Criminal Sessions of the Madras High Court for supplying liquor without a license made punishable by Act I of 1866 was held to be without jurisdiction as the Act which declares it illegal made it punishable by a Magistrate. See 19 A. 465 where a commitment to the Court of Sessions by a Magistrate under the Opium Act was held to be without jurisdiction as the offence made punishable by the Act was triable by a Magistrate. So also by exercising the power of transfer an offence under a special law cognizable by a Magistrate invested with special powers cannot be transferred to Magistrate exercising ordinary powers. 1886 A.W.N. 289. See also 23 C. 442; Ratanlal 126, 364 and 763. A Presidency Magistrate cannot try an offence under the Prisons Act as he is not a District Magistrate or Magistrate of the first class empowered to try the offence under the Act, 32 M. 303. See S. 184 *infra* which says that all offences against the provision of any law relating to Railways, Telegraphs, the Post Office or Arms and Ammunitions may be tried by a Presidency Magistrate whether the offence is stated to have been committed within the presidency town or not, provided the offender and all the witnesses for the prosecution are to be found there; see also 7 M. 347 followed in Weir II, 25 where it was held that this section does not affect the jurisdiction given to a second class Magistrate by the Registration Act to try offences under that Act. Any Magistrate authorized under the Code by the District Magistrate to take cognizance of offences generally is thereby authorized to take cognizance of an offence under a Special Act, for example, under S. 20 of Cattle Trespass Act and no special authorization is necessary, 50 M. 844.

Where no Court is mentioned.—See 9 C.W.N. 816=2 Cr.L.J. 532 (2) where it was held that a Magistrate has jurisdiction to try a landlord for an offence under S. 58 (3) of the Tenancy Act, viz., failure to prepare and retain counterfoils of rent receipts. "Reading the definition of offence in S. 4 (1) (b) with S. 20 (2) and the last entry in Sch. II of the Code, we entertain no doubt that the Magistrate had jurisdiction to try the case."

29A. *No Magistrate of the second or third class shall inquire into or try any offence which is punishable otherwise than with fine not exceeding fifty rupees where the accused is an European British subject who claims to be tried as such.*

Trial of European British subjects by second and third class Magistrates.

This section is new and was added by Act XII of 1923; it enables second and third class Magistrates to try European British subjects, but an European British subject who claims his privilege as such, cannot be tried except for offences punishable with fine not exceeding Rupees Fifty. All first class Magistrates are now empowered to try European British subjects.

29B. *Any offence, other than one punishable with death or transportation for life, committed by any person who at the date when he appears or is brought before the Court is under the age of fifteen years, may be tried by a District Magistrate or a Chief Presidency Magistrate, or by any Magistrate specially empowered by the Local Government to exercise the powers conferred by Section 8, sub-section (1), of the Reformatory Schools Act, 1897, or, in any area in which the said Act has been wholly or in part repealed by any other law providing for the custody, trial or punishment of youthful offenders, by any Magistrate empowered by or under such law to exercise all or any of the powers conferred thereby.*

Jurisdiction in the case of juveniles.

This section has been newly added for the benefit of juveniles, and provides that offence committed by children not being very serious shall be tried by District Magistrate, Chief Presidency Magistrate or by a Magistrate specially empowered under S. 8 (1), Reformatory Schools Act. See also Madras Act IV of 1920, an Act to make further provision for the custody, trial and punishment of youthful offenders and for the protection of children and young persons as amended by Madras Act VI of 1923. See also The Madras Borstal Schools Act, 1925. "The existing procedure of committal to a Court of Session is lengthy and often involves the prolonged detention of juvenile offenders as undertrial prisoners, although the offences generally committed by them seldom require to be so severely punished as to necessitate the intervention of a sessions Court the sentence or order eventually passed being often incommensurate with the time and energy expended upon a committal and Sessions trial." *Statement of Objects & Reasons.*

30. In the territories respectively administered by the Lieutenant-Governors of the Punjab and Burma and the Chief Commissioners of Oudh, the Central Provinces, Coorg and Assam, in Sind, and in those parts of the other Provinces in which there are Deputy Commissioners or Assistant

Offences not punishable with death.

Commissioners the Local Government may, notwithstanding anything contained in S. 29, invest the District Magistrate or any Magistrate of the first class, with power to try as a Magistrate all offences not punishable with death.

Scope of the section.—This section must be read as qualifying or controlling the provisions of S 28 *supra* which in its turn makes reference to col. 8 of the Sch. II to the Code, 27 Cr. L. J. 728=95 Ind. Cas. 56. This section must be read with S. 34 *infra*. Any Magistrate so empowered can pass a sentence of imprisonment not exceeding seven years including such solitary confinement as is authorized by law. The object of conferring special powers on District Magistrates is to accelerate proceedings, by avoiding delay consequent on commitment to Sessions Court which sit only at considerable intervals and also to afford relief to those who are to attend as witnesses, 7 C.W.N. 457. He must purport to act under his special powers, 7 Cr. L. J. 46 and he is subordinate to the Session, Court, 1 Cr. L. J. 163. Where a Sessions Judge is of opinion that a Magistrate empowered under this section has in fact tried a case which he is not competent to try he should report the case to the High Court for an order that the accused be committed for trial to the Court of Session, 27 Cr. L. J. 846=95 Ind. Cas. 766.

To try as a Magistrate.—Where a Deputy Commissioner tries a case exclusively triable by a Court of Session under the special powers conferred by this section he does so as a Magistrate, 10 C.W.N. 847=4 Cr. L. J. 44.

All offences not punishable with death.—When there is evidence which if believed would sustain a charge of murder—an offence punishable with death—it is undesirable that a Magistrate should under this section try the case on a minor charge. By doing so he incurs a grave responsibility, 10 C. 85, but where the charge was under S. 302 read with 120 B, a Magistrate specially empowered under this section can try the offence if murder is not committed in pursuance of the conspiracy so that the offence was not punishable with death, 23 Cr. L. J. 1241=82 Ind. Cas. 169.

A Magistrate exercising special powers under this section should not himself try a case when there is evidence which if believed would substantiate a charge of an offence beyond his jurisdiction, 10 C. 85; 12 M. 54 at 55.

Appeal—See S. 408 *infra*, In 9 C. 513 at 516 it was held that the expression "District Magistrate" in S. 408 *infra* includes a District Magistrate specially empowered under this section.

B.—Sentences which may be passed by Courts of various classes.

31. (1) A High Court may pass any sentence authorized by law.

(2) A Sessions Judge or Additional Sessions Judge may pass any sentence authorized by law; but any sentence of death passed by any such Judge shall be subject to confirmation by the High Court.

Sentences which High Courts and Sessions Judges may pass.

(3) An Assistant Sessions Judge may pass any sentence authorized by law, except a sentence of death or of transportation for a term exceeding seven years or of imprisonment for a term exceeding seven years.

Pass any sentence authorized by law.—In all crimes except those for which the sentence of death must be pronounced, a very wide latitude in the matter of fixing the degree of punishment is allowed to the Judge who tries the case. The policy of the

law as regards most of the crimes is to fix a maximum penalty which is only intended for the worst cases and to leave it to the discretion of the Judge to determine to what extent in any particular case the punishments awarded should approach to or recede from the maximum limits. The exercise of this discretion is a matter of prudence and not of law. Thus if a crime is committed which is of a kind calculated to inspire great alarm as manifesting a very mischievous disposition or is specially rife in a particular District or throughout the country, it may be necessary to award a very severe punishment. The Court in fixing the punishment in any particular case will have to take into consideration the nature of the offence the circumstances in which it was committed, the degree of deliberation shown by the offender the provocation which he had received, the antecedents of the prisoner up to the time of sentence, his age and character. *Halsbury*, Vol IX, paras 819-22 See also *Arch. Cr. P. & Ev.*, p. 219 (26th Ed). It is obviously impossible to give an exhaustive list of circumstances which should be taken into consideration in determining the amount of the punishment, or to lay down any mathematical formula to measure the penalty in each case. But it is perfectly clear that the maximum punishment prescribed by the law should not automatically follow upon a conviction. When Legislature has laid down a maximum punishment for an offence or a series of offences, it is the duty of the trial Court to apportion punishment in each case after considering all the circumstances having a bearing upon it and not to shirk its responsibility by imposing the maximum penalty upon every offender, 30 Cr. L. J. 45=112 Ind. Cas. 783. The question of punishment depends upon two considerations (1) the public importance of the offence, (2) the deserts of the particular offender. A sentence passed should not be such as to be open to the criticism that it is an unmitigated exhibition of superior force unredeemed by a tinge of judicial balance, A I.R. 1928 All. 150 (F.B.). These words "pass any sentence authorized by law" so far as Sessions Judges are concerned must be read subject to S. 34A, *infra* So a sentence of whipping on a European British subject cannot legally be passed by a Session Judge, Additional Sessions Judge or an Assistant Sessions Judge, See S. 53, I.P.C., which gives the punishments to which the offenders are liable under the I.P.C., viz, death, transportation, penal servitude, imprisonment (simple or rigorous), forfeiture of property and fine whipping and detention in a reformatory may also be passed. If a criminal were to ask the Court to pass a sentence upon him not authorized by law instead of a sentence which the law warrants the request would not render valid a sentence otherwise unlawful—*per Peacock, C.J.*, in 3 B.L.R. (Ap. Cr) 50 at 52. See also S. 59, I.P.C., as to commutation of a sentence of imprisonment into transportation but transportation can be awarded in lieu of a substantive term of imprisonment for a term of seven years or upwards, 5 M. 28. But transportation is to be abolished shortly, and a Bill has been introduced already, in the Legislative Assembly, six years ago.

Sentences of death—The old maxim 'life for life' has been in existence ever since the beginning of the world and is proof of the animal craving for vengeance still throbbing in the veins of man in spite of science and civilization. It is always strongly argued that capital sentence has a deterrent effect. Educative and moral aspects are subordinated and even stifled by putting an end to life. Progressive countries like Denmark, Norway, Sweden, Belgium, Holland, Italy and Austria have already set an example by abolishing capital sentence. In America in some States prisoners are not hanged by the neck till they are dead, but electrocuted by placing the condemned man in an electric chair and killed, instantaneously by electric shock but in other states it is abolished and in a member of states courts are given power to pass imprisonment for life. In England public opinion is gradually gaining ground to abolish capital sentence. In India a Bill has been introduced in the Legislative Assembly to do away with the capital sentence clearly showing thereby a natural inclination of the Indian mind to respect human life, and if the Bill is passed into law, it is bound to have an exhilarating moral effect. The Code does not indicate what reasons should be considered as sufficient for refraining from passing a sentence of death in a case of murder. Judges must not shrink from doing their duty, however painful it may be and must pass capital sentence

in cases of deliberate murder, 3 L.B.R. 163-4 Cr. L J. 132. In the interest of the community, it behoves the Court to pass very severe sentences upon persons who pander to the unhealthy cravings of their fellow creatures by supplying them with drugs, 28 Cr. L J. 321 at 322-100 Ind. Cas. 703. If Judges have conscientious scruples to pass death sentences they ought to resign their office and not to throw upon the High Court the unpleasant duty of issuing notice to the accused to show cause why death sentence should not be passed and then enhancing the sentence to one of death, Cr. A. No. 335 of 1927 (M.H.C.) See 7 W.R. (c) 33. It is opposed to ordinary humane principles that a person who has not reached the legal age of discretion should be made to pay the death penalty where the law allows an alternative punishment 30 Cr. L.J. 63 at 67-113 Ind. Cas. 177. Where a body of persons go out with the deliberate intention of killing a person and in pursuance of the common object one or other kill him, it is manifest that all would be equally guilty and should receive a capital sentence even though it may not be possible to establish which of the accused struck the fatal blow. There should not be, if in fact it does exist, a practice to assume that where the particular person cannot be found to be guilty of having inflicted the fatal blow, capital sentence should not be inflicted, 27 A.L.J. 234 at 236. Mere suspicion of a wife's conduct is no extenuation for not passing the death sentence, 52 M.L.J. 147 at 150-30 L.W. 229-1929 M.W.N. 269-30 Cr. L.J. 630 -116 Ind. Cas. 142 See 53 M. 147 at 150, where it was held that where two or more persons band themselves together for taking a man's life and are found guilty of murder the Court is not justified in refraining from passing a sentence of death which would otherwise be proper merely because that it could not be found definitely which of the accused inflicted the fatal blow. In deciding as to whether some or all of a number of persons are to be sentenced to death after a conviction of all for murder it has been long settled that *prima facie* all the persons convicted should be sentenced to extreme penalty and it is only where special circumstances are shown in favour of any individual that the Court sentences such individual to the alternative punishment of transportation for life, 8 Pat. 181.

Sentences which Magistrates may pass.

32. (1) The Courts of Magistrates may pass the following sentences, namely :—

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| (a) Courts of Presidency Magistrates and of Magistrates of the first class : | { | Imprisonment for a term not exceeding two years, including such solitary confinement as is authorized by law ;
Fine not exceeding one thousand rupees ;
Whipping. |
| (b) Courts of Magistrates of the second class : | { | Imprisonment for a term not exceeding six months, including such solitary confinement as is authorized by law ;
Fine not exceeding two hundred rupees. |
| (c) Courts of Magistrates of the third class : | { | Imprisonment for a term not exceeding one month ;
Fine not exceeding fifty rupees. |

(2) The Court of any Magistrate may pass any lawful sentence, combining any of the sentences which it is authorized by law to pass.

It is obviously impossible to give an exhaustive list of circumstances which should be taken into consideration in determining the amount of the punishment or to lay down any mathematical formula to measure the penalty in each case. But it is perfectly clear that the maximum punishment prescribed by the law should not automatically follow upon a conviction, 30 Cr.L.J. 15=112 Ind. Cas. 783. The nature and limit of sentences are generally prescribed by the law defining the offence and it is within such limits that the powers of individual Magistrates should be exercised subject to jurisdiction to try the particular offence set forth in Sch. II, col. 8 of this Code and to special local jurisdiction (Ch XV). The provisions of this section are not affected by S. 75 I.P.C. although Magistrates frequently quote wrongly S. 75 I.P.C. when passing a severer sentence. Ratanlal 688; 6 Bom L.R. 548. An Appellate Court when varying the sentence passed by the lower Court is bound by the limitation contained in this section, 45 A. 592.

Imprisonment.—No rigid rule can be laid down as to punishments for offences, each case must depend upon its own circumstances. In certain cases imprisonment may be desirable or necessary, in other cases where the offence is casually committed with a view to petty gain or to meet necessities of life infliction of a suitable fine may not be altogether inappropriate but even preferable to short term of imprisonment. It is the duty of the prosecution to place before the Court the requisite and relevant evidence indicating the measure of the guilt of the accused, 4 Mys. L.J. 132. In awarding sentence the Court should have regard to the ultimate consequences of the acts committed by the accused, 44 C.L.J. 208. An accused person is not entitled to get off with a small sentence merely because he is a person of high position and one who has done good service for the Government in the past. When such a man falls in this manner, everybody looks to see whether it is not true that there is one law for the rich and another for the poor, and a Court cannot lightly reduce the sentence in such a case to one far below that which should have been awarded to an ignorant and poverty-stricken offender who had in the same way fallen a victim to temptation, 23 Cr.L.J. 749=103 Ind. Cas. 757. In every sessions trial the reasons which guided the Judge for passing a sentence of exceptional severity or undue leniency or for awarding varying degrees of punishments on different accused convicted, of the same offence at one trial should be recorded. G.O. No. 918 Jud. dated 16-6-1910—Rule 49 *Mad. Cr. Rule of Pr.* Where the statute lays down that for certain offences, e.g., S. 471 or S. 193 I.P.C. the punishment shall be imprisonment, it means that the offender shall go to jail and imprisonment till the rising of the Court is a clear evasion of that intention. Possibly in rare cases where the offence is obviously technical a Court may be justified in taking the extreme step of evading the statute which it is appointed to administer. That an accused is a fairly respectable man and not a hardened litigant are not circumstances of extenuation, 1929 M.W.N. 114=30 Cr. L.J. 237=115 Ind. Cas. 234. Where an accused is convicted of an offence for which he shall be punished with imprisonment and shall also be liable to fine say S. 420 I.P.C., the sentence of imprisonment must be awarded and the Court has a discretion to add or refrain from adding a fine to the sentence of imprisonment and the word "liable" is significant, 27 A.L.J. 300. It means imprisonment of either description (i.e., rigorous or simple) as defined by S. 63 I.P.C. & S. 3(26), General Clauses Act. The period during which a person was kept in custody as an undertrial prisoner cannot count as a part of the sentence nor can the Court order it to be so considered as such, 5 Lah. L.J. 224=24 Cr.L.J. 583=68 Ind. Cas. 817. In computing the sentence of imprisonment, the day upon which the sentence is passed and the day of release both days to be included and considered as days of imprisonment. Rule 173 *Mad. Cr. Rule of Pr.*

Solitary Confinement.—Solitary confinement is regulated by Ss. 73 and 74, I.P.C. It is not illegal to impose solitary confinement as part of the sentence in a case tried summarily under Chap. XXII, 6 A. 83. S. 262 *infra* only limits the term of imprisonment but does not take away the Court's powers under S. 73, I.P.C. A Court has no jurisdiction

to impose a sentence of solitary confinement when convicting an accused under S. 22 of the Criminal Tribes Act as S. 73 prescribes the punishment, 46 A. 114, nor has the Court power to award solitary confinement when convicting an accused person under a special or local law such as the Arms Act, 25 Cr. L. J. 190=76 Ind. Cas. 151.

Fine—This section gives power to a Presidency Magistrate and a Magistrate of the first class only to fine up to Rs. 1,000. The fact that several offences have been committed, and therefore the Magistrate's power to fine would extend to more than Rs. 1,000 is not affected by this section, 20 C. 676 at 631. The power of a Magistrate to pass a sentence of fine is in all cases limited to rupees thousand. The power of Sessions Court and the High Court to impose a sentence of fine is unlimited, 7 W.R. (Cr.) 37. But regard must be had to the pecuniary circumstances of the offender and to the character and magnitude of the offence. A sentence of fine which when imposed is wholly impossible for an accused to pay without ruining himself and without inflicting great hardship upon his family should not be imposed. It is useless to inflict fines which will cripple the family of the accused for years and in the end fall upon the women and children, 23 Cr. L.J. 863=104 Ind. Cas. 705. In cases of offences of an aggravated nature imprisonment is undoubtedly more suitable than fine, 24 Cr. L.J. 278=71 Ind. Cas. 918 followed in 27 Cr. L. J. 450=93 Ind. Cas. 704. A sentence of fine should never be inflicted in order that a further term of imprisonment in default should be suffered. If the substantive sentence which could be passed by a Magistrate is insufficient for the offence, the proper course is to send the case for trial to a Court which can pass an adequate sentence. An order to pay a daily fine is illegal, 27 C. 565. See also 24 A. 392, 22 B. 766. Imprisonment in default of payment of fine may be of any description, S. 66, I P.C., but when the offence is punishable with fine only, then simple imprisonment shall be imposed, S. 67, I P.C., and the imprisonment shall cease immediately the fine is either paid or levied by process of law, S. 68, I P.C. As to payment of compensation out of fine See Ss. 545 and 546, *infra*.

Whipping.—S. 3 of the Whipping Act VI of 1909 specifies the offences punishable with whipping in lieu of other punishments, viz., (1) theft and its aggravated forms (2) lurking house-trespass and its aggravated forms. S. 4 specifies offence punishable with whipping in lieu of, or in addition to other punishment, viz., (1) rape, its abetment or attempt, (2) unnatural offence, (3) hurt in committing or attempting robbery, (4) dacoity. S. 5 says that juvenile offenders who commit, abet or attempt offences under Chapter VI I.P.C. and Ss 153 and 503 I.P.C. and offences punishable with death (2) offences under other laws punishable with imprisonment specially notified by Governor-General in Council, may be punished with any other punishment. Where the law empowers a particular Magistrate to do a particular act or to make a certain order it should always appear upon the proceedings that the Magistrate making the order or doing the act is a Magistrate who had jurisdiction to do it, 22 W.R. (Cr.) 30. Under the Whipping Act IV of 1909 second class Magistrates are no longer competent to sentence offenders to whipping. For general instructions as to whipping, see *Pro. of Govt. of India Dept. (Jud.) Home*, 11-1-1892. It is competent to a Magistrate in British India to pass a sentence which should take effect after the expiration of a previous sentence in a foreign territory; e.g., Mysore, 20 M. 444. As a general proposition, it is clearly the duty of a Magistrate, when pronouncing a sentence, to define precisely the nature of the sentence, which, like a Civil Court decree, ought to be self-contained, so that the functionary who has to execute it should have no doubt as to the directions given therein, 24 M. 13.

May pass any lawful sentence—A Magistrate is entitled to release a first offender on probation of good conduct, discharge him with an admonition, to require an accused to notify his residence or change of residence after release. A sentence of imprisonment for the period an accused was in the lock up as an under trial prisoner is bad, but imprisonment till the rising of the Court is good. When a prisoner is liable to be sentenced to imprisonment and fine for a particular offence, some term of imprisonment however short should be imposed. In awarding sentence, in a case of communal riot and dacoity, it

must very clearly be remembered that when the accused were smarting with indignation against outrages upon sacred places, every allowance should be made to their feelings and comparative leniency should be shown but at the same time the sentence should be adequate, 2 Luck. 264 A consolidated sentence should not be passed for a number of offences, 46 M.L.J. 311=1924 M.W.N. 238=19 L.W. 211=25 Cr. L.J. 396=77 Ind. Cas. 444.

Power of Magistrates to sentence to imprisonment in default of fine,

33. (1) The Court of any Magistrate may award such terms of imprisonment in default of payment of fine as is authorized by law in case of such default:

Provided that—(a) the term is not in excess of the Magistrate's powers under this Code; (b) in any case decided by a Magistrate where imprisonment has been awarded as part of the substantive sentence, the period of imprisonment awarded in default of payment of the fine shall not exceed one-fourth of the period of imprisonment which such Magistrate is competent to inflict as punishment for the offence otherwise than as imprisonment in default of payment of the fine.

Proviso as to certain cases.

(2) The imprisonment awarded under this section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under section 32.

Scope of the section.—This section does not authorize a Magistrate to pass a sentence of imprisonment in default of payment of fine in excess of the term prescribed by S. 65 I.P.O., 10 M. 155 (F.B.), and 166 (foot-note) *overruling* 1 M. 277. It only regulates the proceedings of Magistrates whose powers are limited, 1 A. 461 (F.B.). Thus there are two limitations as to the term of imprisonment which could be awarded—(1) that imposed by S. 66 I.P.O., (2) that imposed by cl. (1) (b) of this section and S. 32 *supra*. The excess fare and fare referred to in S. 113 (4) of the Indian Railways Act cannot be a fine although it can be recovered as such. Therefore a Magistrate has no power to impose imprisonment in default of payment, 18 B. 440 at 451.

As is authorized by law.—Courts are first to comply with the provisions of S. 32 *supra* and to conform to the provisions of Ss. 64 to 70, I.P.O. and this section only regulates the proceedings of Courts which are thus limited, 1 A. 461 (F.B.).

Imprisonment in default of payment of fine—See Ss. 64 and 65, I.P.O., as to cases where the offence is punishable with imprisonment as well as fine and Ss. 66 and 67 and S. 25 General Clauses Act, with regard to cases where the offences are punishable with fine only. In cases of simple imprisonment ordered in default of payment of fine the general rules of Ss. 32 and 33 are applicable, and the principle of S. 67, I.P.O. read with this Code is unaffected by Ch. XXII of this Code (Summary Trials), 6 A. 61. Owing to omission to notify part-payment of the fine, the full term of imprisonment was served out by the accused and even in such a case the Court had no power to order a refund of the amount paid, 3 B.H.C.R. (Cr. Ca.) 37.

Proviso (1) (b).—Where the accused were sentenced by the Presidency Magistrate under S. 58 of the Bengal Excise Act to a fine of Rs. 100 each in default to 3 months' imprisonment and also each of the accused to 6 months' imprisonment which was the maximum term that could be awarded under S. 74 of the Act, it was held that the sentence of imprisonment under S. 74 was not in excess of the Magistrate's power and would not affect the sentence under S. 58 and that the three months' imprisonment in default was a legal sentence, 80 C. 575 at 578-79.

34. The Court of a Magistrate, specially empowered under section 30, may pass any sentence authorized by law, except a sentence of death or of transportation for a term exceeding seven years or imprisonment for a term exceeding seven years.

Higher powers of
certain District
Magistrates.

This section prescribes the limit to the sentence which could be passed by Magistrates exercising higher powers. As to the rules of trial see §s. 28, 29 and 30 *supra*. Generally cases on the border line of jurisdiction and cases of great difficulty ought to be committed to the Court of Session. Where the offence charged appears to be beyond the jurisdiction of the Magistrate the proper course is to commit to the Court of Session, e.g., if the offence disclosed was one of attempting to wage war against the King, the Magistrate should not try it as one of dacoity. See 10 C 83.

Sentences which
Courts and Magis-
trates may pass upon
European British
subjects.

34A. Notwithstanding anything contained in sections 31, 32 and 34—

(a) no Court of session shall pass on any European British subject any sentence other than a sentence of death, penal servitude, or imprisonment with or without fine, or of fine, and

(b) no District Magistrate or other Magistrate of the first class shall pass on any European British subject any sentence other than imprisonment which may extend to two years, or fine which may extend to one thousand rupees, or both.

This section was newly added by Act XII of 1923 and provides for sentences which could be passed on European British subjects by Courts of Session, District Magistrate, and Magistrates of the first class. Whipping as a sentence is excluded by this section. See notes to S. 30 *supra*. A sentence by a Magistrate acting under this section exceeding four years' imprisonment, or any sentence of transportation is appealable direct to the High Court, S. 403, proviso (b) *infra*. No cases in which a Magistrate exercising special powers under this section shall be tried summarily, S. 260 (1) proviso.

35. (1) When a person is convicted at one trial of two or more offences the Court may, subject to the provisions of section 71 of the Indian Penal Code, sentence him for each offence, to the several punishments prescribed therefor which such Court is competent to inflict; such punishments, when consisting of

Sentence in cases
of conviction of several
offences at one
trial.

imprisonment or transportation to commence the one after the expiration of the other in such order as the Court may direct, unless the Court directs that such punishments shall run concurrently.

(2) In the case of consecutive sentences, it shall not be necessary for the Court, by reason only of the aggregate punishment for the several offences being in excess of the punishment which it is competent to inflict on conviction of a single offence, to send the offender for trial before a higher Court :

Provided as follows :—

(a) in no case shall such person be sentenced to imprisonment for a longer period than fourteen years :
 Maximum term of punishment

(b) if the case is tried by a Magistrate (other than a Magistrate acting under section 34), the aggregate punishment shall not exceed twice the amount of punishment which he is, in the exercise of his ordinary jurisdiction, competent to inflict.

(3) For the purpose of appeal, the aggregate of consecutive sentences passed under this section in case of convictions for several offences at one trial shall be deemed to be a single sentence.

Amendment—The explanation and illustration to this section are now repealed. Sub-section (1) is so amended as to make its meaning clear. For the word "aggregate" the words "aggregate of consecutive" have been substituted.

Scope of the section.—The English law is stated thus in Arch. Cr. P. and Ev. p. 225 (25th Ed.) "Where the defendant is convicted of several offences on different Courts of the same indictment or different indictments at the same assizes or sessions, the Court as a general rule has power to direct that the sentences shall run concurrently or consecutively." The object of this section is to award a specific punishment for each particular offence of which an accused person may be proved guilty, when all the charges against him are tried together, so that, in case some one or other of the charges break down on appeal, the amount of punishment to be remitted may, be known, 1 B.L.R. (Ap. Cr.) 3 at 5; 4 M.H.C.R. Appx 27. The rule as to assessment of punishment is laid down in this and Ss 71 and 72 I.P.C., 12 M. 36. Ordinarily sentences can only be ordered to run concurrently when they are passed in a single trial under the conditions laid down in this section and not in the case where the offences are not of the same kind falling within S. 234 *infra* punishable with different punishments, 27 Cr. L.J. 807=95 Ind. Cas. 471. This section has now been amended so as to restore the previous view of the law in 17 B. 260 to the effect that separate sentences are quite legal. The word "distinct" in sub-section (1) and the explanation to the section have now been repealed and the only qualification is that separate sentences are subject to the provisions of S. 71, I.P.C., this prevents the offender from being punished with a more severe punishment than the Court could inflict or could have awarded for any one of the offences coming within the scope of the section, 49 B. 916 at 918. This section now definitely states that it must be read subject to S. 71, I.P.C., which regulates punishment for offences and has nothing to do with procedure. The object of this section is to declare in what cases and subject to what limitations a Court may exceed its ordinary powers of passing sentence under S. 32, *supra*. This section is only permissive, and no Court is bound to pass separate sentences. This section is confined to separate charges against the same person, and convicted at one trial, 3 A. 305 (F.B.) ; Welr 11, 30 and 31; 5 Bom. L.R. 26. This section applies to trials only, and not to miscellaneous proceedings, 31 M. 515; 16 Cr. L.J. 622; 5 Bom. L.R. 26; 4 Bom. L.R. 876. Separate sentences can now legally be passed under this section for offences under Ss. 350 and 457, I.P.C., 41 C.L.J. 563=26 Cr. L.J. 1253=83 Ind. Cas. 927. So also for rioting and hurt when the Court finds that each accused took individual part in causing hurt, 41 C.L.J. 471=26 Cr. L.J. 1297=89 Ind. Cas. 241. It is not necessary to pass separate sentences for rioting armed with deadly weapon causing grievous hurt under S. 326, I.P.C., but the two sentences are within the power of the Court, 49 B. 916; 28 Cr. L.J. 1003=105 Ind. Cas. 517. The power to pass concurrent sentences was given

decisions in 25 C. 557; 20 A. 1; 10 A. 58; 10 B. 254 are no longer law. Under the present law it is not necessary that the offences should be *distinct* in order to enable a Magistrate to pass consecutive sentences, 20 Bom. L.R. 383=29 Cr. L.J. 544=109 Ind. Cas. 368; 52 B 277. The amendment made in 1923 deleting the word '*distinct*' before the word 'offences' renders obsolete the decisions in 3 C.W.N. 174; 8 C.W.N. 483=1 Cr. L.J. 265 and separate sentences can now be passed for offences under Ss. 323, 321 and 325 I.P.C. even though the acts in respect of which such charges were included with a charge under S. 147 I.P.C., 23 Cr. L.J. 751=103 Ind. Cas. 799 following 41 C.L.J. 563=83 Ind. Cas. 997. Where a series of acts proved against the accused establishes two distinct offences say under Ss. 366 and 376 I.P.C., the accused can be convicted separately for both the offences, 29 Cr. L.J. 243=107 Ind. Cas. 333 following 7 Lah. 334. Under this section as amended in 1923 separate sentences for rioting and hurt can legally be passed although in practice it is undoubtedly better to give a single sentence for all the offences or to order the sentences to run concurrently, 33 Cr. L.J. 575=116 Ind. Cas. 216 following 49 B. 916.

Is convicted.—The accused may be convicted under the Indian Penal Code or under any special or local law. There is no provision of law authorizing a Court to refrain from passing a sentence provided by the Code when convicting an accused, 22 C. 805.

At one trial.—The absence of a provision in the Code enabling a Judge to order a sentence in different cases to run concurrently is a *casus omissus* by the legislature, 21 Cr. L.J. 398 at 399=55 Ind. Cas. 1006. The section does not embrace a case of separate trials held on the same or subsequent days for separate offences committed by the same person, but has reference only to the conviction of the accused of two or more offences at one trial, Weir II, 30 followed in Weir II, 31; 22 C.W.N. 597; 24 C.L.J. 54=20 C.W.N. 1330; 13 Cr. L.J. 3=13 Ind. Cas. 169; 22 Cr. L.J. 520; 12 Bom. L.R. 129; 19 A.L.J. 310; 11 Cr. L.J. 679=8 Ind. Cas. 550; 21 C.L.J. 898; 23 Cr. L.J. 85=76 Ind. Cas. 21; 14 Cr. L.J. 388=20 Ind. Cas. 212. If the trials are separate, the sentence that a Magistrate can pass in each case is limited to his ordinary powers, 3 A. 305 (F.B.). In order to bring a case under this section so as to enable a Magistrate to exceed his ordinary powers, the accused must have been convicted of two or more *distinct* offences in the same trial, 23 B. 706 (F.B.). The accused must be convicted at one trial of two or more distinct offences to enable the Court to pass concurrent sentence. Sentence passed in one trial cannot be ordered to run concurrently with the sentence passed in other trials, 47 A. 59. When a person is convicted and sentenced to a term of imprisonment for an offence and is convicted again for a similar offence by another Judge, concurrent sentence cannot be passed but if the Judge who convicts for the later charge is of opinion that the previous sentence is quite adequate, he may pass a nominal sentence on the accused, 21 Cr. L.J. 346=55 Ind. Cas. 1006. The section does not authorize a Court to direct that two or more sentences shall run concurrently except when the sentences are passed in one trial, see S. 397 *infra*. The section applies to sentences on conviction at one trial. 22 C.W.N. 597; 27 Cr. L.J. 807 (2)=95 Ind. Cas. 471, (2) *distinguishing* 13 Bom. L.R. 200=12 Cr. L.J. 241=10 Ind. Cas. 769; 7 Cr. L.J. 445=4 L.B.R. 147; 18 Cr. L.J. 410=38 Ind. Cas. 970; 20 C.W.N. 1303=24 C.L.J. 54; 10 Cr. L.J. 236, and has no application to imprisonment under S. 123 *infra* in default of giving security for good behaviour, 5 Bom. L.R. 26. Where a person is convicted of separate offences and sentenced to pay a fine in default to suffer imprisonment for a specified period for each of the offences of which he was convicted, the sentences in default of payment of fine cannot be directed to run concurrently. This sub-section only authorizes concurrent punishment in the case of imprisonment or transportation. It does not authorize concurrent fines. A Magistrate if he wants to fine for a second offence is entitled to inflict a nominal fine considering the fine already imposed, 27 Cr. L.J. 111=91 Ind. Cas. 543 following 13 Cr. L.J. 536=15 Ind. Cas. 808. Separate sentences can now legally be passed under this section for offences under Ss. 380 and 457, I.P.C., 41 C.L.J. 563=83 Ind. Cas. 597 followed in 23 Cr. L.J. 751=103 Ind. Cas. 799. So also for rioting and hurt when the Court finds that each accused caused hurt individually, 41 C.L.J. 471. But sentences cannot be passed under Ss. 147 and 353, I.P.C., where the act which

accused into members of an unlawful assembly was the same as rendered them liable to punishment under S 353 I.P.C., 27 Cr. L.J. 834=93 Ind. Cas. 754.

May sentence.—This section is permissive and no Court is bound to pass a separate sentence for each of the offences of which one is found guilty at one trial; generally it is better to pass a separate sentence for each offence.

Imprisonment or Transportation.—This section is not restricted to cases where the several punishments are all of the same kind, i.e., are all sentences of imprisonment or all sentences of transportation notwithstanding the use of the word 'or' between the words 'imprisonment' and 'transportation'; the section was intended to cover cases where one of the punishment inflicted is imprisonment while the other is transportation; otherwise the result will follow that the Legislature has made no provision for such cases, 23 C.L.J. 566.

One after the expiration of the other.—In order to this effect is necessary and if omitted the judgment will be irregular. A Magistrate in British India is competent to pass a sentence which should take effect after the expiry of a sentence in Mysore, 20 M. 445.

Unless the Court directs such punishments shall run concurrently.—These words were first introduced in the 1893 Code; the decisions, 25 C. 537 and 20 A 1 are no longer law but there must be separate conviction at one trial to pass a concurrent sentence. It is, however, permissible for a Judge, when sentencing an accused person to take into account an existing sentence passed by another Judge in another trial for passing only a nominal sentence, or pass an adequate sentence and then report the case for orders to the Local Government, 21 Cr. L.J. 393=55 Ind. Cas. 1006.

Sub-Section (2).—This sub-section enhances the sentencing power given to Magistrate under S. 32, *supra*. The limits of punishment fixed by this section do not apply to cases of offences committed by persons who are already undergoing sentence of imprisonment, 7 W.R. (Cr.) 1. The words "in the case of consecutive sentences" were added in the 1893 Code. This sub-section enacts that it is not necessary for the Court when the consecutive sentences passed for the several offences being in excess of the sentencing power of the Court to send the offender for trial before a higher Court. The proviso (a) makes it clear that in no case shall the offender be sentenced to imprisonment for more than fourteen years.

Sub-Section (3)—The words "for the purpose of appeal" mean for the purpose of being appealed from 1887 P.R. (Cr) 45. The ruling in 6 C. 575 is no longer law. The addition of the words "the aggregate of consecutive sentences" now removes the conflict of decisions which previously existed as to whether this clause applied to consecutive sentences also. It was held in 17 C.W.N. 72 and 15 C.W.N. 734 that the aggregate of the concurrent sentences determined the right of appeal, although taken individually, the sentence was not appealable. But in 42 C. 631; 25 C.W.N. 613; 17 C.L.J. 332 a different view was taken and in 17 C.W.N. 225; 11 Bom. L.R. 544; 35 A. 154 it was held that this clause applied only to cases of consecutive and not concurrent sentences. The decision in 3 Pat. L.J. 38 took the same view. This sub-section now makes it clear that in cases of conviction for several offences at one trial, the aggregate of sentences passed if they are made to run consecutively shall be deemed to be a single sentence for purposes of appeal, and this refers only to sentences of imprisonment, 28 Bom. L.R. 668=27 Cr. L.J. 926 (1)=98 Ind. Cas. 270 (1). The term "aggregate sentences" applies only to consecutive and not concurrent sentences; so no appeal lies to the High Court when the whole sentence did not exceed four years, 3 Pat. L.J. 138. See also 25 C.W.N. 613. Consecutive sentences are allowed to be taken in the aggregate as one sentence for purposes of appeal. The new amendment makes this quite clear. Passing of concurrent sentences of imprisonment in default

of payment of fine is not warranted by this section, 27 Bom. L.R. 1351=27 Cr. L.J. 111=91 Ind. Cas. 543 following 13 Cr. L.J. 536 (1)=15 Ind. Cas. 808 (2). See S. 415 *infra* which explicitly excludes a sentence of imprisonment in default of payment of fine; imprisonment in default of finding security under S. 123 cannot also be taken into account. See 15 C.W.N. 734 and 17 C.W.N. 72. The offences under Ss. 147 and 225 I.P.C. are not distinct offences and so not liable to separate punishments for each offence, 37 C.L.J. 171=24 Cr. L.J. 851=74 Ind. Cas. 1043. So also separate sentences under S. 147 and S. 825/149 I.P.C. are illegal even when they are made to run concurrently, 51 C. 79, *followed* in 49 B. 916. See also 17 B. 250; 23 B. 708. Separate sentences can be passed for convictions under Ss. 148 and 326, I.P.C., 43 B. 216 *followed* in 30 Cr. L.J. 575=116 Ind. Cas. 216. See also for causing hurt under S. 323, I.P.C., and for rescuing cattle under S. 21 of the Cat. Tres. Act as force does not appear in the definition of hurt, 39 M.L.T. 543 but see 27 Cr. L.J. 333=95 Ind. Cas. 754. Separate sentences can be passed for house-breaking to commit theft under S. 457, I.P.C., and theft in a house under S. 380, I.P.C., 41 C.L.J. 563=26 Cr. L.J. 1253=88 Ind. Cas. 997. Separate sentences can be passed for the offence of possessing liquor under the Abkari Act and of possessing apparatus for manufacturing such liquor, 52 B. 277 *following* Ratanlal 523. Consecutive sentences can be passed when convicting an accused under S. 411, I.P.C., for receiving stolen property and also under S. 414, I.P.C., for concealing other stolen properties, 30 Bom. L.R. 383=29 Cr. L.J. 544=109 Ind. Cas. 368. Under the present law after the repeal of the explanation and illustration to the section and the omission of the word, *distinct* it is not even necessary that the offences should be distinct in order to enable a Magistrate to pass consecutive sentences, 30 Bom. L.R. 393; 52 B. 277. The decision in 27 Cr. L.J. 338=92 Ind. Cas. 850 of the Lahore High Court holding that separate sentences for abduction to commit rape and for committing rape cannot be awarded, is of doubtful authority as reliance is placed on a decision based on the illustration to this section which has now been repealed.

The explanation and the illustration to this section which had been added to set at rest the conflict of rulings of the Allahabad High Court have now been repealed as they occasioned considerable difficulty in construing the section, and it is now definitely stated that this section must be read subject to S. 71, I.P.C.

C.—Ordinary and Additional Powers.

36. All District Magistrates, Sub-divisional Magistrates and Magistrates of the first, second and third classes, ^{Ordinary powers of Magistrates.} have the powers hereinafter respectively conferred upon them and specified in the third schedule. Such powers are called their "ordinary powers"

Ordinary Powers—The ordinary powers are specified in the Sch. III to the Code. The section read with Sch. III defines certain incidental powers vested in the Magistrate of each class which they are required to exercise either in the course of trial before them or otherwise. These powers are referred to as 'ordinary powers' of a Magistrate as opposed to the 'Additional powers' which may be conferred on him. Both S. 28 and this section deal with powers which are conferred by the Code on each class of Magistrates, 28 Cr. L.J. 913 (F.B.)=105 Ind. Cas. 433. The term "ordinary powers" does not mean general powers of the Magistrate under the Code such as to entertain complaints, 4 L.W. 405=17 Cr. L.J. 209=31 Ind. Cas. 135; 34 M. 343 at 345; Ordinary powers are to be found in Columns 1, 2 and 3 of Schedule III. See 31 M. 315 as to power of a District Magistrate to remand a person to custody under this section read with S. 107 (4) *infra*.

This section is not exhaustive. See Col. 8 of Sch. II as to jurisdiction to try offences. See S. 32 as to the power of passing sentence and S. 12 and Chap. XV *infra* as to local jurisdiction of Magistrates.

37. In addition to his ordinary powers, any Sub-divisional Magistrate or any Magistrate of the first, second or third class may be invested by the Local Government or the District Magistrate, as the case may be with any powers specified in the fourth schedule as powers with which he may be invested by the Local Government or the District Magistrate.

Additional powers
conferable on
Magistrates

Ordinary powers of Magistrates are mentioned in S. 36, *supra*. Additional powers may be conferred on them by the District Magistrates or by the Local Government. See S. 41 as to withdrawal of powers by the Local Government.

This section read with Sch. IV to the Code deals with 'Additional powers' which may be specially given to any particular Magistrates of each of the three classes. These powers are not conferred by the mere fact of a person being appointed as a Magistrate of any particular class but are conferable on him, 28 Cr. L.J. 913 (F.B.) = 105 Ind. Cas. 433

Control of District
Magistrate's investing
power.

38. The power conferred on the District Magistrate by section 37 shall be exercised subject to the control of the Local Government.

D.—Conferment, Continuance and Cancellation of Powers.

39. (1) In conferring powers under this Code the Local Government may, by order, empower persons specially by name or in virtue of their office or classes of officials generally by their official titles.

Mode of conferring
powers.

(2) Every such order shall take effect from the date on which it is communicated to the person so empowered.

The Code confers powers on Courts (including Magistrates) for the purpose of the General Administration of Criminal Justice. In connection with the exercise by Magistrate of their general jurisdiction, the Code *inter alia* confers powers on Magistrates, 51 C. 1 at 37.

Or by virtue of their Office.—In the Madras Presidency in taluks where there are no Stationary Sub-Magistrates all second class powers are conferred on Tahsildars but in taluks where there are Stationary Sub-Magistrates all second class powers except under Ss. 190 and 206 are conferred on them: Fort St. George Gazette, 1893, Pt. I, p. 579.

Empower specially by Name or Officials generally.—This section declares that the Local Government may empower classes of officials generally or by their official titles, or persons specially by name or in virtue of their office. When therefore a class of officials is invested with powers to try certain offences it would appear that they are "generally" empowered. The word "*generally*" is in contrast to the word "*specially*" which is used in speaking of individuals, (1913) M.W.N. 269 at 270 = 17 M.L.T. 191 = 16 Cr. L.J. 268 = 28 Ind. Cas. 156.

Every order shall take effect from the date of communication.—This sub-section clears the doubt expressed in 6 C. 476. A Magistrate of the second class began a trial. But before passing sentence he was invested with first-class powers, it was held by a Full Bench of the Allahabad High Court that he could pass sentence as a First Class Magistrate, 7 A. 414 (F.B.). See also 51 M. 257; 6 Pat. L.T. 554 = 1925 Pat. 420 = 26 Cr. L.J. 914 = 86 Ind. Cas. 978.

40. Whenever any person holding an office in the service of Government who has been invested with any powers under this Code throughout any local area is appointed to an equal or higher office of the same nature, within a like local area under the same Local Government, he shall, unless the Local Government otherwise directs, or has otherwise directed, exercise the same powers in the local area in which he is so appointed.

The new amendment is intended to save the powers of officers on return from leave without the formality of re-gazetting them.

Exercise the same powers in the Local Area to which he is appointed.—See Weir II 36 and 15 M. 132; Ratanlal 322. In the latter case it was held that a Sub-Registrar who was appointed Magistrate of a particular town, on transfer, could exercise in another locality the powers conferred on him unless withdrawn by the Local Government, and further when the Government order withdrawing his power was not communicated to him till he had decided certain cases the proceedings are not void. An Honorary Magistrate ceases to be a Magistrate only when his resignation is accepted by the Local Government and not when he sends in his resignation, 45 M L.J. 793; 43 M. 309.

Appointed to equal or higher office.—A Magistrate who was acting as a District Magistrate when transferred to another District not as a District Magistrate will not carry with him the powers of a District Magistrate, since he is not appointed to an equal or higher office of the same nature, 3 A. 563 (F.B.); 14 Cr. L.J. 239 (2)=19 Ind. Cas. 335 (2). But where a Head Assistant Magistrate having almost completed the trial of a criminal case was appointed to the office of Deputy Magistrate in another station in the same district and the case was transferred to him by the District Magistrate, it was held that the trial need not be commenced *de novo* but could be proceeded with from the point at which it was left before the transfer, 22 M. 47. See also 1906 A.W.N. 201; 3 A.L.J. 896=4 Cr L.J. 149 where it was held that when an officiating District Magistrate reverted as a Joint Magistrate in the same district during the pendency of the trial of a case and continued it after reversion without objection of the parties, he had jurisdiction to do so. Cases pending on the file of a Magistrate relieved of his charge of a sub division do not automatically pass into the hands of his successor merely because the first Magistrate is transferred to another sub division in the same District; 8 12 *supra* does not lay down such a rule, 42 A. 649 at 654 following 9 A.L.J. 448=13 Cr L.J. 203=14 Ind Cas 203. This section keeps alive the powers once conferred on an officer even in a case of absence on leave but if he absents himself without leave or overstays his leave, he vacates office under the rules of service and the section cannot apply, 2 Bom L.R. 536.

Same Local Government.—These words were introduced to meet the objections raised in 2 C 117 To make it clear that the power conferred by one Local Government cannot avail an officer when transferred to a province under another Local Government. See also 1894 P.R. (Cr.) 15.

41. (1) The Local Government may withdraw all or any of the powers conferred under this Code on any person by it or by any officer subordinate to it.

(2) Any powers conferred by the District Magistrate may be withdrawn by the District Magistrate.

Under sub-section (2) a District Magistrate may withdraw the powers conferred by him under 8. 13 or 37 *supra* on Subordinate Magistrates.

PART III.

GENERAL PROVISIONS.

CHAPTER IV. .

OF AID AND INFORMATION TO THE MAGISTRATES, THE POLICE AND PERSONS MAKING ARRESTS.

42. Every person is bound to assist a Magistrate or police-officer reasonably demanding his aid, whether within or without the presidency-towns,—

(a) in the taking or preventing the escape of any other person whom such Magistrate or police-officer is authorized to arrest ;

(b) in the prevention or suppression of a breach of the peace, or in the prevention of any injury attempted to be committed to any railway, canal, telegraph or public property.

Every person is bound to assist.—This section expressly declares that every person whether an official or private citizen is bound on reasonable demand by a Magistrate or Police-officer to render personal assistance in executing processes or preventing or suppressing breaches of the peace or preventing injury to public properties. The word 'assistance' implies that the party who assists is doing something which, in the ordinary circumstances, the party assisted can do for himself, 26 M. 419 (F.B.). S. 187, I.P.O., makes an intentional omission to assist a public servant punishable. As to persons required to assist in the dispersion of unlawful assemblies, see Ss. 125 to 127, *infra*. See Ss. 54 to 57, 128, 151 and 157, *infra* as to the circumstances under which a police-officer may lawfully arrest.

Reasonably demanding aid—The assistance that can be demanded under this section is *personal assistance* of the individual of whom it is demanded, and not the supply of a contingent of men to assist, Weir II, 37. The refusal to comply with the demand, on the ground that it was not reasonable, might render him liable under S. 187, I.P.O., and it would then be determined whether the demand was reasonable. Where a Magistrate directed a land-holder to find a clue in a case of theft within 15 days and to assist the police, *held* such order was not authorized by law, and a conviction under Ss. 187 and 188 I.P.O. for disobedience of such order was not sustainable, 3 A. 201; 42 A. 314. The word "assistance" referred to in the first part of S. 187, I.P.O., is *ejusdem generis* with the various forms of assistance specified in the latter half of the section. The assistance must have some direct personal relation to the execution of the duty by the public officer. It was not reasonable to ask for the assistance of a member of the public to arrest a large number of unknown persons whose precise whereabouts were also unknown at the time when the request for assistance was made. Obviously the law does not intend that police officers should have a general power of calling upon members of the public to join them in doing the work for which they are paid, such as tracing out the whereabouts of an absconding criminal or collecting evidence to warrant his conviction, 42 A. 314. Similarly omission to assist the police to bury a dead body will not come within this section, 6 C.P.L.R. 45. See also 42 A. 314. Illegal escape from the custody of a private person by one lawfully arrested is also punishable under S. 223B, I.P.C., 6 C.W.N. 337.

43. When a warrant is directed to a person other than a police-officer, any other person may aid in the execution of such warrant, if the person to whom the warrant is directed be near at hand and acting in the execution of the warrant.

Aid to person, other than police-officer, executing warrant.

To a person other than a Police-officer.—See Ss. 77 and 78, *infra*.

May Aid.—The assistance to be given to a private person is not obligatory as in the case of a Magistrate or police-officer under S. 42, *supra*. For rights and liabilities of a person acting under this section, see explanation (2) to S. 99, I.P.C.

44. (1) Every person, whether within or without the presidency-towns, aware of the commission of, or of the intention of any other person to commit any offence punishable under any of the following sections of the Indian Penal Code (namely), 121, 121A, 122, 123, 124, 124A, 125, 126, 130, 143, 144, 145, 147, 148, 302, 303, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 456, 457, 458, 459, and 460, shall, in the absence of reasonable excuse, the burden of proving which shall lie upon the person so aware, forthwith give information to the nearest Magistrate or police-officer of such commission or intention.

(2) For the purposes of this section the term "offence" includes any act committed at any place out of British India which would constitute an offence if committed in British India.

Offences specified herein are—S. 121. Waging or abetting or attempting to wage war against the king; S. 121-A. Conspiring to commit offences against the state; S. 122. Collecting arms, etc., for waging war against the king; S. 123. Concealing with intent to facilitate a design to wage war; S. 124. Assaulting Governor-General, etc., to compel them or restrain the exercise of lawful power; S. 124-A Sedition; S. 125. Waging war against any Asiatic power in alliance with the king, etc.; S. 126. Committing depredation into territory in alliance with the king; S. 130. Aiding escape of or harbouring state or war prisoners; S. 143. Being member of unlawful assembly; S. 144. Joining unlawful assembly armed with deadly weapons; S. 145. Joining or continuing in an unlawful assembly ordered to disperse; S. 146. Rioting; S. 148. Rioting armed with deadly weapon; S. 302. Murder, S. 303. Murder by life convict; S. 304. Culpable homicide; S. 382. Theft after preparation to cause death or hurt; S. 392. Robbery; S. 393. Attempt at robbery; S. 394. Hurt in robbery; S. 395. Dacoity; S. 396. Murder in dacoity; S. 397. Causing death or grievous hurt in dacoity or robbery; S. 398. Attempt at dacoity or robbery armed with deadly weapon; S. 399. Preparation to commit dacoity; S. 402. Assembling to commit dacoity; S. 435. Mischief by fire, etc.; S. 436. Mischief by fire to destroy a house, etc.; S. 449. House-trespass to cause death; S. 450. Lurking house-trespass to commit offence punishable with transportation for life; S. 456. Lurking house-trespass or house-breaking by night; S. 457. Lurking house-trespass, etc., to commit offence punishable with imprisonment; S. 458. Lurking house trespass etc., after preparation to cause hurt; S. 459. Grievous hurt in house-trespass or house-breaking; S. 460. Death or grievous hurt by one of several persons engaged in house-breaking.

See Ss 176 and 202, I.P.C., which make intentional omission punishable, and also S. 177, I.P.C., which makes giving false information punishable; see S. 161, I.P.C., which makes owners or occupiers of land punishable for failure to give information as to the formation of an unlawful assembly or rioting on the land.

Shall forthwith give information—Under this section it is the duty of a person who witnesses the commission of an offence to give information thereof to the nearest magistrate or police-officer and failure to do so renders him liable to be punished under S. 202, I.P.C., for intentionally omitting to give information, which one is legally bound to

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(2) For the purposes of this section the term "offence" includes any act committed at any place out of British India which would constitute an offence if committed in British India.

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Shall forthwith give information—Under this section it is the duty of a person who witnesses the commission of an offence to give information thereof to the nearest magistrate or police-officer and failure to do so renders him liable to be punished under S. 202, I.P.C., for intentionally omitting to give information, which one is legally bound to

give, 21 Cr. L.J. 486 at 493=55 Ind. Cas. 582. Where once information of a crime has reached the authorities, the object of this section is fulfilled, and no further duty imposed by it remains, Ratanlal 674 and 778; 7 M. 436; 23 C. 316. The burden of proving that there was reasonable excuse for not giving the information is cast on the person who has the information.

Sub-section (2).—This sub-section was introduced in the 1893 Code, and extends the obligation to acts or omissions out of British India which if committed in British India would constitute an offence.

45. (1) Every village-headman, village-accountant, village-watchman, village-police-officer, owner or occupier of land, and the agent of any such owner or occupier *in charge of the management of that land* and every officer employed in the collection of revenue or rent of land on the part of Government or the Court of Wards, shall forthwith communicate to the nearest Magistrate or to the officer-in-charge of the nearest police-station, whichever is the nearer, any information which he may *possess* respecting—

Village headman, accountants, land-holders and others bound to report certain matters.

(a) the permanent or temporary residence of any notorious receiver or vendor of stolen property in any village of which he is headman, accountant, watchman or police-officer, or in which he owns or occupies land, or is agent, or collects revenue or rent;

(b) the resort to any place within, or the passage through, such village of any person whom he knows, or reasonably suspects, to be a thug, robber, escaped convict or proclaimed offender;

(c) the commission of, or intention to commit, in or near such village any non-bailable offence or any offence punishable under Sections 143, 144, 145, 147 or 148 of the Indian Penal Code;

(d) the occurrence in or near such village of any sudden or unnatural death or of any death under suspicious circumstances *or the discovery in or near such village of any corpse or part of a corpse, in circumstances which lead to a reasonable suspicion that such a death has occurred or the disappearance from such village of any person in circumstances which lead to a reasonable suspicion that a non-bailable offence has been committed in respect of such person;*

(e) the commission of, or intention to commit, at any place out of British India near such village any act which, if committed in British India, would be an offence punishable under any of the following sections of the Indian Penal Code, namely, 231, 232, 233, 234, 235, 236, 237, 238, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459, 460, 489A, 489B, 489C, and 489D;

(f) any matter likely to affect the maintenance of order or the prevention of crime or the safety of person or property respecting

which the District Magistrate, by general or special order made with the previous sanction of the Local Government, has directed him to communicate information.

(2) In this section—

(i) "village" includes village-lands; and

(ii) the expression "proclaimed offender" includes any person proclaimed as an offender by any Court or authority established or continued by the Governor-General in Council in any part of India, in respect of any act which, if committed in British India, would be punishable under any of the following sections of the Indian Penal Code, namely, 302, 304, 382, 392, 393, 394, 395, 396, 397, 398, 399, 402, 435, 436, 449, 450, 457, 458, 459 and 460.

(3) Subject to rules in this behalf to be made by the Local Government, the District Magistrate or *Sub-divisional Magistrate* may from time to time appoint one or more persons *with his or their consent to perform the duties of a village-headman under this section whether a village-headman has or has not been appointed for that village under any other law.*

Appointment of village-headmen by District Magistrate or Sub-Divisional Magistrate in certain cases for purposes of this section.

Amendment—In sub-section (1) the words "in charge of the management of that land" after "occupier" have been added and for the word "obtain" the word "possess" has been substituted. In sub-section (1) (d) after "suspicious circumstances" the words "the discovery of a corpse or part of a corpse in or near such village which lead to a reasonable suspicion of death or disappearance of any person, etc.," have been added. In sub-section (1) (e), Ss 231 to 238, 489-A to 489-D, I.P.C., have been added. By the amendment in sub-section (3), a Sub-divisional Magistrate is empowered to appoint a village-headman, a power till now exercised by the District Magistrate.

Object of the section.—The object of this section is to ensure that information obtained be not intentionally withheld by those, whose position in the locality renders them liable to it. Its provisions are not to be used for the purpose of vexation, 7 M. 436; 20 G. 318. The provisions of this section are not intended to be punitive in themselves but are intended to facilitate information as to the commission of an offence and thereby facilitate steps being taken in the investigation of the same, 23 Cr. L. J. 162=65 Ind. Cas. 626; 53 B. 181.

Village-Headman.—The expression village-headman in the Madras Presidency means a Village Munsif or a Village Magistrate, 32 M. 253 (F.B.) Under S. 8 of Reg. XI of 1816 every Village-headman should reciprocally communicate any information which he may receive regarding offences committed or of gangs of robbers or of suspicious characters having entered or taken refuge in each other's villages and should co-operate in apprehending them. Under S. 9 of the same regulation they are to report to a Police-officer the arrival of strangers and suspicious persons in their village. Under this section the village-headman is bound forthwith to communicate to the nearest first-class Magistrate or the officer-in charge of a police-station, whichever is the nearer, any information which he may obtain respecting certain grave offences. In point of fact in this Presidency the complaint or information to the Village Magistrate is ordinarily the first step in setting the Criminal Law in motion in the case of grave offences specified in this section, 32 M. 253 at 262 (F.B.).

Owner or Occupier of Land.—The words 'in or near such village' are now added. The section speaks of the owner or occupier of land but not of a house. Where there are houses it is expected that the place would be populous and the Police would somehow get the information. In case of land in the Muffassal there are not enough of policemen always available in the locality and hence it is necessary that the owner or occupier of the land should give such information to them, 53 B. 184. See 23 W.R. (Cr.) 60 at 61. In 12 Mad 92 it was held that the owner or occupier of a house within a village was not an owner of land within the meaning of S. 45; 53 B. 184. See also Weir I, 101. Land does not mean an irrigation tank and so a father was held by the Madras High Court (Cr. R. Case 67 of 1905) not bound to report the death of his child by drowning in such a tank under this section.

Agent of such owner or occupier.—The words "in charge of the management of such land" have been newly added. The liability of a resident agent of an owner arises when the owner is not resident and has no personal knowledge of the fact; when he has such knowledge the liability attaches to the owner, 23 W.R. (Cr.) 60 at 61. See 28 C 504, where it was held that a landlord was liable for the acts of commission and omission not only of himself but also of his agent or manager.

Forthwith—This word must be construed with reference to the object of the enactment. Where a village *kulkarni* gave information to the Police some 7 or 8 hours after he was aware of the occurrence, it was held that the information was not given *forthwith* as required by this section, Ratanlal 784

Communicate any information—Mere rumour which a Zamindar of a village and his agent had heard of a disappeared man having been killed is not information within the meaning of this section, 1900 A.W.N. 297. Where the only information which a Village Munsif had was that a jewel was missing, but it was not known whether it was stolen or lost, it was held that there was not such information of the commission of the offence which he was bound to communicate under this section, 5 M.L.T. 257=9 Cr. L.J. 224. But the provisions of this section should not be put in force against a person for purposes of vexation where the police actually obtained information from other sources, 4 C 623, followed in 20 C. 316; see 7 M 436 at 438, where it was held that these provisions of law ought not to be worked solely for the purpose of vexation, but for the purpose of insuring that information be not wilfully withheld by those whose position renders them liable to give it, and that it is not reasonable that every person other than him or those from whom such information has been actually obtained, who may possibly be bound to give the information, should be prosecuted for not having done so. See Ss. 176, 177. See 179 and 217, I.P.C., for punishment for omission to give the information. See also 23 Cr. L.J. 162=63 Ind. Cas. 626; 23 Cr L J. 345=66 Ind. Cas. 1031.

Which he may possess.—This section does not make it incumbent to communicate to the officer in charge of a police station any rumour of an occurrence on the village. It is only such information which a village headman, etc., may possess that is to be communicated. The amendment is clear as it uses the word 'possess' in the place of 'obtain' which was in the section before the amendment, 1924 Pat 181=25 Cr. L J. 973=81 Ind. Cas. 620 See also L.J. 257=9 Cr. L J 224.

Notorious Receiver or Vendor of property, see S. 410, I.P.C., and for habitual 19 C. 190.

A Thug is one who habitually associates persons for robbing and murdering them.

Escaped —See S. 212, I.P.

Proclaim er.—The person and above the... the expression M. 436.

property.—For definition of stolen property, see S. 413, I.P.C. See

others for com bbery, decoying, I.P.C.

in the mod lon

Sub-section (3).—An order passed by the District Magistrate in accordance with the rules framed by Government under this sub-section, i.e., dismissing a village-headman is an executive order and is therefore not subject to the revisional jurisdiction of the High Court, 29 A. 563.

The offences mentioned herein are—S. 231. Counterfeiting coin; S. 232 Counterfeiting king's coin; S. 233 Making or selling counterfeiting instruments; S. 234. Making or selling instruments for counterfeiting king's coin; S. 235 Possession of counterfeiting instruments; S. 236. Abetting in India counterfeiting coin out of India; S. 237. Import or export of counterfeit coin; S. 238 Import or export of king's coin; S. 302. Murder; S. 304. Culpable homicide not amounting to murder; S. 382. Theft after preparation to cause death or hurt; S. 392. Robbery; S. 393. Attempt at robbery; S. 394. Hurt in robbery; S. 395. Dacoity; S. 397. Causing death or hurt in robbery or dacoity; S. 398. Attempt at robbery or dacoity armed with deadly weapon; S. 399. Preparation to commit dacoity; S. 402. Assembling to commit dacoity; S. 435. Mischief by fire, etc.; S. 436 Mischief by fire to destroy house, etc.; S. 449. House-trespass to commit offence punishable with death; S. 450. House-trespass to commit offence punishable with transportation for life; S. 457. Lurking house-trespass or house-breaking by night; S. 458. Lurking house-trespass or house-breaking by night after preparation to cause hurt, etc.; S. 459. Grievous hurt in committing lurking house-trespass or house-breaking; S. 460. Death or grievous hurt by one of several persons engaged in house-breaking, etc.; S. 489-A. Counterfeiting currency or bank notes, S. 489 B. Using as genuine forged currency or bank note; S. 489-C. Possession of forged or counterfeit currency or bank notes; S. 489-D. Making or possessing instruments for forging or counterfeiting currency or bank notes.

CHAPTER V.

OF ARREST, ESCAPE AND RETAKING.

A.—Arrest generally.

46. (1) In making an arrest the police-officer or other person making the same shall actually touch or confine the body of the person to be arrested, unless there be a submission to the custody by word or action.

(2) If such person forcibly resists the endeavour to arrest him, or attempts to evade the arrest, such police-officer or other person may use all means necessary to effect the arrest.

(3) Nothing in this section gives a right to cause the death of a person who is not accused of an offence punishable with death or with transportation for life.

Arrest—Manual detention is not essential to constitute arrest. Weir I, 203. The Court is a jealous guardian of the right of personal freedom and requires any interference with the liberty of the subject to be strictly justified, 52 C 615 at 616; see also 14 A. 45 at 47; 1885 A W.N 53 (F.B.). Any man who is being arrested has a right to ask the officer arresting him to show him what power he has to do so. If the arrest is under a warrant it has been held that the man arrested is entitled to ask that the warrant be shown to him to see that he is being properly arrested, and that, when the warrant is not shown to him and the arrest is made such an arrest will not be a legal arrest. A man is entitled to know when a constable is arresting him under what power he is acting and if the constable states that he acts under a certain power which the man knows

he has not got, he is entitled to object to such arrest and to escape from such custody when arrested, 47 M. 442 at 444; See S 80, *infra* which lay down that if the arrest be under a warrant, the substance should be notified to the person to be arrested, and, if so required, the warrant should be shown. See Ss. 224 and 225, I.P.C. which make resistance or obstruction to lawful arrest punishable. Illegality of the arrest does not affect the jurisdiction of the Magistrate to try the offence though that fact is material in cases of prosecution for resistance to police in arresting. See 35 B. 225; 26 M. 124; 29 Cr. L.J. 1089=112 Ind. Cas. 673. A police officer who arrests a person without notifying to him the substance of the warrant under S 80 *infra* where efforts have been made to evade or prevent the arrest is justified in his action by the provisions of this section and such custody is lawful custody and rescue from such custody is an offence under S 225-B, I.P.C. 49 C.L.J. 264=33 C.W.N. 284=30 Cr. L.J. 703=116 Ind. Cas. 723. See Ss. 59, 66, 67, 77, and 78 *infra* as to arrest by private persons. See Ss. 130 and 131 as to arrest by military officers and Ss. 64 to 67 as to arrests by Magistrates.

47. If any person acting under a warrant of arrest, or any police-officer having authority to arrest, has reason to believe that the person to be arrested has entered into, or is within, any place, the person residing in, or being in charge of, such place shall, on demand of such person acting as aforesaid or such police-officer, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

Under Ss. 77 and 78, *infra*, warrants of arrest may be directed to persons not police-officers, and Ss. 54 and 58, *infra*, apply to arrest by a police-officer. This section is not intended to restrict the powers of the police to enter the place to be searched. It is a provision compelling house-holders to afford the police facilities in carrying out their duties, and if any difficulty is placed in the way of a police-officer, he may use force to enter and free ingress ought to be afforded. If difficulties as to ingress and search are placed in the way of a police-officer, he may use force to obtain ingress under the next section.

48. If ingress to such place cannot be obtained under section 47 it shall be lawful in any case for a person acting under a warrant and in any case in which a warrant may issue, but cannot be obtained without affording the person to be arrested an opportunity of escape, for police-officer to enter such place and search therein, and in order to effect an entrance into such place, to break open any outer or inner door or window of any house or place, whether that of the person to be arrested or of any other person, if after notification of his authority and purpose, and demand of admittance duly made, he cannot otherwise obtain admittance:

Provided that, if any such place is an apartment in the actual occupancy of a woman (not being the person to be arrested) who, according to custom, does not appear in public, such person or police-officer shall, before

Breaking open
same.

entering such apartment, give notice to such woman that she is at liberty to withdraw, and shall afford her every reasonable facility for withdrawing, and may then break open the apartment and enter it.

"In all cases where the king is a party, the officer, if the doors be not open may break the party's house either to arrest him or to do other execution of the kings process if otherwise he cannot enter. But before he breaks it he ought to signify the cause of his coming and to make request to open the doors. The house of any one is not a castle or privilege but for himself and shall not extend to protect any person who flies to his house or the goods of any other which are brought or conveyed into his house to prevent a lawful execution and to escape the ordinary process of law and therefore in such cases after denial on request made the officer may break the house" *Chester's Public Officers*, page 6. "Having obtained admission the officer may break inner doors whether the defendant be therein at the time or not. He may also break out in order to complete the execution. Although the officer may force an entrance he is not authorized in remaining in the house more than a sufficient time to execute the warrant and in the case of an arrest if the party be away from the house he is not justified in remaining there awaiting his return" *Ibid* page 7.

For arresting a suspected person if the police-officer enters into a building his action would be *prima facie* justifiable, 36 C. 433. See S. 90 *infra* as to a case in which a warrant may issue when summons which may be issued may not be obeyed.

49. Any police-officer or other person authorized to make an arrest may break open any outer or inner door or window of any house or place in order to liberate himself or any other person who, having lawfully entered for the purpose of making an arrest, is detained therein.

Power to break open doors and windows for purposes of liberation.

This section empowers a police-officer who having lawfully entered a house for making an arrest finds himself locked inside and in such a case he may break open door, etc., to liberate himself.

50. The person arrested shall not be subjected to more restraint than is necessary to prevent his escape.

No unnecessary restraint.

See also Ss. 62 and 63 *infra* in this connection. In no case is a police-officer justified in detaining a person for a single hour except on reasonable grounds justified by the circumstances of the case, 6 W.R. (Cr.) 83; 19 W.R. (Cr.) 36. Abuse of the power conferred by this section is punishable under S. 220, I.P.O. and S. 29 of the Police Act V of 1861. Authority to arrest implies authority to detain, Ratanlal 223. A police-officer is not warranted in detaining a person pending instructions from his superior officer as to whether he should take cognizance, 24 W.R. (Cr.) 51.

51. Whenever a person is arrested by a police-officer under a warrant which does not provide for the taking of bail, or under a warrant which provides for the taking of bail, but the person arrested cannot furnish bail, and whenever a person is arrested without warrant, or by a private person under a warrant, and cannot legally be admitted to bail, or is unable to furnish bail,

Search of arrested persons.

the officer making the arrest or, when the arrest is made by a private person, the police-officer to whom he makes over the person arrested, may search such person, and place in safe custody all articles, other than necessary wearing apparel, found upon him.

Under this section a private person making an arrest is not entitled to make any search. He is to make over the person arrested without delay to a police-officer who may search such person. Under S. 523, *infra*, the seizure of property shall be forthwith reported to the Magistrate and S. 53, *infra*, provides for the custody of offensive weapons taken from the arrested person.

Mode of searching
women.

52. Whenever it is necessary to cause a woman to be searched, the search shall be made by another woman, with strict regard to decency.

The word '*decency*' was substituted for the words '*habits and customs of the country*', which occurred in the 1872 Code.

53. The officer or other person making any arrest under this Code may take from the person arrested any offensive weapons which he has about his person, and shall deliver all weapons so taken to the Court or officer before which or whom the officer or person making the arrest is required by this Code to produce the person arrested.

Power to seize
offensive weapons.

Any offensive weapons—Such as swords, daggers, rifles, guns, clubs, or the like.

B.—Arrest without Warrant.

When police may
arrest without war-
rant.

54. (1) Any police-officer may, without an order from a Magistrate and without a warrant, arrest—

first, any person who has been concerned in any cognizable offence or against whom a reasonable complaint has been made or credible information has been received, or a reasonable suspicion exists of his having been so concerned ;

secondly, any person having in his possession without lawful excuse, the burden of proving which excuse shall lie on such person, any implement of house-breaking ;

thirdly, any person who has been proclaimed as an offender either under this Code or by order of the Local Government ;

fourthly, any person in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such thing ;

fifthly, any person who obstructs a police-officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody ;

sixthly, any person reasonably suspected of being a deserter from Her Majesty's Army, Navy or Air Force or of belonging to Her Majesty's Indian Marine Service and being illegally absent from that service ;

seventhly, any person who has been concerned in, or against whom a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in, any act committed at any place out of British India, which, if committed in British India, would have been punishable as an offence, and for which he is, under any law relating to extradition or under the Fugitive Offenders Act, 1881, or otherwise, liable to be apprehended or detained in custody in British India ;

eighthly, any released convict committing a breach of any rule made under section 565, sub-section (3) ; and

ninthly, any person for whose arrest a requisition has been received from another police-officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

(2) This section applies also to the police in the town of Calcutta.

Amendment.—CL (9) is new.

Police-officer.—In 35 C. 351 it was held that a *Duffadar* under Bengal Act VI of 1870 is not a police-officer. A *Choudidar* in the N.W.P. is not a member of the police force, and cannot arrest under this section, 14 A.L.J. 789; 3 A. 60; 2 C.W.N. 637. But a police constable deputed by his superior officer to be on the look out for one against whom a warrant has been issued was held to be a police-officer within this section, 36 A. 6. See also 40 M. 1028. The police of an adjoining Native State cannot lawfully arrest a person suspected of having committed an offence in a Native State, in British territory, 29 A. 377.

May arrest.—The word arrest literally signifies a setting, a stop or stay. Arrest is the restraining of the liberty of a man's person in order to compel obedience to the order of a Court of Justice, or to prevent the commission of a crime or to ensure that a person charged or suspected may be forthcoming to answer it" *Wharton's Law Lexicon*. When the person to be arrested comes within the 1st clause of this section he may be arrested without an order from a Magistrate and without a warrant. The writing out of a warrant or an order for arrest in such a case is a superfluous act and it cannot be considered as illegal, 18 Cr L J. 666 = 43 Ind. Cas. 314. Where a police-officer arrests and tells the person arrested expressly that he is doing so under a particular authority which he claims to arrest him and such arrest is resisted, it will be for the prosecution on a charge for resistance to establish that the police-officer had power to act under the authority he claimed to have and not under some other provision of law to arrest, 47 M. 442. The question whether the officer who effected the arrest was acting within or beyond his powers in making the arrest does not affect the question whether the accused was guilty or not guilty of the offence with which he was charged, 26 M. 124. Illegality of arrest does not vitiate extradition proceedings provided further

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fourthly, any person in whose possession anything is found which may reasonably be suspected to be stolen property and who may reasonably be suspected of having committed an offence with reference to such

fifthly, any person who obstructs a police-officer while in the execution of his duty, or who has escaped, or attempts to escape, from lawful custody ;

sixthly, any person reasonably suspected of being a deserter from Her Majesty's Army, Navy or Air Force or of belonging to Her Majesty's Indian Marine Service and being illegally absent from that service ;

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ninthly, any person for whose arrest a requisition has been received from another police-officer, provided that the requisition specifies the person to be arrested and the offence or other cause for which the arrest is to be made and it appears therefrom that the person might lawfully be arrested without a warrant by the officer who issued the requisition.

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action was gone thoroughly, 39 C. 164. A police constable not in police uniform has authority to arrest a person suspected of having committed cognizable offence without a warrant, 21 A.L.J. 791=25 Cr. L.J. 652=81 Ind. Cas. 159. A police constable, who knew a warrant of arrest had been issued against the accused, and who was asked by his Inspector to look out for him, may arrest even though he has no warrant with him, 40 M. 1028. If a Court is competent to try case, it does not in the least matter how the accused came before the Court, whether he was legally or illegally arrested, 31 C. 557; 25 B. 225; 7 B. 369; 26 M. 124; 1906 P.R. (Cr.) 17; 29 Cr. L.J. 1089=112 Ind. Cas. 673.

Reasonable complaint or suspicion.—What is a reasonable complaint or suspicion must depend on the circumstances of each particular case, but it must at least be founded on some definite fact, tending to throw suspicion on the person arrested and not on a mere surmise or information. A general definition of what constitutes reasonableness in a complaint or suspicion or credibility of information cannot be given, but must depend upon the existence of some tangible proof within the cognizance of the arresting officer and he must judge whether it is sufficient to establish the reasonableness or credibility of the charge, information or suspicion, 52 C. 319. The complaint referred to in this section need not be made to the police constable himself who arrests the person. But it is sufficient if it was made to a Magistrate who issues a warrant of arrest. In such a case there is a reasonable complaint of the accused being concerned in a cognizable offence, and the arrest by the constable without a warrant is justified under this section, 21 A.L.J. 791; 22 Cr. L.J. 758=64 Ind. Cas. 278. Still less have the police any power to arrest the persons as they appear sometimes to do merely on the chance of something being hereafter proved against them on a complaint being made—*per Markby, J.*, in 7 W.R. (Cr.) 3 at 5. See also 12 B. 377 as to what is reasonable suspicion. A police constable has authority to arrest under this section a person suspected of having committed a cognizable offence even though he is not in police uniform when arresting the person suspected, 1923 Pat. 181=25 Cr. L.J. 972=81 Ind. Cas. 620.

Credible information.—As to what is credible information, see 36 A. 6. As laid down in 1882 P.R. (Cr. J.) 7 (F.B.) credible information includes any information which, in the judgment of the officer to whom it is given, appears entitled to credit in the particular instance and which he believes, and it need not be sworn information, 30 Cr. L.J. 625=116 Ind. Cas. 455. Where a constable who knowing the existence of the warrant of arrest against a person for the offence of cheating, tried to arrest him, was held to have reasonable suspicion and credible information within this clause. Reasonable suspicion and credible information must be based upon definite facts which the police-officer must consider for himself before he acts under the section, 44 C. 76. Omission to notify substance of the order for arrest to the person arrested is an irregularity cured by S. 537, *infra*, 18 Cr. L.J. 666=40 Ind. Cas. 315.

Clause (3).—Proclamation under the Code is one made under S. 87, *infra*.

Clause (5)—Stolen property.—For definition of stolen property see S. 410, I.P.C. Possession of stolen property must be recent and exclusive, 8 W.R. (Cr.) 23. This clause refers only to property reasonably suspected to have been stolen and not to anything which the police may choose to imagine to have been stolen, 10 W.R. (Cr.) 20. See Ss 523 to 535 *infra* as to the procedure to be followed when stolen goods are found.

Clause (5).—Obstruction.—The word "obstruction" is not defined in the Indian Penal Code. In ordinary language it means impeding the progress of anything and Ss. 186, 221 and 225 I.P.C., make obstruction penal. A person who obstructs a police-officer trying to seize property which he believes to be stolen may be arrested under this section, 12 B. 377.

Escape from lawful custody.—This section permits an arrest upon reasonable suspicion of the commission of an offence, and therefore the custody is none the less legal because it is not followed by conviction or trial on the merits, 1836 A.W.N. 151, see also 28 C. 253; 21 C. 337; 29 A. 377; 19 M. 310; 11 M. 441 and 480. A detention by a village headman for an offence is lawful custody, 17 M. 103.

Clause (6).—See S. 549 *infra* which enables the Governor-General in Council to make rules as to cases in which persons subject to military law shall be tried by a Court to which the Code applies or by a Court-martial, and the procedure to be adopted by a Magistrate in such cases

Clause (7).—To satisfy the requirements of this clause two conditions must be present first, that the person to be arrested has been concerned in any act committed at any place out of British India which if committed in British India would have been punishable as an offence, or against the person a reasonable complaint has been made or credible information has been received or a reasonable suspicion exists of his having been concerned in such act; and second, that the person is liable for such act to be apprehended or detained in custody in British India under any law relating to extradition or under the Fugitive Offenders' Act 1881 or otherwise. The first of these requisites contemplates either the proof of a fact, *viz.*, the fact that the person having been concerned in the act, or a reasonable complaint, or credible information or a reasonable suspicion of his having been concerned therein. The wording of this part of the clause is very similar to that of cl. (1) of the section. Under that clause it has been held (44 C 76) that it gives a police-officer personal authority which involves personal responsibility and the reasonable suspicion and credible information must be based upon definite facts which the police-officer must consider for himself before he acts under this section and that he cannot delegate his discretion or take shelter under the belief or judgment of another police-officer. The wording of the clause clearly indicates that the arresting officer has to exercise his own judgment and to form his own opinion as to whether he should or should not act and to enable him to do so he must have the necessary facts before him. What is a reasonable complaint or suspicion must depend on the circumstances of each particular case but it must be at least founded on some definite fact tending to throw suspicion on the person arrested and not a mere vague surmise or information. A general definition of what constitutes reasonableness in a complaint or suspicion or credibility of an information cannot be given but must depend upon the existence of some tangible proof within the cognizance of the arresting police-officer, and he must judge whether it is sufficient to establish the reasonableness or credibility of the charge, information or suspicion. The second requisite is that there must be a present liability for apprehension or detention and not a future possible liability for apprehension or detention. The issue of some sort of process under the law would create such a liability though the process may not have been allowed and is not available for execution. These conditions being made out and an arrest being validly and lawfully made, the police must forthwith produce a person arrested before a Magistrate, 52 C. 319 B 58 *infra* authorizes a police-officer to pursue any person to be arrested into any place in British India. He cannot pursue an offender into any place outside British India, say a Native State, and arrest him there, 25 C. 20 (P.C.); 1 Lah. 406. This clause authorizes the arrest in British India of a British subject committing outside British India criminal breach of trust or any one of the offences mentioned in the schedule to the Extradition Act of 1903, thus superceding the decision in 19 B. 72. The police in British India can now arrest fugitives from Native States without a warrant under this clause, 7 Bom. L.R. 453.

Clause (8).—This clause refers to rules made by Local Governments relating to notification of residence by a released convict under S. 565, *infra*, and any released convict committing a breach of the rule may be arrested.

Clause (9).—This clause has been newly added to provide for cases when one police-officer has to act on the requisition issued by another police-officer restricting the responsibility of the arresting police-officer to the conditions mentioned in this clause. In cases however where the clause "firstly" applies, the responsibility is that of the arresting officer himself and the principle laid down in (44 C. 76) still holds good. This new clause does not affect the provisions of "seventhly," 52 C. 319.

Arrest of vagabonds,
habitual robbers, etc.

55. (1) Any officer in charge of a police-station may, in like manner, arrest or cause to be arrested—

(a) any person found taking precautions to conceal his presence within the limits of such station, under circumstances which afford reason to believe that he is taking such precautions with a view to committing a cognizable offence; or

(b) any person within the limits of such station who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself; or

(c) any person who is by repute an habitual robber, house-breaker or thief, or an habitual receiver of stolen property knowing it to be stolen, or who by repute habitually commits extortion or in order to the committing of extortion habitually puts or attempts to put persons in fear of injury.

(2) This section applies also to the police in the town of Calcutta.

Scope of the section.—This section is independent of Chapter VIII, although proceedings under Chapter VIII may follow such an arrest as a natural consequence. Therefore a police-officer under this section may arrest without an order from a Magistrate any person against whom proceedings under S. 121 *infra* are contemplated, 33 A. 437 at 438. Where certain persons were arrested on suspicion of having been concerned in a dacoity and committed to jail on the Magistrate's warrants, and before the formal conclusion of the investigation by police officer reported to the Magistrate that there was no sufficient evidence as to their participation in the dacoity, but the Magistrate directed them to be detained in jail pending police inquiry as to their liability to be proceeded against under S. 110 and information was laid before the Magistrate some time afterwards, and an order under S. 112 passed, it was held that the detention was illegal unless and until they were re-arrested by the police under this section, 43 A. 183; 41 A. 433; 1933 A.W.N. 212. Compare the provisions of this section with S. 100, *infra*, and see the notes thereunder; See also 35 A. 407.

Officer in charge of police-station.—See for definition S. 4 (1) (p), *supra*, and also S. 550, *infra*, which includes officers of higher rank also in this expression. It is not any police-officer who is empowered to arrest under this section. Officers in charge of police-stations are armed with exceptional powers under this section for the purpose of restraining bad characters. They provide very strong remedies and should never be put in force either by the officer in charge of a police-station, or the Magistrate of the district without the greatest deliberation, and except upon evidence which convinces the Magistrate that in the interests of public welfare it is absolutely necessary to demand from the person before him security to be of good behaviour. Comparing this section with S. 112, *infra*, and the following sections, there is little doubt that this section was intended for suppression of habitual bad characters whom an officer in charge of a police station suddenly finds within his circle, or about whom he has good cause to fear that they will commit serious harm before there is time to apply to the nearest Magistrate, 14 A. 43 at 45. It is intolerable that the police should pursue the investigation of crime by defying all the provisions of law for the protection of the liberty of the subject under the colourable pretension that no actual arrest has been made, when, to all intents and purposes a person has been in their custody. Such a procedure is illegal and is a gross and unwarranted breach of the powers entrusted to the police-officers, 1895 A.W.N. 53 (F.B.) at 59. This section does not empower the police to arrest a person on suspicion of unlawful gaming, 3 Cr. L.J. 20.

In like manner.—These words refer to the previous section which applies to certain specified cases and mean without a warrant and order from a Magistrate.

Sub-Section (1) (c).—It is not sufficient that a police-officer arresting a person under this sub-section has reason to suspect that the person was concerned in several offences. It is further necessary to prove that the person was by repute a habitual offender or by repute a person habitually committing the various offences referred to herein; otherwise the arrest is illegal, 47 M. 442.

Sub-Section (2).—The police in Calcutta are empowered to act under this section, 31 C. 557.

56. (1) When any officer in charge of a police-station or any police-officer making an investigation under Chapter XIV requires any officer subordinate to him to arrest without a warrant (otherwise than in his presence) any person who may lawfully be arrested without a warrant, he shall deliver to the officer required to make the arrest an order in writing, specifying the person to be arrested and the offence or other cause for which the arrest is to be made.

The officer so required shall, before making the arrest, notify to the person to be arrested the substance of the order and, if so required by such person, shall show him the order.

(2) This section applies also to the police in the town of Calcutta.

Amendment.—By the addition of the words "any police-officer making investigation", etc., power is given also to the investigating officer to depute a subordinate to effect and arrest. The last portion of sub-section (1) is newly added

An order in writing.—An order in writing is an authority to a subordinate police-officer to make an arrest, which the superior officer, if present, would himself make on his own responsibility. The issue of an order under this section does not limit the power of the officer under S. 54 *supra*, 5 Pat. 533. S. 83, *infra*, only applies to execution of warrants, and not to an order in writing under this section, and so the officer making the arrest is not bound to show the authority under which he is acting though it may be desirable to do so, 27 C. 320, but the last portion of sub-section (1) newly introduced provides a real safeguard against abuse of powers by the Police. See 25 Cr. L.J. 563. It is to be presumed that an officer who takes action under a particular section must be deemed to have full powers until the contrary is proved; even where a police-officer who takes action is not in charge of a police-station under the provisions of this section he could have been authorized by the officer in charge of the police-station to lawfully conduct the search. It is for the defence to prove that an officer who conducted the search was not the officer in charge of the police-station at the time of the search. Whether the search was legal or illegal, when contraband articles were as a matter of fact found in the possession of the accused, no question of the legality of the search or otherwise can be raised by him, 27 A.L.J. 28 at 33 following 23 A.L.J. 364. No order in writing is necessary if the offence is a cognizable one. S. 54, *supra*, empowers any police-officer to arrest on his own responsibility. Where a head-constable verbally ordered a constable to arrest one suspected of dacoity which the constable did in the presence of his superior, it was held that the arrest was legal, as dacoity is an offence for which any police-officer may arrest without a warrant and the arrest was virtually made by the head-constable, 11 W.R. (Cr.) 20. It is perfectly competent to the officer in charge of the *thana*, if he had disposed to have issued to any constable subordinate to him an order in writing

section for arresting a person. The Magistrate having issued his warrant for the arrest of the person, did not exclude the jurisdiction of the officer in charge of the *thana* and prevent him from issuing his written order under this section; but it might be different if the Magistrate had decided to issue a summons only. Mere writing of the names of any of the constables on the back of the copy of the warrant and the signing of that endorsement by the police-officer did not constitute the copy of the warrant "an order in writing", within the meaning of this section; but if the officer writes on the copy of the warrant "Arrest D, the person within named for the offence within named" and had put the names of the constables on the copy of the warrant and had signed such endorsement, he would have made an order in writing within the meaning of this section, 18 A. 246 at 248-49. See also Ss. 55, 92, 107 (3) and 114, *infra*. A *chaukidar* arresting under an order given by an S. H. O. is not bound to show the order unless asked to produce it, 26 Cr. L.J. 795=86 Ind Cas. 427.

Or other cause.—As to other causes for which action can be taken, See Ss. 55, 92, 107 (3) and 114 *infra*.

Before arresting, notify to the person to be arrested, substance of the order.—This provision has been newly added in the amendment of 1923 making it compulsory on the officer arresting if so required to notify before arresting, to the person to be arrested the substance of the order but this "section does not deprive, say a police constable of his statutory powers conferred independently of this section. The terms of S. 54 *supra* are very wide and authorize any police officer without an order from a Magistrate and without any warrant to arrest any one concerned in a cognizable offence, etc. The mere fact that a command certificate had been given to the officer under this section is not material as he had independently of such certificate power to make arrest and no valid plea of non-compliance with the provision of this section could be successfully raised, 27 Cr. L.J. 1310=93 Ind. Cas. 254.

57. (1) When any person who in the presence of a police-officer has committed or has been accused of committing a non-cognizable offence refuses, on demand of such officer, to give his name and residence or gives a name or residence which such officer has reason to believe to be false, he may be arrested by such officer in order that his name or residence may be ascertained.

(2) When the true name and residence of such person have been ascertained, he shall be released on his executing a bond, with or without sureties, to appear before a Magistrate if so required :

Provided that, if such person is not resident in British India, the bond shall be secured by a surety or sureties resident in British India.

(3) Should the true name and residence of such person not be ascertained within twenty-four hours from the time of arrest or should he fail to execute the bond, or, if so required, to furnish sufficient sureties, he shall forthwith be forwarded to the nearest Magistrate having jurisdiction.

Refuses on demand to give name and residence.—This is the only instance in which a police-officer is empowered to make an inquiry in a non-cognizable case, and the scope of such inquiry is limited as laid down by this section. See S. 153, *infra* as to procedure on receiving information in non-cognizable cases. See 5 Bom. L.R. 597 where the action

of a constable who arrested one who was quarrelling on the public road and detained him till his name and address were ascertained was justified under this section. A person who was tried and acquitted of dacoity was re-arrested by the police under S. 55 and detained in custody for 12 days on the pretext that they did not know his true name and residence, held that he should have been released on his executing a bond under this section. For a police-officer or a Magistrate to detain an accused person when orders have been passed by the Sessions Judge for his immediate release is a most grave irregularity and might expose the Magistrate and a police-officer to very serious results, 41 A. 433.

Sub-Section (2).—A police-officer other than an officer in charge of a police-station may release a person on his executing a bond for appearance before a Magistrate. This and S. 59 (3) are the only two instances where an inferior police-officer is empowered to release a person arrested. S. 60 *infra* provides that in any other case he is bound to send the arrested person to a station house officer or to a Magistrate without unnecessary delay.

58. A police-officer may, for the purpose of arresting without warrant any person whom he is authorized to arrest under this Chapter, pursue such person into any place in British India.

Pursuit of offenders into other jurisdictions.

Arrest by a police-officer in a Native State of a person charged with an offence committed in British India is illegal, as he is only entitled to pursue and arrest in any place in British India, 25 C. 20 (P.C.) ; 1 Lah. 426.

As to arrest without a warrant see §§. 54 and 55, *supra*. For definition of British India, see notes to S. 1 where S. 3 (7) of the General Clauses Act is set forth.

59. (1) *Any private person may arrest any person who in his view commits a non-bailable and cognizable offence, or any proclaimed offender, and, without unnecessary delay, shall make over any person so arrested to a police-officer, or, in the absence of a police-officer, take such person or cause him to be taken in custody to the nearest police-station.*

Arrest by private persons and procedure on such arrest.

(2) If there is reason to believe that such person comes under the provisions of section 54, a police-officer shall re-arrest him.

(3) If there is reason to believe that he has committed a non-cognizable offence, and he refuses on the demand of a police-officer to give his name and residence, or gives a name or residence which such officer has reason to believe to be false, he shall be dealt with under the provisions of section 57. If there is no sufficient reason to believe that he has committed any offence, he shall be at once released.

Amendment.—Sub-section (1) is re-drafted, the chief alteration is "cause him to be taken." It is not now obligatory for the person arresting to take the person himself to the police-station. Any private person may arrest.

Scope of the section.—Under English Common Law all private persons are justified without a warrant, in apprehending and detaining until they can be carried before a Magistrate all persons found committing or attempting to commit a felony in the night.

Though the cases expressly refer to the night, they are sometimes cited without qualification but in cases of mere suspicion of felony and offences less than felony, a private person has no such right. Where a breach of the peace is actually being committed any private person may interfere to prevent it even though no felony be committed or attempted, after proper warning and calling upon the parties to desist *Roscoe Cr. Ev. and Pr. p. 222* Now see 24 and 25 Vict., C. 96 S. 103; C. 99 S. 31; C. 97 S. 61 as to statutory power of private persons to arrest. See also 14 and 15 vict., C. 19 S. 11. It is not obligatory on a private person to make an arrest under this section. Under the Common Law of England, a private citizen has a right to arrest any person who is about to commit a breach of the peace, a power very essential to the orderly government of society and preservation of the peace. In 44 M. 913, following the common law principle it was held that a private citizen (village headman) had the right to arrest a drunken and disorderly person when there was a reasonable apprehension that he would commit a breach of the peace and be a danger to villagers as such power of arrest is very essential to the orderly government of society and the preservation of the peace. But the Full Bench decision in 46 M. 605 held the power of arrest was not by virtue of the rule of English Common Law but by reason of the provision of Ss. 81, 95 to 105, I.P.C. and the person cannot plead and invoke the aid of the Common Law of England as a defence when charged for illegal arrest. The decision in 44 M. 913 was affirmed not on the ground of the applicability of the English Common law on which the decision was based, but on the provisions of the Indian Penal Code relating to private defence. The Common Law of England relating to arrest by private individuals does not run in India. The general law on the subject is to be found in this section. This section is not happily worded but the intention of the Legislature appears to have been to restrict the right of arrest by private persons to cases in which a cognizable and non-bailable offence has been committed in the presence of the person who arrests or causes the arrest of the offender. It is not necessary that the person should himself physically arrest the offender. He may cause such offender to be arrested by another, 52 C. 615 at 618-19 where 11 M. 480 is followed and 35 C. 361 is dissented from.

In his view commits a non-bailable and cognizable offence.—Private persons are not empowered to arrest in cases which involve suspicion. In 35 C. 361 it was held that when a theft had been completed before a *Duffadar* came up, and the offence of theft not being a continuing offence, he had no power to arrest the thief who was carrying the stolen property. This case is dissented in 52 C. 615. See 27 C. 366; 23 Cr. L.J. 82=64 Ind. Cas. 371. The words "in his view" mean "in the presence of" "or within the sight of" and the section provides that if an offence is committed in the presence of or within the sight of such person, any private person, may arrest when he is entitled to arrest the offender if the offence is non-bailable and cognizable. To construe the words as meaning "in his opinion" is unwarranted. The Legislature did not intend to give a private person authority to arrest an offender if upon information received or from other circumstances appearing before him he is of opinion, that an offence has been committed. Consequently the person arrested by a private individual cannot be said to be in lawful custody, if no offence has been committed in the presence of the person arresting and within his sight, but was found hiding himself inside a house, 20 Cr. L.J. 1462 =89 Ind. Cas. 1030. One should not put too strained a construction on the words 'in his view'. Where out of three persons who went out to commit theft of toddy from a tree two went up the trees to bring the toddy and the third man was standing at the foot of the tree collecting the toddy in a pot which he had in his hands with a view to carry it away his arrest with toddy in his hands as a thief committing theft 'in his view' was legally justified, 18 L.W. 818=25 Cr. L.J. 792=81 Ind. Cas. 812, where 35 C. 361 and 23 Cr. L.J. 32=64 Ind. Cas. 371 are distinguished.

Take such person or cause him to be taken.—The words "cause him to be taken" are new, and it is not obligatory on the private citizen to take the arrested person himself to the nearest police station. It is in accordance with the rulings in, 11 M. 480; 23 A. 266; 29 A. 575.

Make over person so arrested to a police-officer.—Where a private person *bona fide* makes an arrest under this section but instead of taking him to the nearest police-station takes him to a Magistrate he is protected from a charge of wrongful confinement, 5 Pat. L.J. 123. But if he keeps in his own custody without taking the arrested person to the police or Magistrate, he is guilty of an offence under S. 342 I.P.C., 27 Cr. L.J. 1378=93 Ind. Cas. 594. The provisions of this section are not complied with, if the arrested person is made over to a *Chakildar* to be taken to a police-station, as the *Chakildar* is not a police-officer under this section and escape from his custody is not punishable, 41 C. 17; see 27 C. 356; but escape from the custody of a servant of the person who arrested while on his way to the nearest police station was held punishable, 11 M. 450. See also the new amendment, Rescue from the custody of a private person who arrested a thief while in the act of stealing is punishable under S. 225, I.P.C. 11 M. 441 and 450; see also 17 M. 103; 5 M. 22 and 29 A. 575.

Without unnecessary delay.—As a general rule the person arrested should be taken directly to the Magistrate and nothing that is avoidable will justify the non-compliance of this rule. Twenty-four hours mentioned in S. 61 *infra* is the maximum period of detention. A police-officer has not at all events the power to detain an arrested person for more than 24 hours. A police-officer should in no case detain an arrested person for a single hour except on reasonable grounds justified by the circumstances, Ratanlal 22; 6 W.R. (Cr.) 83; 7 W.R. (Cr.) 3; 19 W.R. (Cr.) 36.

60. A police-officer making an arrest without warrant shall,
 without unnecessary delay and subject to the provisions herein contained as to bail, take or send the Person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police-station.

Person arrested to be taken before Magistrate or officer in charge of police-station.

Scope of the section.—The precaution laid down in this and the next section is designed to secure that within not more than 24 hours of the arrest of an accused person some Magistrate shall have seisin of what is going on and some knowledge of the nature of the charges against the accused, however incomplete the information may be, 23 C.W.N. 850=25 Cr. L.J. 1233=82 Ind. Cas. 131. A police-officer arresting a person should not keep him in a place of confinement selected by him, but should send him immediately to the police-station, and thus place the arrested person in the custody of the officer in charge of the station who is the person entrusted by the Act in the conduct of the inquiry, 7 W.R. (Cr.) 3. He has no authority to detain the arrested person for 24 hours under S. 61 *infra*, Ratanlal 22.

Provisions herein contained as to bail.—See Ss. 63, 169, 170 (1), 496 and 497 *infra* which provide for the taking of bail. When the police arrest a person under S. 55 *supra* they are bound to give the person arrested the option of bail and that bail shall be, as the Code requires not excessive and in accordance with the position in life occupied by him.....To deprive any person of his liberty is a most serious step to take and it is hardly too much to say that every step in the process should show extreme deliberation and care and if a person has to be arrested previous to inquiry he should be given the option of release upon proper bail, 14 A. 45 at 47; 52 C. 615.

61. No police-officer shall detain in custody a person arrested
 without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, exceed

Person arrested not to be detained more than twenty-four hours.

Though the cases expressly refer to the night, they are sometimes cited without qualification but in cases of mere suspicion of felony and offences less than felony, a private person has no such right. Where a breach of the peace is actually being committed any private person may interfere to prevent it even though no felony be committed or attempted, after proper warning and calling upon the parties to desist. *Roscoe Cr. Ev. and Pr.* p. 222 Now see 21 and 25 Vict., C. 96 S. 103; C. 99 S. 31; C. 97 S. 61 as to statutory power of private persons to arrest. See also 14 and 15 vict., C. 19 S. 11. It is not obligatory on a private person to make an arrest under this section. Under the Common Law of England, a private citizen has a right to arrest any person who is about to commit a breach of the peace a power very essential to the orderly government of society and preservation of the peace. In 44 M. 913, following the common law principle it was held that a private citizen (village headman) had the right to arrest a drunken and disorderly person when there was a reasonable apprehension that he would commit a breach of the peace and be a danger to villagers as such power of arrest is very essential to the orderly government of society and the preservation of the peace. But the Full Bench decision in 45 M. 605 held the power of arrest was not by virtue of the rule of English Common Law but by reason of the provision of Ss. 81, 95 to 105, I.P.C., and the person cannot plead and invoke the aid of the Common Law of England as a defence when charged for illegal arrest. The decision in 44 M. 913 was affirmed not on the ground of the applicability of the English Common law on which the decision was based, but on the provisions of the Indian Penal Code relating to private defence. The Common Law of England relating to arrest by private individuals does not run in India. The general law on the subject is to be found in this section. This section is not happily worded but the intention of the Legislature appears to have been to restrict the right of arrest by private persons to cases in which a cognizable and non-bailable offence has been committed in the presence of the person who arrests or causes the arrest of the offender. It is not necessary that the person should himself physically arrest the offender. He may cause such offender to be arrested by another, 52 C. 615 at 618-19 where 11 M. 430 is followed and 35 C. 361 is dissented from.

In his view commits a non-bailable and cognizable offence.—Private persons are not empowered to arrest in cases which involve suspicion. In 35 C. 361 it was held that when a theft had been completed before a *Dugadar* came up, and the offence of theft not being a continuing offence, he had no power to arrest the thief who was carrying the stolen property. This case is dissented in 52 C. 615. See 27 C. 366; 23 Cr. L.J. 82=64 Ind. Cas. 371. The words "in his view" mean "in the presence of" "or within the sight of" and the section provides that if an offence is committed in the presence of or within the sight of such person, any private person, may arrest when he is entitled to arrest the offender if the offence is non-bailable and cognizable. To construe the words as meaning "in his opinion" is unwarranted. The Legislature did not intend to give a private person authority to arrest an offender if upon information received or from other circumstances appearing before him he is of opinion, that an offence has been committed. Consequently the person arrested by a private individual cannot be said to be in lawful custody, if no offence has been committed in the presence of the person arresting and within his sight, but was found hiding himself inside a house, 26 Cr. L.J. 1462 = 89 Ind. Cas. 1033. One should not put too strained a construction on the words "in his view". Where out of three persons who went out to commit theft of toddy from a tree two went up the trees to bring the toddy and the third man was standing at the foot of the tree collecting the toddy in a pot which he had in his hands with a view to carry it away his arrest with toddy in his hands as a thief committing theft "in his view" was legally justified, 13 L.W. 815=25 Cr. L.J. 792=81 Ind. Cas. 812, where 35 C. 361 and 23 Cr. L.J. 32=64 Ind. Cas. 371 are distinguished.

Take such person or cause him to be taken.—The words "cause him to be taken" are new, and it is not obligatory on the private citizen to take the arrested person himself to the nearest police station. It is in accordance with the rulings in, 11 M. 450; 23 A. 266; 29 A. 573.

Take over person so arrested to a police-officer.—Where a private person *bona fide* makes an arrest under this section but instead of taking him to the nearest police station takes him to a Magistrate he is protected from a charge of wrongful confinement, 5 Pat. L.J. 129. But if he keeps in his own custody without taking the arrested person to the police or Magistrate, he is guilty of an offence under S. 342 I.P.C., 27 Cr. L.J. 1378=83 Ind. Cas. 591. The provisions of this section are not complied with, if the arrested person is made over to a *Choudidar* to be taken to a police-station, as the *Choudidar* is not a police officer under this section and escape from his custody is not punishable, 41 C. 17; see 27 C. 366; but escape from the custody of a servant of the person who arrested while on his way to the nearest police station was held punishable, 11 M. 430. See also the new amendment, Release from the custody of a private person who arrested a thief while in the act of stealing is punishable under S. 225, I.P.C. 11 M. 441 and 450; see also 17 M. 103; 5 M. 22 and 29 A 575.

Without unnecessary delay.—As a general rule the person arrested should be taken directly to the Magistrate and nothing that is avoidable will justify the non-compliance of this rule. Twenty-four hours mentioned in S. 61 *infra* is the maximum period of detention. A police-officer has not at all events the power to detain an arrested person for more than 24 hours. A police-officer should in no case detain an arrested person for a single hour except on reasonable grounds justified by the circumstances, Ratanlal 22; 6 W.R. (Cr.) 88; 7 W.R. (Cr.) 3; 19 W.R. (Cr.) 36.

60. A police-officer making an arrest without warrant shall, without unnecessary delay and subject to the provisions herein contained as to bail, take or send the Person arrested before a Magistrate having jurisdiction in the case, or before the officer in charge of a police-station.

Person arrested to be taken before Magistrate or officer in charge of police-station.

Scope of the section.—The precaution laid down in this and the next section is designed to secure that within not more than 24 hours of the arrest of an accused person some Magistrate shall have seisin of what is going on and some knowledge of the nature of the charges against the accused, however incomplete the information may be, 28 C.W.N. 850=25 Cr. L.J. 1203=82 Ind. Cas. 131. A police-officer arresting a person should not keep him in a place of confinement selected by him, but should send him immediately to the police-station, and thus place the arrested person in the custody of the officer in charge of the station who is the person entrusted by the Act in the conduct of the inquiry, 7 W.R. (Cr.) 3. He has no authority to detain the arrested person for 24 hours under S. 61 *infra*, Ratanlal 22.

Provisions herein contained as to bail.—See §§. 63, 169, 170 (1), 496 and 497 *infra* which provide for the taking of bail. When the police arrest a person under S. 55 *supra* they are bound to give the person arrested the option of bail and that bail shall be, as the Code requires not excessive and in accordance with the position in life occupied by him.....To deprive any person of his liberty is a most serious step to take and it is hardly too much to say that every step in the process should show extreme deliberation and care and if a person has to be arrested previous to inquiry he should be given the option of release upon proper bail, 14 A. 45 at 47; 52 C 618.

61. No police-officer shall detain in custody a person arrested without warrant for a longer period than under all the circumstances of the case is reasonable, and such period shall not, in the absence of a special order of a Magistrate under section 167, ex-

Person arrested not to be detained more than twenty-four hours.

twenty-four hours exclusive of the time necessary for the journey from the place of arrest to the Magistrate's Court.

Scope of the section.—This section applies only to the case of *arrest without a warrant*, and S. 81 *infra* provides for the case of *arrest under a warrant*. The intention of the Legislature having regard to this section and S. 167 *infra*, and the requirement of justice generally is that an accused should be brought before a Magistrate competent to try or commit, with as little delay as possible, 11 M. 98. This section does not apply to the police in Calcutta, 44 C.L.J. 134=27 Cr. L.J. 1185=97 Ind. Cas. 945; though the improper exercise of such power may be corrected by the High Court under S. 491 *infra*. See also 44 C.L.J. 138 (F.B.).

Custody—The retaining of a person in a particular place or compelling him to go in a particular direction by force of an exterior will over-powering or suppressing in a way his own voluntary action is an imprisonment on the part of the person exercising that exterior will, 2 M.H.C.R. 396; see also 7 W.R. (Cr.) 3; 4 Bom L.R. 79.

Custody not to exceed 24 hours.—This section provides that the accused must not be kept in custody for more than 24 hours, but the law cannot mean that the number of hours an accused person is detained at a *thana* is to be added irrespective of the circumstances. There must be a continuous detention of 24 hours to bring the parties within the scope of this section, 1 W.R. (Cr.) 5. "Even if a person be rightly arrested, it does not rest with the discretion of the police-officer to keep the prisoner in custody wherever and as long as he pleases. Under no circumstances can he be detained without the special order of a Magistrate for more than 24 hours. At the expiration of 24 hours, unless the special order has been obtained, the prisoner must either be discharged or sent on to the Magistrate, and any longer detention is absolutely unlawful; and though the Code is not so express upon the place as the time of confinement, still, we think it is perfectly clear that it was intended that, where a police-officer arrested any person, the prisoner should not be kept in confinement in any place which the subordinate officer might select but that he should, if possible, be sent immediately to the police-station and be placed in the custody of the officer in charge of the station, who is the person entrusted by the Act with the conduct of the inquiry." 7 W.R. (Cr.) 3 at 6; see also 6 W.R. (Cr.) 88 at 89; Ratanlal 22; 19 W.R. (Cr.) 36. The 24 hour's detention and the additional time necessary to bring the accused before a Magistrate allowed by this section and the 15 days additional detention allowed under S. 167 *infra*, having expired, an accused person must either be released by the police under the provisions of S. 109 *infra*, security being taken for his appearance before a Magistrate, if and when required or the accused, must, under the provisions of S. 170 *infra*, be forwarded under custody to a Magistrate who is empowered to take cognizance of the offence upon a police report. The law as laid down in the sections of the Code seems to be this, that on the expiration of the maximum period of 15 days detention and the additional time necessary to bring him before the Magistrate under this section and S. 167 *infra*, an accused must be released by the police under S. 109, security for appearance being taken, the Magistrate empowered must either take cognizance, if he has a police report before him under S. 173 *infra* which makes out a *prima facie* case or he must release him, 28 C.W.N. 490 at 492=26 Cr. L.J. 68=83 Ind. Cas. 628. The intention of the Legislature is that an accused person should be brought before a Magistrate competent to try or to commit, with as little delay as possible, 51 C. 402. The precaution laid down in this and the previous section is designed to secure that within not more than 24 hours of the arrest a Magistrate shall have *seisin* of what is going on and some knowledge of the nature of the charge against the accused however incomplete the information may be, 23 C.W.N. 850=23 Cr. L.J. 1203=82 Ind. Cas. 131.

Excluding time necessary for journey.—The twenty-four hours specified herein are to be counted up to the time the arrested person leaves the police-station to the Magistrate's Court. The time occupied by the journey is not to be counted in the period but it is the duty of the Magistrate to see that the time so occupied is reasonable having regard to the distance to be traversed and other local considerations, Ratanlal 22.

Special order of a Magistrate under S. 167.—S. 167 *infra* fixes 15 days in the whole as the extreme period for which a Magistrate can authorize detention in police custody during investigation. The special order under S. 167 is different from an order of adjournment and remand under S. 344 or S. 247, *infra*. S. 344 *infra* also declares that the term of police custody is not to exceed 15 days at a time. A Magistrate authorizing detention in police custody under S. 167, *infra* should record his reasons for doing so. He can make an order only when the accused is produced before him, S B.L.R. 274; 13 W.R. (Cr.) 27; see also Weir II, 439.

62. Officers in charge of police stations shall report to the District Magistrate, or, if he so directs, to the Sub-divisional Magistrate, the cases of all persons arrested without warrant, within the limits of their respective stations, whether such persons have been admitted to bail or otherwise.

Police to report apprehensions.

Scope of the section—This section is enacted with the object of prompt exercise of judicial authority with regard to arrests by the police to see that no one is kept unnecessarily in custody and it is the duty of the District Magistrate to examine carefully the reports of arrests made under this section by the police, Ratanlal 234. See *Ibid* 239 and 261.

Or otherwise.—These words mean released under sub-S. (3) of S. 59, *supra*. Failure on the part of a police officer to report is an offence under S. 217 I.P.C.

63. No person who has been arrested by a police-officer shall be discharged except on his own bond, or on bail, or under the special order of a Magistrate.

Discharge of person apprehended.

Discharged on his own Bond or on Bail.—See Ss. 57, 59, 169, 170, 496 and 497 *infra* as to discharge on bond or bail.

Under special order of a Magistrate.—Compare the language of S. 61, *supra*; the special order contemplated is one under S. 167, *infra*.

64. When any offence is committed in the presence of a Magistrate within the local limits of his jurisdiction, he may himself arrest or order any person to arrest the offender, and may thereupon, subject to the provisions herein contained as to bail, commit the offender to custody.

Offence committed in Magistrate's presence.

This section is clearly not intended to trench upon the great principle embodied in S. 556, *infra*, and therefore the Magistrate is disqualified from exercising his judicial function in relation to the offence committed in his presence, Ratanlal 339. See Ss. 496 and 497 *infra* as to bail.

65. Any Magistrate may at any time arrest or direct the arrest in his presence, within the local limits of his jurisdiction, of any person for whose arrest he is competent at the time and in the circumstances to issue a warrant.

Arrest by or in presence of Magistrate.

Magistrate may arrest or direct the arrest in his presence.—When the Legislature empowers an officer to delegate an authority to do certain act to another person

it necessarily implies that the original authority to do such act is fully and completely in the officer himself but that it is necessary for the exigencies of business that it should be done in the majority of cases by persons acting under authority derived from him. This principle is adopted by the Legislature in Ss. 65 and 105 of the Code. S. 65 authorizes a Magistrate to make an arrest himself, or direct an arrest in his presence in cases in which he is competent at the time and in the circumstances to issue a warrant and S. 105 provides similarly for a search by him or in his presence, 31 B. 438 at 445.

Acting under this section and S. 190 *infra* in respect of a complaint under S. 448, I.P.O., a Magistrate went and arrested a person hiding in a temple without making any final order on the occurrence report he had received previously. It was held that independently of the occurrence report the Magistrate's action was justified, and no action will lie against him for damages, 52 Ind. Cas. 699.

66 If a person in lawful custody escapes or is rescued, the person from whose custody he escaped or was rescued may immediately pursue and arrest him in any place in British India.

Power, on escape, to pursue and retake.

Under this section any private person who makes an arrest under S. 59, *supra*, is empowered on escape of the arrested person in his custody, to pursue and retake the arrested person. The expression used is "the person from whose custody he escaped," which will certainly include a private person. Escaping, rescuing and attempts to escape or rescue are punishable under Ss. 224 and 225, I.P.C. With regard to general power of arrest see S. 55, Cl. (5) *supra* and S. 59, *supra* which authorizes pursuit of offenders into other jurisdictions in British India.

67. The provisions of sections 47, 48 and 49 shall apply to arrests under section 66, although the person making any such arrest is not acting under a warrant, and is not a police-officer having authority to arrest.

Provisions of Ss. 47, 48 and 49 to apply to arrests under S. 66

Sections 47, 48 and 49.—These sections relate to search of the place entered into by the person sought to be arrested, what should be done when ingress is not obtainable and to break open doors and windows for purpose of liberation, etc.

CHAPTER VI.

OF PROCESSES TO COMPEL APPEARANCE.

A.—Summons.

68. (1) Every summons issued by a Court under this Code shall be in writing, in duplicate, signed and sealed by the presiding officer of such Court, or by such other officer as the High Court may, from time to time by rule, direct.

Form of summons

(2) Such summons shall be served by a police-officer, or, subject to such rules as the Local Government may prescribe in this behalf, by an officer of the Court issuing it or other public servant.

Summons by whom served.

(3) This section applies also to the police in the towns of Calcutta and Bombay.

Scope of the section.—(1) Sub-section (1) deals with personal service where it is practicable. Personal service may be made either by delivering or tendering a copy, but that tender must be a real tender of a document which is understood by the person to be served and he must have voluntarily waived actual delivery and indicated in some way that a tender was sufficient. If the man to be served gives the server an adequate opportunity of tendering the summons, the serving officer need not deliver it. By sub-section (2), the person to whom the summons has been tendered may be required to sign a receipt on the back of one of the duplicates and if he runs away and shuts himself in his house he clearly cannot be asked to sign a receipt and he shows his intention to prevent service. Thus a person who gets away from the serving officer with the obvious intention of not allowing him to hold any communication with him at all and shuts himself in his house, is intentionally preventing service either by tender or by delivery, 26 A.L.J. 107 at 103=29 Cr. L.J. 263=107 Ind. Cas. 563; 31 C.W.N. 143. This section incorporates the form of summons which is a statutory form contained in Schedule V. There appears to be no authority as to what such summons should contain. But the statutory form contained in the Act provides that summons should give as a part of the requirement to the accused person to attend at a specified time and place to answer to charge, particulars of the offence charged. This seems but reasonable and in accordance with common sense. It is an elementary observation to point out that it is not reasonable to summon a person to answer a charge, unless he is informed of the charge he is summoned to answer. The form says '*state shortly the offence charged*' that statutory requirement cannot be satisfied by a reference to a general omnibus clause which may include a variety of charges nor does it justify the omission of the place where, the date when, and the precise nature of the offence which the accused person is supposed to have committed and a summons issued by a Magistrate's Court which does not contain in the form prescribed by the statute particulars of the place where, the time when and the nature of the offence charged may be disregarded by the person summoned and proceedings taken thereon, if objected to must necessarily be invalid, 26 A.L.J. 331 at 334=29 Cr. L.J. 357=108 Ind. Cas. 230. Under this section a summons may be (a) to the accused, (b) to witness, (c) to a person to show cause against some order by a Magistrate, (d) to attend as a Juror or Assessor in a sessions trial, 1 C.W.N. cxvi. Under the 1872 Code the corresponding section related only to service of summons on the accused. The law for the service of summons in criminal cases is on the same lines as the rules for the service of summons in civil cases, 20 Cr. L.J. 816=53 Ind. Cas. 720. As to form of summons to an accused, see *Bch. V, Form Nos. 1 and 12*; to witnesses, see *Form No. 31*; to Juror or Assessor, see *Form No. 33*. Summons should be clear and specific as to the Court at which, the day and time of the day when the attendance of the person summoned is required, 7 M.H.C.R. Appx. 14 and 43; 5 A. 7. An accused person summoned must wait a reasonable time if he finds the Magistrate absent, 10 B. 93. So also a witness, 14 W.R. (Cr.) 20. It is not an offence to disobey a summons directing a person to appear at a place outside British India, 16 M. 465. There is no provision in the Code for the issue by a Magistrate either of summons or warrant requiring a person to appear before a police-officer, 24 C. 320.

Every summons shall be in writing.—But there is nothing illegal in a Magistrate verbally directing a person who appears on the first day to appear on a subsequent day, *Welf. I, 87*. Expressions referring to writing include reference to printing, lithography, photography, and other mode of representing or reproducing words in a visible form, S. 8 (38) of the General Clauses Act X of 1897.

Every summons shall be signed.—When the formalities are not strictly complied with, a conviction for disobedience of summons under S. 174, I.P.C., cannot stand, 3 A. 7; 20 M. 31; 11 C. 111. See 23 C. 896 where a warrant not signed but merely initialled was held invalid. Summonses issued from a Magistrate's Court shall ordinarily be signed by the chief ministerial officer of the Magistrate's establishment with the words 'by order of Court' invariably prefixed to the signature of the ministerial officer, *M.H.C. Cir. Dis. No. 734 dated 16—10—1900*.

Every summons shall be sealed.—A summons which is not sealed as required by this section is illegal and prosecution for disobeying such void summons is not sustainable, 27 M.L.J. 588=10 L.W. 554 where 42 C. 703 is referred to. See also Weir I, 99; 21 Cr. L.J. 800=55 Ind. Cas. 523.

69. (1) The summons shall, if practicable, be served personally on the person summoned, by delivering or tendering to him one of the duplicates of the summons.

Signature of receipt for summons. (2) Every person on whom a summons is so served shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

(3) Service of a summons on an incorporated company or other body corporate may be effected by serving it on the secretary, local manager or other principal officer of the corporation or by registered post letter addressed to the chief officer of the corporation in British India. In such case the service shall be deemed to have been effected when the letter would arrive in ordinary course of post.

Shall be served personally.—The mere showing to a witness of a summons is not sufficient service. Either the original should be left with him or should be exhibited to him and a copy of the summons delivered or tendered to the witness, 5 B.H.C.R. (Cr. Ca.) 20. Mere tendering of summons amounts to sufficient service if the person to be served refuses to take the summons. 1836 A.W.N. 93; 28 M.L.J. 503 at 508. A process-server has no right to enter a house to serve summons without the owner's permission, 28 M.L.J. 503.

Shall sign a receipt—Mere refusal to sign a receipt is not an offence under S 173 or 180, I.P.C., 20 C. 338; 3 C. 621; 5 B.H.C.R. (Cr. Ca.) 34; 6 A.L.J. 777; 5 M. 199; Weir I, 80; 1 Ran 49. Service of a summons on the pleader of a party is not sufficient service, 6 C.W.N. 927.

70. Where the person summoned cannot by the exercise of due diligence be found, the summons may be served by leaving one of the duplicates for him with some adult male member of his family, or, in a presidency-town, with his servant residing with him; and the person with whom the summons is so left, shall, if so required by the serving officer, sign a receipt therefor on the back of the other duplicate.

Scope of the section.—This section is analogous to O. V, r. 15, C.P.O.; service on adult member of the family is considered sufficient. Unlike the provision of the C.P.O. in the presidency-town, service on a servant residing with the person sought to be served is sufficient.

Person summoned cannot be found—See the next section as to procedure when service cannot by the exercise of due diligence be effected. Not finding a man in his house when summons is taken to him is not attempt to find him, 1832 A.W.N. 170; 19 C. 201; 26 C. 101; 21 M. 419 and 324.

71. If service in the manner mentioned in sections 69 and 70 cannot by the exercise of due diligence be effected, the serving officer shall affix one of the duplicates of the summons to some conspicuous part of the house or homestead in which the person summoned ordinarily resides; and thereupon the summons shall be deemed to have been duly served.

Procedure when service cannot be effected as before provided. Scope of the section.—It is plain that the procedure which is provided by this section cannot be made use of unless service in the manner mentioned in Es. 69 and 70 *supra* cannot be effected by the exercise of due diligence. The return of the poon should show that first service could not be effected personally on the person summoned by delivering or tendering him one of the duplicates as provided by S. 69 and then it must be shown that service could not be effected by leaving one of the duplicates with some adult male member of the family of the person summoned and if these modes fail then only service by affixture should be resorted to under this section, 31 C.W.N. 143=43 C.L.J. 113 at 115=27 Cr.L.J. 715=94 Ind. Cas. 937. It is only when reasonable grounds exist for believing that the person summoned is keeping out of the way to avoid service or that for other reasons it cannot be served in the ordinary way that substituted service should be ordered, 29 M. 324. The law as to service of summons in criminal cases is on the same lines as the rules for service of summons in civil cases, 20 Cr. L.J. 816=53 Ind. Cas. 720. This section corresponds to O. V. r. 17 of the Q.P.C. The provision of this section should be resorted to when service in the manner mentioned in the last two preceding sections cannot be effected after due diligence. Then only, what is termed "*substituted service*" can be resorted to by affixing one of the duplicates to some conspicuous part of the house or homestead in which the person summoned ordinarily resides, and thereupon the summons shall be deemed to be duly served. See 23 Cr. L.J. 739=69 Ind. Cas. 627.

Shall affix one of the duplicates of summons to conspicuous part of the house.—The affixture is to be only done after proper attempts have been made to find out the person summoned; going to a man's house and not finding him there, is not attempting to find him. But the process-server should go to the house, make inquiries and if necessary follow him. Enquiry should be made to find out when he is likely to be at home, and go to the house at that time when he can be found. It must be shown that proper efforts have been made to find out when and where the man is likely to be found—not as seems to be done, in this country, to go to his house in a perfunctory way, and because he has not been found there, to affix a copy of the summons to the outer door of his house, 19 C. 201; 21 M. 419. If information obtained by the serving officer leads him to think that the person summoned will only be absent for a short time, he should wait and effect service personally, 29 M. 324.

72. (1) Where the person summoned is in the active service of the Government or of a Railway Company, the Court issuing the summons shall ordinarily send it in duplicate to the head of the office in which such person is employed; and such head shall thereupon cause the summons to be served in manner provided by section 69, and shall return it to the Court under his signature with the endorsement required by that section.

(2) Such signature shall be evidence of due service.

The words '*under his signature*' occurring in sub-section (1) and sub-section (2) were added in the 1898 Code. The return should now therefore contain the signature of the head of the office where the person summoned is employed, in addition to the signature of the person summoned, and such signature shall be evidence of due service.

This section is confined to summons issued by a Court of Justice, and not to orders made by police-officers investigating a crime under Chapter XIV *infra*, 18 Cr. L.J. 733=40 Ind. Cas. 733=10 Cr. L. Rev. 1. See S. 90 as to procedure to be adopted if the person summoned fails to appear.

73. When a Court desires that a summons issued by it shall be served at any place outside the local limits of its jurisdiction, it shall ordinarily send such summons in duplicate to a Magistrate within the local limits of whose jurisdiction the person summoned resides or is, to be there served.

Service of summons outside local limits.

Outside the limits of its jurisdiction.—The procedure prescribed by this section, *viz.*, to send the summons in duplicate to the Magistrate within whose jurisdiction the person summoned resides is to be adopted to serve summons at any place outside the limit of the Magistrate's jurisdiction. For example service on witnesses resident in the Presidency Towns is to be effected through the Chief Presidency Magistrate not through the Commissioner of Police. The Code does not say expressly how a person say in England is to be served with summons. The section only lays down that if a summons is to be served outside the local limits of a Magistrate's jurisdiction the summons shall ordinarily be sent to the Magistrate within the local limits of whose jurisdiction the person summoned resides or is. In a case where the witness was examined and cross-examined before charge and the witness had left for England the Magistrate may act under S. 33, Ind. Ev. Act, 28 Cr. L.J. 851=101 Ind. Cas. 637.

74. (1) When a summons issued by a Court is served outside the local limits of its jurisdiction, and in any case where the officer who has served a summons is not present at the hearing of the case, an affidavit, purporting to be made before a Magistrate, that such summons has been served, and a duplicate of the summons purporting to be endorsed (in manner provided by section 69 or section 70) by the person to whom it was delivered or tendered or with whom it was left, shall be admissible in evidence, and the statements made therein shall be deemed to be correct unless and until the contrary is proved.

Proof of service in such cases and when serving officer not present.

(2) The affidavit mentioned in this section may be attached to the duplicate of the summons and returned to the Court.

This is the only section in the Code for use of affidavits as evidence before a Magistrate. The affidavit may be attached to the duplicate of the summons and returned to the Court as proof of service, and the production of the affidavit dispenses with the presence of the serving officer at the hearing of the case. The provisions of Ss. 526 and 539, *infra*, regarding the use of affidavits are confined to the High Court.

Form of affidavit:—I, A son of B, hereby solemnly declare that I did on the day of serve son of of , with summons now shown to me and marked 'A' by delivering (tendering) a duplicate to him for by leaving a duplicate for him with an adult male member of his family residing with him or by affixing a duplicate to a conspicuous part of his house or homestead. Taken the day of 192 place. Before me. (Ed) Magistrate.

B.—Warrant of Arrest.

"A warrant may be defined as a written authority under the hand and seal of some Court or judicial or other officer authorized by law to issue the same, commanding the person or persons to whom it is addressed to arrest, or detain, or produce or release the body or to search the premises or seize or suspend execution on the goods or land of some person named therein" *Chester's Public Officers*, p. 3.

There is no doubt that the law is just as jealous of personal liberty in India as it is in England and that liberty cannot lightly be taken away except under circumstances which are clearly prescribed by positive law, 13 W.R. (Cr) 27; 4 B.L.R. Appx. 1. A Magistrate should arrest on personal knowledge, i.e., on sworn testimony given before him that a person has committed an offence unless and until a Magistrate has good reasons to believe that there is a real likelihood of a charge being proved. A *purdah* lady of good position should not ordinarily be compelled to appear in Court in person. See 8 Cr. L.J. 434.

75. (1) Every warrant of arrest issued by a Court under this Code shall be in writing, signed by the presiding officer, or in the case of a Bench of Magistrates, by any member of such Bench; and shall bear the seal of the Court.

Form of warrant of arrest.

Continuance of warrant of arrest.

(2) Every such warrant shall remain in force until it is cancelled by the Court which issued it, or until it is executed.

Every warrant of arrest—Like a summons a warrant of arrest may be for attendance (a) of an accused (b) of a witness (c) of a juror or assessor (d) of a person to show cause against a Magistrate's order. Cases falling under (b) and (c) are subject to the provisions of B. 90, *infra*. A summons is always addressed to a person for his attendance but a warrant is an order to the Police to arrest a person and produce him in Court if the warrant is non-bailable and take bail for appearance if bailable, 5 W.R. (Cr.) 71; 2 C.L.J. 625. See Sch. V, Form No. 2 as to form of warrant of arrest. When any Act does not provide a form of warrant, the form to be used is the ordinary one prescribed by the Code of Criminal Procedure, 18 B. 636 at 668.

To be signed by the presiding officer.—The affixing of a signature with a stamp and not with a pen was held to be more than a mere irregularity, 6 M. 396. See 23 C. 896, where a warrant of arrest not signed but *initialled* by the Magistrate was held to be illegal. In 2 Pat L.J. 487=17 Cr. L.J. 526=39 Ind. Cas. 494 it was held that a warrant not signed is a void document, and resistance to it is no offence. A contrary view was taken in 8 A. 293. The repeal of Illustration to S. 537 *infra* confirms the former view.

Shall bear the seal of the Court.—The reason for requiring the seal of the Court is that the attaching of the seal shows that the document to which it is attached has not been issued without due deliberation, as well, of course, as to prove the authenticity of the instrument, 9 B.H.C.R. 154 at 158. A warrant of arrest issued without the seal of the Court is invalid, as under this section the seal of the Court is essential to the validity of the warrant; arrest made under such a warrant is therefore illegal, 42 C. 708; 18 B. 636,

omission to seal renders the warrant void and a person offering resistance to apprehension on such a warrant commits no offence, 29 Cr.L.J. 265 at 267=107 Ind. Cas. 601, following 42 C. 708 and 18 B. 636. See 37 M.L.J. 588, where the principle enunciated in 42 C. 708 was adopted in the case of a summons issued under B. 68, *supra*.

Sub-section (2).—A warrant once issued remains in force until it is cancelled by the Court which issued it or until it is executed even where it bears a date for its return, 7 Pat. 478. It can only be cancelled by the Court issuing it, 28 Cr.L.J. 326=103 Ind. Cas. 710. This section and S. 76 *infra* should be read together. If a warrant issued contained a direction as to bail and fixed a date as required by S. 76 (2) (c) at which the accused was to attend before the Court, the warrant itself will not lapse, the date fixed having passed, 13 C.W.N. 1091 at 1092=10 Cr. L.J. 479=4 Ind. Cas. 31. A warrant shall remain in force until it is executed, i.e., the warrant is exhausted. When the accused is brought before the Court, 13 W.R. (Cr.) 1=4 B.L.R. Appx. 1; 13 W.R. (Cr.) 27=5 B.L.R. 274; 17 W.R. (Cr.) 55=9 B.L.R. 354; 28 B. 129; 1 C.W.N. 650. A warrant once cancelled is at an end and cannot be re-issued, 1 C.W.N. 650.

76. (1) Any Court issuing a warrant for the arrest of any person may in its discretion direct by endorsement on the warrant that, if such person executes a bond with sufficient sureties for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court, the officer to whom the warrant is directed, shall take such security and shall release such person from custody.

Court may direct security to be taken.

(2) The endorsement shall state—

- (a) the number of sureties ;
- (b) the amount in which they and the person for whose arrest the warrant is issued, are to be respectively bound ; and
- (c) the time at which he is to attend before the Court.

(3) Whenever security is taken under this section, the officer to whom the warrant is directed, shall forward the bond to the Court.

Recognizance to be forwarded.

For his attendance before the Court.—These words have been substituted for the words “to answer the complaint,” thus expressly extending the benefit of this section to witnesses as well as to accused person, Weir II, 39.

May in its discretion direct.—This sub-section is permissive, 13 C.W.N. 1091=10 Cr. L.J. 479=4 Ind. Cas. 31. The discretion allowed under this section is certainly a beneficent provision of law and should be exercised freely, especially in the case of respectable citizens who would voluntarily appear to answer any charge against them and indiscriminate arrest of such persons will certainly bring the administration of justice into contempt. Thus in a non bailable offence even a Magistrate may issue a bailable warrant especially when the accused is a man of position and the charge appears to be suspicious [1911] 2 M.W.N. 452=12 Cr.L.J. 430=11 Ind Cas 614. Unless and until a Magistrate has good reason to believe that there is strong likelihood of the charge being proved, an accused if really a *purdah* woman of position should not ordinarily be compelled to appear in the first instance under a warrant, 8 Cr. L.J. 454.

To take such security.—Security may be given by depositing a sum of money or Government promissory-note to the amount specified, see S. 513 *infra*. S. 170 *infra* provides for taking security by a police officer from an accused, for his appearance before a Magistrate whenever on investigation there appears to be reasonable grounds for suspicion or sufficient evidence that he has committed a cognizable and bailable offence.

To attend before the Court.—A warrant of a Magistrate must be for attendance before himself or some other Magistrate. It cannot be for attendance before a police officer conducting an investigation, 24 C. 320. For form of endorsement see Sch. V, Form 2.

77. (1) A warrant of arrest shall ordinarily be directed to one or more police-officers, and, when issued by a Presidency Magistrate, shall always be so directed; but any other Court issuing such a warrant may, if its immediate execution is necessary and no police-officer is immediately available, direct it to any other person or persons; and such person or persons shall execute the same.

Warrants to whom directed.

Warrants to several persons.

(2) When a warrant is directed to more officers or persons than one, it may be executed by all, or by any one or more of them.

Scope of the section.—The entrustment of a warrant of arrest is regulated by this section. First of all there must be the necessity to arrest and then there must be the necessity for immediate arrest and then there must be the third condition that no police-officer is immediately available. In the absence of these three conditions a Court is not justified in entrusting the warrant for execution to any person other than a police-officer, 51 M. 873. This section is *directory* and not *mandatory*. It directs that a warrant shall ordinarily be directed to one or more police-officers. It does not say that the name and designation of the police-officer is to be inserted in it. It would certainly be extremely difficult to carry on police administration if every warrant is to be directed by name to a police-officer and upon his transfer, it were to become incapable of execution until the name of some other officer is substituted in its place, 3 Pat. L.J. 433=19 Cr.L.J. 747=46 Ind. Cas. 523=1918 Pat. 269.

Warrant to be directed to a police-officer.—In 8 W.R. (Cr.) 74 the Calcutta High Court condemned the practice of issuing a warrant to a person other than a police-officer as a direct violation of the law. S. 79 *infra* authorizes a police-officer to whom a warrant is directed to endorse it for execution to another police-officer. But when the Magistrate could not obtain the assistance of a police-officer, and execution of the warrant is urgently required, he can issue the same to a private person, 13 W.R. (Cr.) 27=5 B.L.R. 274.

78. (1) A District Magistrate or sub-divisional Magistrate may direct a warrant to any landholder farmer, or manager of land within his district or sub-division for the arrest of any escaped convict, proclaimed offender or person who has been accused of a non-bailable offence, and who has eluded pursuit.

Warrant may be directed to landholders, etc.

(2) Such landholder, farmer or manager shall acknowledge in writing the receipt of the warrant, and shall execute it if the person for whose arrest it was issued, is in, or enters on, his land or farm, or the land under his charge.

(3) When the person against whom such warrant is issued is arrested, he shall be made over with the warrant to the nearest police-officer, who shall cause him to be taken before a Magistrate having jurisdiction in the case, unless security is taken under section 76.

Scope of the section.—This section is an exception to S. 77 *infra* ordinarily requiring a warrant to be issued to a police-officer and authorizes a District Magistrate or Sub-divisional Magistrate to direct a warrant for the arrest of any escaped convict or proclaimed offender or one accused of a non-bailable offence who has eluded pursuit to a landholder, farmer or manager of land within his District or sub-division and such landholder, etc., are bound to execute the warrant if the person to be arrested is present or enters upon his land or farm.

Proclaimed offender.—See S. 87 *infra* which provides for the issue of a proclamation for the appearance of a person against whom a warrant of arrest has been issued but cannot be executed; see also S. 54, cl. (3) *supra*.

79. A warrant directed to any police-officer may also be executed by any other police-officer whose name is endorsed upon the warrant by the officer to whom it is directed or endorsed.

Warrant directed to police-officer.

Scope of the section.—This section has no application to any person other than a police-officer and the endorsement of the warrant by such person in favour of another can confer no power to arrest the person named in the warrant and such person who arrests cannot be said to be executing a lawful warrant and acting in the discharge of his duty, 51 M. 873.

May be executed by other police-officer whose name is endorsed on the warrant.—The endorsement referred to therein should be regularly made by name to a certain person in order to authorize him to arrest, and when there is no endorsement by the person having authority to do so, the arrest is not legal, 4 C.W.N. 85 followed in 3 Pat. L J 493=1918 Pat. 269=19 Cr. L J. 747=45 Ind. Cas. 523. When a warrant is endorsed over to a particular officer for execution another officer who was doing temporarily the current duties during the absence of that officer cannot endorse the warrant, 27 C. 437. No person other than a police-officer is competent to execute a warrant under endorsement from a police-officer. So, arrest by process-serving peons is illegal, 27 C. 437; 18 A. 246. A special warrant must specify the officer to whom the authority is given and only that officer can execute the warrant, 10 Cr. L J. 3=2 Ind. Cas. 371.

80. The police-officer or other person executing a warrant of arrest shall notify the substance thereof to the person to be arrested, and, if so required, shall show him the warrant.

Notification of substance of warrant.

Scope of the section.—The provisions of this section should not be extended to an arrest to be made by the police on an order in writing under S. 56 *supra*, so as to require the officer to notify the substance of the order in writing to the person to be arrested. Such a course may be desirable, but to hold it to be obligatory before a person can be arrested is to extend the law beyond the limits laid down by the Legislature, 27 C. 320.

Shall notify the substance thereof.—The words 'shall notify the substance' are not to be taken to mean that a police-officer is to explain to the person to be arrested the reasons which prompted the order which he is carrying out. There should be no argument

or altercation but the duty of the officer is only to state the substance of the order clearly and briefly and then to show a determination to carry out the order by that quiet and firm demeanour that precludes discussion. If he does not notify he is not acting in the discharge of his public function, 10 C. 18. Ordinarily a person to be arrested is entitled to ask the officer arresting him to show him the warrant under which he is arresting him, 47 M. 412 but when a police-officer entrusted with a warrant for arresting a certain person seizes the person without showing or notifying the substance of the warrant to him when he finds that there is an attempt to evade or to prevent the arrest and the arrested person is subsequently rescued from police custody, S. 46 (2) *supra* would empower the police-officer to arrest the person when such arrest was sought to be evaded and non-compliance with the provisions of this section would not make the arrest illegal and the rescue will fall within S. 225B, I.P.C. To say that the apprehension or custody is unlawful in such a case where efforts have been made to evade the law because of the non compliance of the provisions of this section would bring the law into ridicule. So to insist would merely give more time and opportunity to the obstructionists to effect their purpose. The police officer under the circumstances may be able to justify his action under the provisions of S. 46 (2) *supra*, 49 C L J 261 at 266=33 C.W.N. 221=30 Cr. L J 703=115 Ind. Cas. 723

Shall show it to the person to be arrested.—The warrant is to be shown so that the person to be arrested might read it, 26 C. 743; 27 C. 437. The person sought to be arrested is entitled to see that the person arresting has authority to do so, 10 C. 43; 13 B. 163, 23 C 836; 26 C. 743, 18 A 245. Any person who is arrested has a right to ask the officer arresting him to show him what power he has to do so and he is also entitled to ask that the warrant be shown to him to see that he is properly arrested and when the arrest is still made without showing the warrant the arrest will not be a legal arrest, 47 M. 412. A police officer should not proceed to arrest unless he has a warrant with him, 5 A. 318. See S. 46 as to how an arrest is to be made. This section requires that the substance of the warrant shall be notified to the accused, and if the accused demands it, he shall have an opportunity of reading it, so that he may know on what charge he has been arrested and before what Court he is to appear and take steps for arranging for his defence, 1918 Pat. 269=3 Pat. L J. 433=19 Cr. L J. 747=43 Ind Cas 523. A police officer executing a warrant of arrest shall notify its substance. The arresting officer must have the warrant of arrest in his possession when making the arrest, 27 A. 258 and the police-officer who arrests without a warrant in a non-cognizable case is liable to be dealt with under S. 312, I.P.C., but a police officer acting *bona fide* under this section is protected, 24 W.R. (Cr.) 5; 19 W.R. (Cr.) 36; 6 W.R. (Cr.) 88. A warrant specially authorizing a particular officer by name to arrest cannot be delegated, 10 Cr. L J. 3=2 Ind Cas 371. Duty to notify the substance of the warrant is imperative, and failure to do so is fatal, although the police-officer showed in his hands the warrant along with several other warrants but gave no opportunity to the person to be arrested to read the warrant, 26 C. 743=47 M 412; see also 27 C. 320, where it was held that it was obligatory on the police-officer if called upon, to show the authority under which he was acting. Resistance to a warrant which is *ultra vires*, illegal or has ceased to be in force is no offence, 10 C 18, 13 B. 163; 24 C. 320; 22 C. 286; 28 C 339; 33 A 103.

81. The police-officer or other person executing a warrant of arrest shall (subject to the provisions of section 76 as to security) without unnecessary delay bring the person arrested before the Court before which he is required by law to produce such person.

Person arrested to be brought before Court without delay.

Warrant of arrest.—The warrant referred to herein is not a warrant for commitment, but merely an order authorizing the police-officer to whom it is addressed to arrest the person and bring him before the Magistrate. The warrant is exhausted as soon as the person arrested is produced before the Magistrate, 13 W.R. (Cr.) 1=4 B.L.R. (Appx) 1; 13 W.R. (Cr.) 27=5 B.L.R. 273.

Bring the person arrested before the Court.—There is no provision in the Code authorizing a Magistrate to issue a warrant requiring a person to appear before a police-officer for the purpose of giving evidence at an investigation held by him. Reading S. 76 and this section together it would appear that a Magistrate is competent to issue a warrant of arrest for the production of a person before his own Court and not before the police, 24 C. 320 at 323.

Where warrant may be executed.

82. A warrant of arrest may be executed at any place in British India.

British India.—See notes under S. 1, *supra* at p. 15. See 44 and 45 Vict. c. 69 (Fugitive Offenders Act). Any arrest made outside British India is illegal, 25 C. 20 (P C.).

83. (1) When a warrant is to be executed outside the local limits of the jurisdiction of the Court issuing the same, such Court may, instead of directing such warrant to a police-officer, forward the same by post or otherwise to any Magistrate or District Superintendent of Police or the Commissioner of Police in a presidency-town within the local limits of whose jurisdiction it is to be executed.

Warrant forwarded for execution outside jurisdiction.

(2) The Magistrate or District Superintendent or Commissioner to whom such warrant is so forwarded shall endorse his name thereon and, if practicable, cause it to be executed in manner hereinbefore provided within the local limits of his jurisdiction.

When a warrant is to be executed—There are no words in this section limiting its operation to warrants issued under this Code only. For example a warrant issued under Workmen's Breach of Contract Act, XIII of 1859, S. 1 may be executed outside the local limits of the jurisdiction of the Magistrate issuing the same, 20 M 235 followed in 20 A. 124. See also 20 M. 457.

In manner hereinbefore provided.—See Ss. 78—80, *supra*.

84. (1) When a warrant directed to a police-officer is to be executed beyond the local limits of the jurisdiction of the Court issuing the same, he shall ordinarily take it for endorsement either to a Magistrate or to a police-officer not below the rank of an officer in charge of a station, within the local limits of whose jurisdiction the warrant is to be executed.

Warrant directed to police-officer for execution outside jurisdiction.

(2) Such Magistrate or police-officer shall endorse his name thereon and such endorsement shall be sufficient authority to the police-officer to whom the warrant is directed to execute the same within such limits, and the local police shall, if so required, assist such officer in executing such warrant.

(3) Whenever there is reason to believe that the delay occasioned by obtaining the endorsement of the Magistrate or police-officer within the local limits of whose jurisdiction the warrant is to be executed,

will prevent such execution, the police-officer to whom it is directed may execute the same without such endorsement in any place beyond the local limits of the jurisdiction of the Court which issued it.

(4) This section applies also to the police in the town of Calcutta.

Directed to be executed.—This will include a warrant endorsed to another for execution by the officer to whom it is originally issued.

85. When a warrant of arrest is executed outside the district in which it was issued, the person arrested shall, unless the Court which issued the warrant is within twenty miles of the place of arrest or is nearer than the Magistrate or District Superintendent of Police or the Commissioner of Police in a presidency-town within the local limits of whose jurisdiction the arrest was made, or unless security is taken under section 76, be taken before such Magistrate or Commissioner or District Superintendent.

Security under S 76, *supra*, is taken from the person arrested and released on security for his attendance before the Court at a specified time and thereafter until otherwise directed by the Court. When this is not done, the person arrested is to be produced before the nearest Magistrate, the District Superintendent of Police or the Commissioner of Police in a Presidency Town.

86. (1) Such Magistrate or District Superintendent or Commissioner shall, if the person arrested appears to be the person intended by the Court which issued the warrant, direct his removal in custody to such Court.

Provided that, if the offence is bailable, and such person is ready and willing to give bail to the satisfaction of such Magistrate, District Superintendent or Commissioner, or a direction has been endorsed under section 76 on the warrant and such person is ready and willing to give the security required by such direction, the Magistrate, District Superintendent or Commissioner shall take such bail or security, as the case may be, and forward the bond to the Court which issued the warrant.

(2) Nothing in this section shall be deemed to prevent a police-officer from taking security under section 76.

See Sch. V, form No. 3 for form of security bond. As to cases where persons arrested may be discharged on executing bonds without sureties, see S. 496, *infra*.

C.—Proclamation and attachment.

87. (1) If any Court has reason to believe (whether after taking evidence or not) that any person against whom a warrant has been issued by it has absconded or is concealing himself so that such warrant cannot be

Proclamation for person absconding

executed, such Court may publish a written proclamation requiring him to appear at a specified place and at a specified time not less than thirty days from the date of publishing such proclamation.

(2) The proclamation shall be published as follows :—

(a) it shall be publicly read in some conspicuous place of the town or village in which such person ordinarily resides ;

(b) it shall be affixed to some conspicuous part of the house or homestead in which such person ordinarily resides or to some conspicuous place of such town or village ; and

(c) a copy thereof shall be affixed to some conspicuous part of the Court-house.

(3) A statement in writing by the Court issuing the proclamation to the effect that the proclamation was duly published on a specified day shall be conclusive evidence that the requirements of this section have been complied with, and that the proclamation was published on such day.

Scope of the section—Action under this section can be taken only when a Court has reason to believe that any person against whom a warrant has been issued has absconded or is concealing himself, so that such warrant cannot be executed, 38 Cr L J. 454=67 Ind.

whom a warrant has been issued. A Magistrate may simultaneously issue a proclamation against an absconding accused under this section and also make an order under S. 83 *infra* attaching his property, 29 C. 417.

Any Court.—All Magistrates are empowered to issue a proclamation under this section. See Cl (4) of Sch. III.

Has reason to believe—S. 26, I.P.C., enacts that a person is said to have reason to believe a thing if he has sufficient cause to believe that thing and not otherwise.

Whether after taking evidence or not.—These processes of proclamation and attachment are not to issue whenever a warrant fails in its effect. The officer sent to serve the warrant should be examined as to the measures adopted by him to serve it ; and if on evidence in any other manner the Magistrate is satisfied that the accused is evading justice, then and then only can the process of proclamation and attachment issue, 3 W.R. (Cr.) 63, see also 6 W.R. (Cr.) 73; 19 W.R. (Cr.) 12=10 B.L.R. Appx. 14

Warrant has been issued.—Before a proclamation under this section could be issued, a warrant must have been previously issued for the attendance of the person before the Court. The previous issue of a warrant is a condition precedent to the issue of a proclamation.

Has absconded—In order that the Court may issue a proclamation and an order of attachment under S. 83, *infra*, it must be satisfied on materials before it, that the person against whom the proclamation is to be issued has *absconded* or *concealed* himself for avoiding service of the warrant previously issued against him, 10 B.L.R. (Appx.) 14=19 W.R. (Cr.) 12. Absconding does not necessarily imply change of place but may be effected by concealment. The term "*abscond*" is not to be understood as implying necessarily that a

person leaves the place in which he is. Its etymological and ordinary sense is to hide oneself and it matters not whether a person departs from a place or remains in it, if he conceals himself, nor does the term apply only to the commencement of the concealment. If a person having concealed himself before process is issued, continues to do so after it is issued, he absconds, 4 M. 393 at 397. To be deemed an absconder, it is not necessary that the person should be proclaimed as such under this section. It should also be noted that an absent person should not be assumed to be an absconder without due inquiry and notice, *Weir* II, 40. A person who files a petition against the order issuing a warrant against him and takes steps to procure an order of a superior Court that he should be allowed to remain on bail after such warrant has been issued, can neither be said to be absconding nor concealing himself, 23 Cr. L.J. 454=67 Ind. Cas. 726. An absconder must be dealt with under the provisions of the Code and not under S. 172, I.P.C. (absconding to avoid service of summons, etc.), as a warrant issued is not summons, notice, order, etc., within the meaning of S. 172, I.P.C., 7 N.W.P.H.C.R. 302; 9 W.R. (Cr.) 70.

Court may publish a written proclamation.—The most important part of the publication are the publishing of the proclamation in the village and the thirty days allowed by the section is to be calculated from the date of such proclamation. Magistrates when acting under this section should always make an endorsement or statement in writing validating the proclamation as contemplated by sub-section (3) of this section, 17 Cr. L.J. 414=35 Ind. Cas. 574. What is contemplated here is the act of publishing and not the mode of publishing the proclamation dealt with by sub-section (2). The act of publishing is optional but the mode of publication is compulsory under sub-section (2). For forms of proclamation see Nos. 4 and 5 of Sch. V.

Requiring him to appear.—A person against whom a proclamation has been issued must be regarded as in contempt until he has surrendered and the Court will not entertain any application on his behalf. He should first surrender, then apply to be discharged from contempt and also for the release of the property attached, 2 N.W.P.H.C.R. 441; 5 W.R. (Cr.) 71. See also 24 Cr. L.J. 240=71 Ind. Cas. 704 where the High Court refused to hear a revision petition on behalf of an accused person who was released on bail pending the hearing of the revision petition but who absconded subsequently and could not be found, S. 174, I.P.C., provides punishment for not appearing in obedience to the proclamation.

Not less than 30 days from the date of proclamation.—A proclamation under this section against an absconding person should give 30 days' time for his appearance from the date of the proclamation, when this is not done, the proceedings are illegal, 21 Cr. L.J. 210=54 Ind. Cas. 994; 17 M.L.J. 488=6 Cr. L.J. 332; 19 M. 3; 17 Cr. L.J. 414=35 Ind. Cas. 974.

Proclamation shall be published—The provisions of cl. (2) of this section are imperative and failure to comply with them will vitiate a proclamation, 21 Cr. L.J. 210=54 Ind. Cas. 994. The use of the word 'And' is significant. All the three modes contemplated by cl. (2) must be adopted, 27 A. 572; 19 M. 3. Any error, omission or irregularity in the proclamation will not vitiate the proceedings unless such error etc., has occasioned a failure of justice. See S. 537 *infra*.

To some conspicuous place of such town, etc.—Affixing the proclamation to the Court-house is not sufficient; it must be affixed to some conspicuous place in such town or village, 19 M. 3.

Statement in writing by Court, of due publication.—When there is no endorsement or statement by Court in writing, validating the proclamation as required by cl. (3) of this section, there is no proclamation according to law, 22 A. 216.

Sub-section (3).—An order under this sub-section stating that the proclamation was duly published, but omitting to specify the date of the publication cannot be considered as conclusive evidence of the requirements of the sections, 21 Cr. L.J. 210=54 Ind. Cas. 994. The prosecution in a case against an absconder ought to produce the statement under this sub-section to prove the fact of absconding and the accused had been duly proclaimed,

17 Cr. L.J. 78=32 Ind. Cas. 670. A proclamation is not sufficiently proved by proving attachment and sale under the next section, 7 M. 436. A Magistrate ought to preserve the proclamation and the record must be so clear as to satisfy the Court that all the legal formalities were duly complied with. Where neither the proclamation nor a copy of it is forthcoming, the vague indefinite statement of an accused as to a proclamation being issued at some indefinite date cannot be accepted as evidence sufficient to prove that all the legal formalities were complied with, 14 Bom. L.R. 163=13 Cr. L.J. 293=14 Ind. Cas. 757.

A Magistrate may in a proper case issue simultaneously a proclamation and an order of attachment, 29 C. 417.

As to punishment for absconding and failing to attend in obedience to a proclamation under this section, see Ss. 172 and 174, I.P.C.

88. (1) The Court issuing a proclamation under section 87 may at any time order the attachment of any property, moveable or immovable, or both, belonging to the proclaimed person.

Attachment of property of person absconding.

(2) Such order shall authorize the attachment of any property belonging to such person within the district in which it is made; and it shall authorize the attachment of any property belonging to such person without such district when endorsed by the District Magistrate or Chief Presidency Magistrate within whose district such property is situate.

(3) If the property ordered to be attached is a debt or other moveable property, the attachment under this section shall be made—

(a) by seizure; or

(b) by the appointment of a receiver; or

(c) by an order in writing prohibiting the delivery of such property to the proclaimed person or to any one on his behalf; or

(d) by all or any two of such methods, as the Court thinks fit.

(4) If the property ordered to be attached is immovable, the attachment under this section shall, in the case of land paying revenue to Government be made through the Collector of the district in which the land is situate, and in all other cases—

(e) by taking possession; or

(f) by the appointment of a receiver; or

(g) by an order in writing prohibiting the payment of rent or delivery of property to the proclaimed person or to any one on his behalf; or

(h) by all or any two of such methods, as the Court thinks fit.

(5) If the property ordered to be attached consists of live-stock or is of a perishable nature, the Court may, if it thinks it expedient, order immediate sale thereof, and in such cases the proceeds of the sale shall abide the order of the Court.

(6) The powers, duties and liabilities of a receiver appointed under this section shall be the same as those of a receiver appointed under Chapter XXXVI of the Code of Civil Procedure.

(6A) If any claim is preferred to, or objection made to the attachment of, any property attached under this section within six months from the date of such attachment, by any person other than the proclaimed person, on the ground that the claimant or objector has an interest in such property, and that such interest is not liable to attachment under this section, the claim or objection shall be enquired into, and may be allowed or disallowed in whole or in part:

Provided that any claim preferred or objection made within the period allowed by this sub-section may, in the event of the death of the claimant or objector, be continued by his legal representative.

(6B) Claims or objections under sub-section (6A) may be preferred or made in the Court by which the order of attachment is issued or, if the claim or objection is in respect of property attached under an order endorsed by a District Magistrate or Chief Presidency Magistrate in accordance with the provision of sub-section (2), in the Court of such Magistrate.

(6C) Every such claim or objection shall be inquired into by the Court in which it is preferred or made:

Provided that, if it is preferred or made in the Court of a District Magistrate or Chief Presidency Magistrate, such Magistrate may make it over for disposal to any Magistrate of the first or second class or to any Presidency Magistrate as the case may be, subordinate to him.

(6D) Any person whose claim or objection has been disallowed in whole or in part by an order under sub-section (6A) may within a period of one year from the date of such order, institute a suit to establish the right which he claims in respect of the property in dispute; but subject to the result of such suit, if any, the order shall be conclusive.

(6E) If the proclaimed person appears within the time specified in the proclamation, the Court shall make an order releasing the property from the attachment.

(7) If the proclaimed person does not appear within the time specified in the proclamation, the property under attachment shall be at the disposal of Government; but it shall not be sold until the expiration of six months from the date of the attachment and until any claim preferred or objection made under sub-section (6A) has been disposed of under that sub-section, unless it is subject to speedy and natural decay, or the

Court considers that the sale would be for the benefit of the owner, in either of which cases the Court may cause it to be sold whenever it thinks fit.

Amendment.—Sub-sections (GA) to (GE) are new and in sub-section (7) the words "until any claim preferred or objection made under sub-section (GA) has been disposed of," have been newly added.

May at any time—An order for attachment under this section made simultaneously with the issue of a proclamation under S. 57 *supra* is in accordance with law, 23 C. 417 at 413.

Any property belonging to such person.—The property should belong to such person and not subject to other right by an attachment of a Civil Court, 13 Cr. L.J. 563=15 Ind. Cas. 93; A prior attachment by a Civil Court took effect as against the attachment by the Magistrate under this section and the purchaser at the sale held by the Magistrate cannot successfully resist the claim for possession under a Civil Court's decree, 31 Bom. L.R. 343. In *Weir II*, 43 (foot-note) it was held that there was nothing in the language of this section to restrict the meaning of the word 'property' which must include the rights and interests of persons who are members of an undivided family holding jointly the family property; but a contrary opinion was expressed by *Subramania Ayyar, J.*, in *Weir II*, 43, where it was held that the undivided interest of an absconding co-partner in a joint Hindu family or the undivided property itself cannot be attached. The Full Bench decision in 39 M. 831 followed the view in *Weir II*, 43 (foot-note) and dissented from the view of *Subramania Ayyar, J.*, and held that the word 'property' in this section must include the rights and interests of persons who are members of an undivided family jointly entitled to the property of the family. The share of the defaulting member of the family is to be attached subject to the rights of the other members of the family and may be realized by a receiver in a suit for partition or otherwise. With regard to ancestral property, all that can be attached under this section is the interest of the absconder and on his death the property should be released in favour of his heirs, 26 Cr. L.J. 1143=89 Ind. Cas. 439.

Sub-sections (6A) and (6C) are new and they provide for continuance of proceedings by legal representatives of a claimant, who may die pending the enquiry into his claim and for the case of claims to property in another district and for the period of limitation within which proceedings in Civil Court to establish the claim disallowed by a Magistrate must be instituted. O. XXI, rr. 58-62, of the Code of Civil Procedure, Act V of 1908, provide for hearing objections and investigation of claims in respect of attached properties. Such a provision did not previously exist in this Code empowering Magistrates to do so. It was proposed at first to add a new clause similar to S. 278 of Act XIV of 1832 (Civil Procedure) conferring on Magistrates similar powers. The amendment then fell through, but has been retained in the new Act. This is a salutary provision and the needlessly cumbersome procedure of a civil suit by the injured party has been got rid of.

Sub-section (6D) provides for right of suit to a defeated claimant but an absconder cannot sue, 5 Pat. L.J. 321 at 327=21 Cr. L.J. 475=56 Ind. Cas. 507=1920 Pat. 233 and sub-section (6E) provides for an order to release the property from attachment of the proclaimed person appearing within the specified time.

Sub section (7)—The property becoming one at the disposal of government is not confiscated or sold until after the expiry of six months. When selling the property all the formalities required are to be observed, 19 M. 3; 27 A. 572. Once the sale is effected there is no provision to set aside the sale or order its restoration, 12 Cr. L.J. 142 (2)=9 Ind. Cas. 826; 27 A. 572. If the land is sold subject to a lease, the lessee's rights are unaffected, 8 Cr. L.J. 259. By the confiscation of the property after due compliance with the formalities required by this section, the title of the person who absconded has been put an end to, and he has no remedy by way of suit, 23 Bom. L.R. 228; but when a sale is illegal a suit lies, 1904 A.W.N. 159; 20 M. 83.

Revision.—An order under this section refusing to release certain property from attachment is a proceeding within the meaning of S. 435 *infra* and is therefore subject to the Revisional Jurisdiction of the High Court, 23 Cr. L.J. 82=76 Ind. Cas. 18 where 3 Cr. L.J. 260 is followed.

89. If, within two years from the date of the attachment, any person whose property is or has been at the disposal of Government under sub-section (7) of section 88, appears voluntarily or is apprehended and brought before the Court by whose order the property was attached, or the Court to which such Court is subordinate, and proves to the satisfaction of such Court that he did not abscond or conceal himself for the purpose of avoiding execution of the warrant, and that he had not such notice of the proclamation as to enable him to attend within the time specified therein, such property, or, if the same has been sold, the nett proceeds of the sale, or, if part only thereof has been sold, the nett proceeds of the sale and the residue of the property, shall, after satisfying thereout all costs incurred in consequence of the attachment, be delivered to him.

Scope of the section.—The terms of this section are strict. It is not only necessary to make the application but also to prove the necessary facts within two years. The applicant must prove both that he did not abscond and that he had no proper notice, before the property is restored to him, 27 Cr. L.J. 1023=96 Ind. Cas. 977 following 15 Bom. L.R. 173=14 Cr. L.J. 237=19 Ind. Cas. 333; 18 Cr. L.J. 979=42 Ind. Cas. 595; 17 Cr. L.J. 414=33 Ind. Cas. 974. From the date of attachment it cannot be said on a perusal of the language of Ss. 67 to 89 that the interest of an absconder is severed and vests in Government, 39 M. 831 (F.B.). This section prescribes a remedy where there is a good and legal publication, but offers no facility for contesting the legality of the proclamation, 22 A. 216 at 219. If no application is made for restoration of the property attached under the preceding section within two years, the High Court has no power under S. 561A *infra* to order its restoration, because such an order, if made, will be contrary to the provisions of this section. The proper remedy in such a case is to apply to Government for relief, 26 Bom. L.R. 719=23 Cr. L.J. 1293=82 Ind. Cas. 363. If the attachment is not valid then obviously this section cannot apply and the Court can take no action under it. This may result in hardship at times but with that the Courts are not concerned. The question whether the petitioner can induce the executive authorities to return the sale proceeds to him or whether he can, in the circumstances recover the money in the Civil Courts is a matter with which the Court is not concerned, 17 Cr. L.J. 414 at 417=35 Ind. Cas. 974.

Within two years from date of attachment.—These words qualify not only the word 'appears' but also the word 'proves' which is connected with the word "appears" by the conjunction "and" and so, proof that the accused had not absconded should be offered within two years of the date of attachment, 15 Bom. L.R. 173=14 Cr. L.J. 237=19 Ind. Cas. 333. An application made for return of property attached after two years of the attachment is barred, 17 Cr. L.J. 414=35 Ind. Cas. 974 where 22 A. 216 is referred to.

Nett proceeds of the sale and the residue of the property.—When a sale is held and purchasers have acquired title, the Court cannot set aside the sale but the owner is entitled only to the sale proceeds and not to the identical property sold, 22 A. 216; 27 A. 572. Where property has been sold and subsequently an application under this section is made and allowed, the applicant can only get the nett-proceeds of the sale of the property

24 Cr. L.J. 573=73 Ind. Cas. 269. It is not necessary that the absconder should himself personally apply for the restoration of the property. If the requirements of this section are satisfied, an application can be made by any one on his behalf, 12 Cr. L.J. 142=9 Ind. Cas. 825.

Prove to the satisfaction of such Court.—It is open to the absconder to prove that he did not abscond and that there was no publication, or defective publication, 2 Lah. L.J. 82; 21 Cr. L.J. 210=54 Ind. Cas. 994.

Appeal and revision.—Orders passed under this section are appealable under S. 405 *infra* and also subject to revision by the High Court, 19 M. 3; 22 A. 216; 21 Cr. L.J. 210=54 Ind. Cas. 934; 27 A. 292; 18 Cr. L.J. 979=32 Ind. Cas. 595; 14 Bom. L.R. 163=13 Cr. L.J. 293=14 Ind. Cas. 757. But appeal lies only at the instance of one whose property has been attached. After his death his legal representatives have no *locus standi* to have the order set aside, 10 Cr. L.J. 260; but see 15 Bom. L.R. 175=14 Cr. L.J. 237=19 Ind. Cas. 333 which held that any person may apply on behalf of the absconder for the restoration of the property, if other requirements of the section are satisfied, and appeal from the order refusing to release attachment. When an act clearly illegal has been committed viz attachment made without the issue of any warrant, it will be proper to overlook the grave irregularity and in the exercise of the inherent power to release the attachment, 27 Cr. L.J. 1025=96 Ind. Cas. 977.

D.—Other Rules regarding Processes.

90. A Court may, in any case in which it is empowered by this Code to issue a summons for the appearance of any person other than a juror or assessor, issue, after recording its reasons in writing, a warrant for his arrest—

Issue of warrant in lieu of, or in addition to summons.

(a) if, either before the issue of such summons, or after the issue of the same but before the time fixed for his appearance, the Court sees reason to believe that he has absconded or will not obey the summons; or

(b) if at such time he fails to appear and the summons is proved to have been duly served in time to admit of his appearing in accordance therewith and no reasonable excuse is offered for such failure.

Scope of the section.—The normal course to be adopted by the Court under this section is to issue a summons in the first instance; it can however issue a warrant in either of the cases mentioned in cls. (a) and (b) of this section, but in either case it can do so only after stating its reasons in writing, 33 C.L.J. 77 at 90=27 C.W.N. 857=24 Cr. L.J. 681=75 Ind. Cas. 129. The language used in this section is "any person" which will include a witness. This section empowers a Court to issue a warrant only in cases in which it is entitled to issue a summons. If the Court is not entitled to issue a summons, no warrant could be issued. A Magistrate cannot issue a warrant of arrest against a witness unless he is satisfied that the witness will disobey or has disobeyed the summons served on him, 14 W.R. (Cr.) 20; or unless due service of summons is proved, 7 W.R. (Cr.) 37. A warrant is to be issued only when the Magistrate is satisfied that the witness would not attend unless compelled to do so, 13 W.R. (Cr.) 1; a Magistrate is competent to admit such a witness to bail, Weir II, 39. Before issuing a warrant the Court must record its reasons for taking this extreme step, otherwise the warrant is illegal, 10 Cr. L.J. 306=3 Ind. Cas. 575. The adoption of stereotyped printed forms is not sufficient, 33 C. 789; 33 M. 1088; but see 18 A.L.J. 1149 and 24 Cr. L.J. 88 (F.B.) which disapproved of, 33 C. 789.

After recording reasons in writing.—In 30 M. 1088 it was decided that the failure to record reasons in writing violated a warrant under this section, and the omission

to do so was not cured by B. 537, *infra*, as the recording of reasons was a necessary preliminary to the exercise of the jurisdiction, 33 C. 789 also took the same view. So also the decision in 19 Cr. L.J. 44=443 Ind. Cas. 871 in which the Punjab Chief Court followed the Calcutta view. The Allahabad High Court in 18 A.L.J. 1149 dissented from the Calcutta view in 33 C. 789 and the (F.B.) decision in 51 C. 1 overruled 33 C. 789 and held by a majority (*Chatterjee, J., dissenting*) that the words 'after recording its reasons in writing' are not mandatory but only directory and when the warrant on the face of it is good and valid it does not become invalid merely because he omitted to record separately his reasons for the issue of the warrant under this section, the warrant itself stating that the Magistrate had very good reasons for issuing the same. The principle stated in the judgment of *Abbot C.J.*, in 3 B. & Ad. 256 at 276 which is stated thus was followed "It is obvious that if the act of the Justice issuing a warrant be invalid on the ground of such an objection as the present, all persons who act in the execution of the warrant will act without any authority; a constable who arrests and a gaoler who receives a felon, will each be trespasser; resistance to them will be lawful, everything done by either of them be unlawful; and a constable or persons aiding him, may in some possible instance become amenable even to a charge of murder, for acting under an authority which they reasonably considered themselves bound to obey, and of the invalidity whereof they are wholly ignorant. An exposition of these statutes pregnant with so much inconvenience, ought not to be made, if they will admit of any other reasonable construction". The object the legislature had in view in enacting that a Magistrate should record his reasons before exercising this particular power is to ensure due deliberation on the part of the Magistrate or the object may be to give witness after his arrest the opportunity of acquainting himself with the Magistrate's reasons and possibly of removing the Magistrate's belief that he would not have attended in obedience to a summons. Possibly the Legislature had both these objects in view, But whatever the object of the Legislature may be and however important it may be that a Magistrate who desires to inspire confidence in his administration of justice should comply with the requirements of the Code and follow strictly the procedure therein indicated, the omission to record reasons will not invalidate the warrant in the hands of the police-officer, 52 C. 1 at p. 33 (F.B.).

Absconded.—See notes under S. 87, *supra*, at p. 100-101.

Sub-section (b).—A warrant ought not to issue unless service of summons is proved. A warrant of arrest should not be issued in cases in which summons should ordinarily issue unless due service of summons in good time is proved and a mere police-officer's report that summons was served by him is not sufficient evidence of service of summons under this sub-section, 3 L.B. R. 116.

91. When any person for whose appearance or arrest the officer presiding in any Court is empowered to issue a summons or warrant, is present in such Court, such officer may require such person to execute a bond, with or without sureties, for his appearance in such Court.

When a Magistrate suspecting that a witness present in Court might be kept out of the way in the future by the accused, arrested and kept her in the lockup, it was held that there was no justification for a such a course, 1901 A.W.N. 35. But a bond may be taken from the witness for appearance, 6 Cr. L.J. 273

92. When any person who is bound by any bond taken under this Code to appear before a Court, does not so appear, the officer presiding in such Court may issue a warrant directing that such person be arrested and produced before him.

Arrest on breach of bond for appearance.

This section refers to the case of a person who is bound by a bond to appear in Court. It provides for a warrant only when the person does not appear at the time he is bound to appear. It does not therefore apply to a case where before the time fixed for appearance, arrest by a warrant is sought to be effected, 38 M. 1088. See S. 14, *supra*. The Court may also take action under S. 514 *infra*, for forfeiting the bond although a person may prove to the satisfaction of the Court that he was not guilty of the offence charged, yet if he fails to appear in pursuance of the bond taken from him for his attendance in Court he is bound to obey its terms even when he is found not guilty ultimately, 17 A.L.J. 503.

93. The provisions contained in this Chapter relating to a summons and warrant, and their issue, service and execution, shall, so far as may be, apply to every summons and every warrant of arrest issued under this Code.

Provisions of this Chapter generally applicable to summonses and warrants of arrest.

Provisions of this Chapter shall apply to every summons and every warrant.—Having regard to the provisions of this section and S. 76, *supra*, it was held that a Magistrate was competent to admit to bail a recalcitrant witness arrested under S. 90, *supra*, Weir II, 39.

Every warrant of arrest issued under this Code.—This section unlike S. 83 *supra*, is applicable only to warrant of arrest issued under this Code. S. 83 is in general terms and applies to warrants issued under other laws also.

CHAPTER VII.

OF PROCESSES TO COMPEL THE PRODUCTION OF DOCUMENTS AND OTHER MOVEABLE PROPERTY, AND FOR THE DISCOVERY OF PERSONS WRONGFULLY CONFINED.

A.—Summons to produce.

94. (1) Whenever any Court, or in any place beyond the limits of the towns of Calcutta and Bombay, any officer in charge of a police-station considers that the production of any document or other thing is necessary or desirable for the purposes of any investigation, inquiry, trial or other proceeding under this Code by or before such Court or officer, such Court may issue a summons, or such officer a written order, to the person in whose possession or power, such document or thing is believed to be, requiring him to attend and produce it, or to produce it, at the time and place stated in the summons or order.

Summons to produce document or other thing.

(2) Any person required under this section merely to produce a document or other thing shall be deemed to have complied with the requisition if he causes such document or thing to be produced instead of attending personally to produce the same.

(3) Nothing in this section shall be deemed to affect the Indian Evidence Act, 1872, sections 123 and 124, or to apply to a letter, post-card, telegram or other document or any parcel or thing in the custody of the Postal or Telegraph authorities.

Scope of the section.—This section is not limited to documents which form the subject of the offence under investigation but also to documents or things which are or can be used as evidence in support of the prosecution, 5 Bom. L.R. 980 at 982; 15 C. 109; 19 C. 52. The words of this section are of the widest possible character. Any person in whose possession or power a document or other thing which the Court considers necessary or desirable for the purpose of any investigation, inquiry or trial is, may be summoned to produce it, 15 C. 109 at 122. It is competent under this section to a Magistrate to issue a summons to an accused person to produce a document or a thing the production of which might lead to incriminate him, 13 Cr. L.J. 433=15 Ind. Cas. 433 following 15 C. 109. Under this section the Court has power to call upon the Police to produce the inquest report so that the accused be granted a copy of the statements made by the witnesses at the inquest, 20 L.W. 745. An order for the production of the thing or document should be complied with even where there is a lien on the thing directed to be produced, 19 C. 52; 3 C. 379, 2 B.H.C.R. 217.

Any document.—For the definition of the term 'document', see S. 3 (16) of the General Clauses Act X of 1854 and S. 3 of Indian Evidence Act I of 1872. The word 'document' or 'thing' is general and seems to cover any document the production and inspection of which is necessary or desirable or will serve the ends of justice, 1914 P.R. (Cr.) 36; 5 Bom. L.R. 980.

Production necessary or desirable.—The words 'necessary or desirable' mean really necessary in the ends of justice, 8 A.L.J. 517; 16 Cr.L.J. 225=27 Ind. Cas. 897; 26 Cr. L.J. 826=85 Ind. Cas. 42. The Magistrate is given a discretion to decide whether the production of a particular document or book is necessary or desirable for the purpose of any trial, and he is to exercise this discretion *judicially*, in the sense that he must satisfy himself that the document or book has a bearing upon or is relevant to the case. When he is so satisfied, his jurisdiction to order its production comes into play and this carries with it, jurisdiction to permit the production and to have inspection of the same, 5 Bom. L.R. 980; 15 C. 109; but a general search for stolen property is not authorized, and the law cannot be got over by using such an expression "stolen property relevant to the case," 16 C.W.N. 1078=13 Cr. L.J. 764=17 Ind. Cas. 76. It is not open to a Magistrate to issue an order allowing the prosecution to inspect the entries in the books of the accused relating to the subject-matter of the charge at the office of the accused's pleader, 5 Bom. L.R. 978.

Court may issue a summons, etc.—An order upon the police to take possession of the account books of a firm, without issuing a summons under this section or a warrant under S. 96 *infra* was held to be illegal, 33 C. 63.

To the person in whose possession or power such document is.—The words herein used are of the widest character, 15 C. 109. The person need not be a party, 19 C. 52. It is enough that the document is in his possession or power. The provision of this section cannot be taken to apply to the case of an accused person on his trial. No summons could be issued to him to produce an incriminating document, and failure to comply with this requisition is no offence under S. 175, I.P.O., 12 C.W.N. 1016=8 C.L.J. 320=8 Cr.L.J. 225. But this decision was *dissented from* by Benson, J., in 37 M. 112, where His Lordship followed the earlier Calcutta rulings in 15 C. 109 and 19 C. 52, on the ground that a Magistrate had power to issue a search-warrant, and a summons to produce is only another form of attaining the same. This section is limited to a specific document or thing and does not empower a Magistrate to issue a general search for stolen property in the house of an absconding person, 38 C. 304, but in 16 C.W.N. 1078=13 Cr.L.J. 764=17 Ind. Cas. 76, it was held that the police-officer can search an accused's house for property

relevant to the case, 28 C. 303 held otherwise; it is not good law, see 31 C. 251; 27 Cr. L.J. 1155 = 97 Ind. Cas. 553. It is competent for a Magistrate to issue a summons to an accused to produce an incriminating document or other thing, 37 M. 112; 41 C. 161; 15 C. 109; 19 C. 52; 1914 P.R. (Cr.) 36; 16 Cr. L.J. 225 = 27 Ind. Cas. 857; 12 Cr. L.J. 58 = 9 Ind. Cas. 564. The provisions of this section cannot be got over by using general expressions "stolen property relevant to the case" as the law requires mention of specific things, 16 C.W.N. 1078 = 13 Cr. L.J. 764 = 17 Ind. Cas. 76; 13 C.W.N. 485. The document or thing need not be in the actual possession of the party summoned to produce the same. In the 1872 Code the language used was '*in whose keeping*'; the language now used is of the widest character. It is enough if the document or thing is *in the power* of the person summoned to produce.

Indian Evidence Act, Ss. 123 and 124.—These sections regulate the giving of evidence as to affairs of State and the disclosure of official communications. Under S 123 no one is permitted to give evidence derived from unpublished official records relating to affairs of State, except with the permission of the officer at the head of the department concerned and under S. 124 no public-officer can be compelled to disclose official communications made in confidence when public interests will suffer by such disclosure.

Sub-section (2).—A person summoned merely to produce a document or thing may cause it to be produced instead of himself attending the Court personally. Even when the person summoned merely to produce a document or thing appears in Court for its production he does not become a witness by the mere fact that he produces the document, etc., and he cannot be cross-examined unless and until he is cited as a witness in the proceeding. See S. 139 Ind. Ev. Act.

Revision.—Under Ss. 435 and 439 *infra* the High Court has ample powers to interfere in revision in any case where the Magistrate has either refused to exercise a discretion vested in him by law, or has exercised that discretion in an improper manner. Where a Magistrate erroneously refused to order the production of a certain currency note in the possession of the accused and his legal adviser, the High Court set aside the order in the exercise of its revisional jurisdiction, 19 C. 52.

95. (1) If any document, parcel or thing in such custody is, in the opinion of any District Magistrate, Chief Presidency Magistrate, High Court or Court of Session, wanted for the purpose of any investigation, inquiry, trial or other proceeding under this Code, such Magistrate or Court may require the Postal or Telegraph authorities, as the case may be, to deliver such document, parcel or thing to such person as such Magistrate or Court directs.

(2) If any such document, parcel or thing is, in the opinion of any other Magistrate, or of any Commissioner of Police or District Superintendent of Police, wanted for any such purpose, he may require the Postal or Telegraph Department, as the case may be, to cause search to be made for and to detain such document, parcel or thing pending the orders of any such District Magistrate, Chief Presidency Magistrate or Court.

All Provincial Magistrates are empowered to order search to be made for letters and telegrams, Sch. III, cl. (7), but in the presidency town only the Chief Presidency Magistrate can act under cl. (1) of the section. If any Magistrate not being a District Magistrate or a Chief Presidency Magistrate issues a search warrant, for a letter, parcel or other thing in the Post office or a telegram in the Telegraph Department, his proceedings are void, S. 530(b), *infra*.

The act of issuing a search-warrant is judicial, 32 C. 953 (P.C.) at 687, and the Magistrate should weigh the evidence and circumstances and record reasons before issuing a search-warrant, (1917) M.W.N. 494=8 L.W. 287=18 Cr. L.J. 837=44 Ind. Cas. 661; 7 Cr. L. Rev. 476=17 Cr. L.J. 63=32 Ind. Cas. 652; 15 C. 103; 8 W.R. (Cr) 74; 22 B. 949. A Magistrate has jurisdiction to stay execution of the warrant issued by him conditionally on execution of bond to produce copies of document in Court, 47 C. 164. Search-warrants are a species of process exceedingly arbitrary in character and inasmuch as they are resorted to only for very urgent and satisfactory reasons, the rules of law which pertain to them are of more than ordinary strictness. In the first place it is common learning that they are only to be granted in the cases expressly authorized by law and not generally in such cases until it has been shown before a responsible officer on oath that a crime has been committed and that officer has reason to believe that the offender or the property, which is the subject or instrument of a crime is concealed in some specified house or place. The law clearly intends that the evidence shall be given of such facts as shall satisfy the officer issuing the warrant that there is "reason to believe." Suspicion itself is no ground whatever for issue of warrant of this description. Search-warrants are always open to very serious objection and very great particularity is justly required by law in cases where they are authorized before the privacy of a man's premises is allowed to be invaded by the minister of the law, 30 C.W.N. 713 at 717.

B.—Search-warrant.

96. (1) Where any Court has reason to believe that a person to whom a summons or order under section 94 or a requisition under section 95, sub-section (1), has been or might be addressed, will not or would not produce the document or thing as required by such summons or requisition,

When search-warrant may be issued.

or where such document or thing is not known to the Court to be in the possession of any person,

or where the Court considers that the purposes of any inquiry, trial or other proceeding under this Code will be served by a general search or inspection,

it may issue a search-warrant; and the person to whom such warrant is directed, may search or inspect in accordance therewith and the provisions hereinafter contained.

(2) Nothing herein contained shall authorize any Magistrate other than a District Magistrate or Chief Presidency Magistrate to grant a warrant to search for a document, parcel, or other thing in the custody of the Postal or Telegraph authorities.

Scope of the section.—Search-warrants are a species of process exceedingly arbitrary in character and are only to be granted in cases expressly authorized by law and not generally, 53 C. 718. The scheme as regards searches under the Code is reasonably clear. The Court can issue a search-warrant under this section or in lieu thereof the Magistrate may himself search under S. 105 *infra* and S. 165 *infra* deals with searches by Police-officers and not by a Magistrate, 36 C. 433 at 438. The Court should always remember that it is a grave step to issue a search-warrant directing that a man's house should be invaded and searched. It is necessary that power to issue search-warrants should be given but it should

not be exercised without full appreciation of the gravity of the step and after the Court has come to the conclusion that that step is really necessary in the ends of justice, 8 A.L.J. 517 = 12 Cr. L.J. 175 = 9 Ind. Cas. 991. To issue a search-warrant to seize all letters, books, bills, etc., and books of account in a person's house for an inquiry as to whether he had used or sold articles with a counterfeit trade-mark is a gross perversion of the law, 17 Cr. L.J. 533 = 36 Ind. Cas. 591. A Magistrate has no authority to issue on the application of a complainant a search-warrant ordering summary seizure of all the goods of a particular description in the possession of an accused person, 17 Cr. L.J. 60 = 32 Ind. Cas. 652. The issue of a search-warrant is a judicial act, 39 C. 953 (P.C.) at 967, and it ought be used only after a judicial inquiry and upon proper materials. 15 C. 103 : 8 W.R. (Cr.) 74 ; 22 B. 943 = 1917 M.W.N. 434 = 6 L.W. 237 ; 7 Cr. L.R. 476. Under this section before issuing a warrant it is the duty of the Court in the first instance to consider whether a summons to produce would not have the desired effect. The informant should be examined on oath if possible and if this is not possible the Court should act with due application that it is taking upon itself the responsibility of considering the weight of the information as information preparatory to issuing an order of a very serious nature, 8 A.L.J. 517 = 12 Cr. L.J. 175 = 9 Ind. Cas. 991 ; 15 C. 103. All Magistrates are empowered to issue search-warrants, see Sch. III 1 (3) *infra*.

The words of the section are of the widest possible character. Any person to whom a summons under S. 94 *supra* has been or might be addressed and who, the Court has reason to believe will not and would not produce it, is liable to have his premises searched ; search for what ? Surely for the document or thing which the Court has reason to believe he will not produce. The whole object of the section would be frustrated if we were to hold, that because form 8 of Sch. V, says "specifying the thing clearly" and not the "document or thing clearly" there was no authority to issue search-warrant for a document ; a document cannot be seized unless under a search-warrant, 15 C. 109 at 122 and 123. In taking action under this section the Court is authorized to go as far as it is physically possible in that behalf. The accused can perhaps defeat the Court by concealing or destroying the document or thing or having it concealed or destroyed, taking of course the consequences of such action just like an accused in the dock, can when questioned under S. 342 *infra* thwart the Court in its search for the truth by answering falsely or by refusing to answer. But the mere fact that the accused can so defeat or thwart the Court is no reason for holding that the Court is debarred from going so far as the sections specially allow, 1913 P.R. (Cr.) 36. The power of issuing search-warrant is not intended to give the complainant an opportunity of fishing for evidence but is intended for use in respect of a definite existing document which must be clearly specified in the warrant, 17 Cr. L.J. 533 = 36 Ind. Cas. 591. The first para. of this section requires as a condition precedent to the issue of a search-warrant that the Court must have reason to believe that the person against whom the search-warrant is issued is likely not to produce the document or thing in his possession as required by a summons or under S. 94 *supra* or a requisition under S. 95 (1) *supra* served upon him or that he is not likely to produce it, should such summons, order or requisition be served on him, 5 Bom. L.R. 1032. Searches can be made (1) Under a search warrant issued under this section (2) By the Magistrate himself under S. 105 *infra*. (3) By a Police-officer under S. 165 *infra*, 36 C. 433

Inaccuracies in a warrant do not take away the jurisdiction or render the evidence adduced inadmissible by reason of such inaccuracy, 27 Cr. L.J. 503 = 93 Ind. Cas. 967 following 37 C. 457 at 502. A search-warrant which mentions a wrong door number of the house to be searched and gives no other description of it to identify the same is an illegal warrant, 27 Cr. L.J. 503 = 93 Ind. Cas. 967, following 37 B. 402. The question of accused's guilt is entirely different from the question whether the officer was acting within his powers, 26 M. 123.

Any Court.—The 'Code' contains no definition of the word 'Court' nor is a definition of it to be found in the General Clauses Act X of 1897, but according to S. 4 of the Ind. Ev. Act the word 'Court' includes all Magistrates. Taking this definition as a guide a Magistrate must be held to be included in the term Court, 17 Cr. L.J. 491 = 36 Ind. Cas. 171.

It was held in 35 C. 433 by the majority of the Court that the word "Court" implied that the Magistrate was acting in his judicial capacity and if he conducts a search not acting as a "Court" he would be liable civilly for trespass, but Brett, J., dissented from the view of the majority and said, "Court" is nowhere defined in the Code. From Chap. II, of the Code it would, however, appear that the term 'Court' and Magistrate, are in fact synonymous and it should be remembered that under the special conditions prevailing in India a Magistrate is frequently called upon to act as a Court even though he may not be at the time sitting within the four walls of his ordinary Court-building or in fact in any building; the powers of the Court depend upon the power with which the Magistrate presiding in it is vested, 35 C. 433 at 457. This view was approved by the Privy Council in 39 C. 933 at 956; their Lordships held it would seem that the Trial Judge and both the learned Judges who formed the majority of the Court of appeal were misled by the use of the word 'Court' in S. 96. For the sake of brevity the Code uses the term 'Court' and 'Magistrate' generally, if not always, as convertible terms. S. 6 headed classes of Criminal Court enacts I Court of Session, II Presidency Magistrate..... S. 96 taken in conjunction with Sch. III, places the matter beyond all doubt. The ordinary powers of all Provincial Magistrates are declared to be those hereinafter conferred upon them and specified in the third schedule. The power to issue search-warrants is specified among the ordinary powers of all Provincial Magistrates but the only section conferring the power is S. 96 to which the schedule itself refers.

Has reason to believe.—Reason to believe is a condition precedent to the issue of a search-warrant under this section, 5 Bom. L.R. 1032, see also 15 C. 109 at 134.

A person to whom a summons has been addressed—The word person will include an accused person also, 16 Cr. L.J. 225=27 Ind. Cas. 897; 12 Cr. L.J. 98=9 Ind. Cas. 534; 37 M. 112; 41 C. 261; 15 C. 108, see also notes under S. 94 *supra*.

Document or thing.—The words "document or thing" in this and S. 94 *supra* are general and cover any document the production or inspection of which is necessary or desirable or will serve the ends of justice. There is nothing in this and S. 94 *supra* to limit their production to the finding of such documents or things only in respect of which the alleged offence may have been committed, 1314 P.R. (Or) 36; 5 Bom. L.R. 983. The word 'thing' will include any document the production and inspection of which is necessary or desirable or will serve the ends of justice, 16 Cr. L.J. 223=27 Ind. Cas. 897. The word 'thing' is specifically mentioned and that would not include a configuration of a wall or the inspection of any place inside the house for purposes of investigation, 26 A.L.J. 406 at 411=29 Cr.L.J. 272=107 Ind. Cas. 683. This section is inapplicable to the case of a person, i.e., a woman confined in a house or staying voluntarily there. A person cannot be said to be a "thing" to which alone the section is applicable. S. 100 *infra* applies to such a case and a warrant issued under this section, instead of under S. 100 *infra* is illegal and must be treated as a nullity, 11 C.W.N. 835=6 Cr. L.J. 33.

Purposes of inquiry or other proceedings will be served by a general search—It is lawful for a Magistrate to issue a search-warrant when he considers the production of any thing necessary for the purposes of investigation or inquiry under the Code. It is not incumbent on him to wait till the prosecution evidence has been recorded in the presence of the accused. He is entitled to act upon credible information, provided, it is based upon a complaint and the complainant is examined upon solemn affirmation, 13 M. 18, followed in 1910 M.W.N. 818=11 Cr. L.J. 535=7 Ind. Cas. 895; 22 B. 949. A Magistrate ought not to issue a search-warrant simply because a police-officer asks for it, 47 C. 587; 21 Cr.L.J. 313=55 Ind. Cas. 473; 24 C.W.N. 405; 21 Cr.L.J. 573=57 Ind. Cas. 93. In 8 A.L.J. 517 at 522=12 Cr. L.J. 175=9 Ind. Cas. 991, it was held when there is no investigation, inquiry or other proceedings under the Code pending, the issue of a search-warrant is illegal and S. *infra* 537 does not cure the defect. But if the Magistrate subsequently takes cognizance under S. 190 (1) (c) *infra* and then re-issues the warrant it is legal, 35 C. 1076. It is necessary that the power to issue search-warrants should be given, but it should not

be exercised without full appreciation of the gravity of the step and after the Court has come to the conclusion that the step is really necessary in the ends of justice. The power of issuing search-warrants is not intended to be used for the purpose of giving complainants an opportunity of fishing evidence, but is intended for use in respect of definite documents believed to exist which must be clearly specified in the warrant and before issuing the warrant, the Magistrate must have before him some information or evidence that the documents are necessary or desirable for the inquiry before him; to issue a warrant to search a man's house and for production of all papers and books in the house for an inquiry as to whether he had used or sold articles with a counterfeit trade-mark, is a perversion of the law, 17 Cr. L.J. 543=36 Ind. Cas. 591. A search-warrant is not to be given for attaching property the title to which is in dispute and what is known in civil law as attachment before judgment is foreign to criminal law, Ratanial 677. The act of issuing a search-warrant is a judicial act, 39 C. 953 (P.C.) at 967, and the Magistrate should weigh the circumstances, and record his reasons before issuing the search-warrant, 1917 M.W.N. 494=6 L.W. 287; 18 Cr. L.J. 837=43 Ind. Cas. 661; 7 Cr. L. Rev. 476=17 Cr. L.J. 60=32 Ind. Cas. 652. When a search-warrant was issued three weeks after issuing process to accused it was held that it was so dilatory that it could only defeat the object for which such warrants are issued, though the issue of warrant will strictly come within the letter of the law, 22 C.W.N. 719. The Court must have also reason to believe that the person against whom the warrant is issued, is not likely to produce the document or thing in his possession as required by the summons under S. 94 *supra*, or a requisition under S. 95 (1) *supra*, 5 Bom. L.R. 1032. The section is somewhat obscurely worded; it is clear from the wording of cl. (3) that the Legislature intended to restrict it to documents forming the subject of a charge as distinguished from documents sought to be used as evidence in a case, 5 Bom. L.R. 980. But it is not open to a Magistrate to issue an order allowing the prosecution to inspect entries in the book of the accused person relating to the subject matter of the charge at the office of the accused's lawyers, 5 Bom. L.R. 578.

Search or Inspect.—The word "inspect" seems to apply only to locality or place but not to document or thing. The language of S. 97 *infra* to the effect "search or inspect the place or part so specified" supports this view, 15 C. 109 at 124. Once the articles are seized and brought before the Court in execution of a search-warrant issued by the Court, inspection thereof may be allowed to the complainant, 43 C.L.J. 164; 33 C.W.N. 369=30 Cr. L.J. 705=116 Ind. Cas. 721 *relying on* 15 C. 109. Power to search necessarily includes the power to take the thing or document into possession. A Magistrate who is competent to issue a search-warrant is also competent himself to conduct a search, 1884 A.W.N. 213. A Magistrate may direct a search in his presence under S. 105, *infra*.

For form of search-warrant see Sch. V, Form No. 8, S. 530, cl. (b), *infra* provides that if any Magistrate not empowered by law in this behalf issues a search warrant for a letter, parcel or other thing in the Post Office or Telegraph Department, his proceedings are void.

Resistance to illegal search is not protected. See B. 99, I.P.O. No right of private defence exists unless there is an apprehension of death or grievous hurt, 21 M. 296 at 298; 19 M. 349; 28 C. 411; 39 C. 403; 16 C.W.N. 336; 11 C.W.N. 838=6 C. L.J. 127=6 Cr. L.J. 38, but if there is no search-warrant there can be no legal search, and right of private defence is available, 38 C. 303. Illegality of a search cannot be pleaded as a defence when evidence of offence under the Arms Act is discovered in consequence of such illegal search, 47 A. 375; 35 A. 575; see also 48 A. 86.

97. The Court may, if it thinks fit, specify in the warrant the particular place or part thereof to which only the search or inspection shall extend; and the person charged with the execution of such warrant shall then search or inspect only the place or part so specified.

Power to restrict warrant.

98. (1) If a District Magistrate, Sub-divisional Magistrate, Presidency Magistrate or Magistrate of the first class, upon information and after such inquiry as he thinks necessary, has reason to believe that any place is used for the deposit or sale of stolen property,

or for the deposit or sale or manufacture of forged documents, false seals or counterfeit stamps or coin, or instruments or materials for counterfeiting coin or stamps or for forging,

or that any forged documents, false seals or counterfeit stamps or coin, or instruments or materials used for counterfeiting coin or stamps or for forging, are kept or deposited in any place,

or, if a District Magistrate, Sub-divisional Magistrate, or a Presidency Magistrate, upon information and after such inquiry as he thinks necessary, has reason to believe that any place is used for the deposit, sale, manufacture or production of any obscene object such as referred to in section 292 of the Indian Penal Code or that any such obscene objects are kept or deposited in any place [Inserted by Act VIII of 1925, section 3],

he may by his warrant authorize any police-officer above the rank of a constable—

(a) to enter, with such assistance as may be required, such place, and

(b) to search the same in manner specified in the warrant, and

(c) to take possession of any property, documents, seals, stamps or coins therein found which he reasonably suspects to be stolen, unlawfully obtained, forged, false or counterfeit, and also of any such instruments and materials or any such obscene objects as aforesaid, and

(d) to convey such property, documents, seals, stamps, coins, instruments or materials or any such obscene objects before a Magistrate, or to guard the same on the spot until the offender is taken before a Magistrate, or otherwise to dispose thereof in some place of safety, and

(e) to take into custody and carry before a Magistrate every person found in such place who appears to have been privy to the deposit, sale or manufacture or keeping of any such property, documents, seals, stamps, coins, instruments or materials * or any such obscene objects, knowing or having reasonable cause to suspect the said property to have been stolen or otherwise unlawfully obtained, or the said documents, seals, stamps, coins, instruments or materials to have been forged, falsified or counterfeited, or the said instruments or materials to have been or to

* Inserted by Act VIII of 1925, S. 3.

(2) In sub-section (1) "document" includes also any painting, drawing or photograph, or other visible representation.

S. 295-A newly added in the I.P.C. runs thus: "Whoever, with deliberate and malicious intention of outraging the religious feelings of any class of his Majesty's subjects by words either spoken or written, or by visible representations insults or attempts to insult the religion or the religious beliefs of that class shall be punished with imprisonment of either description for a term which may extend to two years or with fine or with both." This section is the outcome of the strained relationship which existed between the Hindus and Muhammadans especially in Northern India. There was no direct provision of law to deal with scurrilous writings intended to insult the religious feelings of both communities and S. 153-A, I.P.C. used to be made applicable to such cases. The judgment in the '*Rangila Rasul Case*' of the Lahore High Court threw considerable doubt of the applicability of S. 153-A to writings intended to insult the religious feeling of any community and consequently this new section is enacted in Chap. XV of the I.P.C. creating a specific offence, viz., deliberate and malicious acts intended to outrage the religious feelings of any class by insulting its religion or its religious beliefs.

In order to justify a forfeiture under this section it is necessary for Government to satisfy the Court that on the evidence produced by the prosecution that a conviction under S. 153-A, I.P.C., could have been had, 29 Cr. L.J. 889=111 Ind. Cas. 659 where 54 C 59 and 28 Cr. L.J. 794=104 Ind. Cas. 234 are referred to.

99B. Any person having any interest in any newspaper, book or other document, in respect of which an order of forfeiture has been made under section 99A, may, within two months from the date of such order, apply to the High Court to set aside such order on the ground that the issue of the newspaper, or the book or other document, in respect of which the order was made, did not contain *seditious or other matter of such a nature as is referred to in sub-section (1) of section 99A.**

Application to High Court to set aside order of forfeiture.

This section as amended by Act XXXVI of 1926 permits any person having any interest in a book in respect of which the order of forfeiture is made under the last section to apply to the High Court to have the order set aside on the ground that the issue of the book in respect of which the order was made did not contain any matter which promoted or was intended to promote feelings of enmity or hatred between different classes of His Majesty's subjects, 43 A 856 (Sp.B.); 50 A. 187. Under this section the High Court is to consider only the question whether in fact the matters contained in the document in question contain any seditious matter. It is precluded from going into other questions; the onus is on the Government to prove that the document contains seditious matter, 47 A. 298 (F.B.).

Hearing by Special Bench.

99C. Every such application shall be heard and determined by a Special Bench of the High Court composed of three Judges.

99D. (1) On receipt of the application, the Special Bench shall, if it is not satisfied that the issue of the newspaper, or the book or other document, in respect of which the application has been made, contained seditious or other matter of such a nature as is* referred to in sub-section (1) of section 99A, set aside the order of forfeiture.

Order of Special Bench setting aside the forfeiture.

(2) Where there is a difference of opinion among the judges forming the Special Bench, the decision shall be in accordance with the opinion of the majority of those Judges.

Under this section, the High Court is precluded from considering any other point than the question whether in fact the matters contained in the document were seditious or not and come within the mischief aimed at by S. 124A, I.P.C. The onus is on the Local Government having regard to the frame work of the section but it is not a matter of great practical moment and indeed it gives to the Local Government the advantage of opening and of reply, 47 A. 298 (F.B.). If the High Court is left in doubt after hearing the application, the order of forfeiture should be set aside—a practice contrary to the practice in a Civil appeal, 49 A. 856 (Sp B.).

99E. On the hearing of any such application with reference to any newspaper, any copy of such newspaper may be given in evidence in aid of the proof of the nature or tendency of the words, signs or visible representations contained in such newspaper, in respect of which the order of forfeiture was made.*

Evidence to prove nature or tendency of newspapers.

99F. Every High Court shall, as soon as conveniently may be, frame rules to regulate the procedure in the case of such applications, the amount of the costs thereof and the execution of orders passed thereon, and until such rules are framed, the practice of such Court in proceedings other than suits and appeals shall apply, so far as may be practicable, to such applications.

Procedure in High Court.

99G. No order passed or action taken under section 99A shall be called in question in any Court, otherwise than in accordance with the provisions of section 99B.

Jurisdiction barred.

These sections were added by Act XIV of 1922, the Press Law Repeal and Amendment Act 1922 and correspond to Ss. 12, 17, 18, 19, 20, 21 and 22 of the Repealed Indian Press Act I of 1920 See 43 M. 146 ; 41 C. 465 at 478, 483 and 487.

C.—Discovery of persons wrongfully confined.

100. If any Presidency Magistrate, Magistrate of the first class or Sub-Divisional Magistrate has reason to believe that any person is confined under such circumstances that the confinement amounts to an offence, he

Search for persons wrongfully confined.

* Amended by Act XXXVI of 1925.

may issue a search-warrant, and the person to whom such warrant is directed may search for the person so confined; and such search shall be made in accordance therewith, and the person, if found shall be immediately taken before a Magistrate, who shall make such order as in the circumstances of the case seems proper.

Scope of the section.—A Magistrate is not bound to issue a search-warrant under this section unless he has reason to believe that a minor is confined wrongfully. The powers under this section are discretionary, Ratanlal 839. An Inquiry under this section is a judicial inquiry, 15 C. 103; 35 C. 1076 (1917) M.W.N. 494. The jurisdiction conferred by this section is not so wide as that under S 491 *infra* relating to the issue of *Habeas Corpus*, Ratanlal 839; 24 C.W.N. 104=29 C.L.J. 602=20 Cr. L.J. 729=52 Ind. Cas. 889.

Has reason to believe that any person is confined may issue.—If the complaint is against a husband for keeping his wife in confinement, the Magistrate will not be justified in passing a hasty order. He should hear both sides and after making such inquiry as may seem necessary pass an order. If he finds the confinement proved he should let go the wife and warn the husband and if he finds against confinement he should advise the wife to go home with her husband warning the husband not to use coercion in taking her, 11 Cr. L.J. 450=7 Ind. Cas. 354, see 24 C.W.N. 104=29 C.L.J. 603=20 Cr. L.J. 729=52 Ind. Cas. 889; 2 C.W.N. CCCXXXIII. As to a complaint with respect of the removal of a child, the paramount consideration for the Court is the health and safety of the child in its being allowed to live with its natural parents. See 1929 M.W.N. 687.

Search-warrant.—Under this section the only kind of warrant that can be issued is a search-warrant, and the person to whom such warrant is directed may search for the person so confined, and such search shall be made in accordance therewith and the person if found, shall be immediately taken before the Magistrate. It is perfectly clear that the form under S 93, *supra* after scoring out cls. (a) and (c) would be sufficient for the execution of a process under this section. When there is no printed form under this section, the form under S. 98 is always used for these warrants under this section, 30 C. 403 at 406 and 45 C. 805. It is immaterial what form is used, provided the substance of the warrant complies with the requirements of the section, 45 C. 805; 16 C.W.N. 336=13 Cr. L.J. 186=13 Ind. Cas. 1002. For the power of the High Courts to issue directions in the nature of *habeas corpus* see S 491 *infra*. See S. 552 *infra* which deals with the powers of a Presidency Magistrate or District Magistrate to compel the restoration of abducted females. Under S. 25 (2) of the Guardians and wards Act VIII of 1890, a District Court for the purpose of arresting the ward may exercise the powers conferred on a Magistrate of the first class by this section.

Magistrate may make such order as in the circumstances seems proper.—The power to issue a search-warrant is discretionary with the Magistrate and before he acts he must have reason to believe that a person is wrongfully confined, Ratanlal 839. The Magistrate is bound to hear both parties and pass an order, not hastily, but after making such inquiry as may seem necessary under the circumstances, 11 Cr. L.J. 450=7 Ind. Cas. 354. Where no search-warrant under this section was in fact issued and the boy said to be wrongfully confined was not produced before the Court although a warrant for the production of the boy was ordered and where it is not clear whether the detention was wrongful, no order can be passed directing the boy to be made over to the complainant, 24 C.W.N. 104=29 C.L.J. 603=20 Cr. L.J. 729=52 Ind. Cas. 889.

D.—General Provisions relating to Searches.

101. The provisions of sections 43, 75, 77, 79, 82, 83 and 84 shall, so far as may be, apply to all search-warrants issued under section 96, section 98, section 99A or section 100.

Direction, etc., of
search-warrants.

A search that was made without a legal warrant is not illegal and cannot vitiate the trial. There is no question of any legal presumption and any irregularity or illegality in the search can neither vitiate nor affect a conviction, 46 A. 85 following 33 A. 358.

A search-warrant under the Gambling Act of 1867 is governed by the provisions of the Code and may therefore be endorsed over by the Police-officer to whom it is addressed to another police-officer duly empowered, 30 A. 60. See also 18 Cr. L.J. 238=27 Ind. Cas. 910, but this section is not applicable to warrant issued under the Burma Gambling Act and consequently a search by an officer to whom the warrant was not originally directed but was only endorsed by the officer named in the warrant is illegal, 21 Cr. L.J. 9=54 Ind. Cas. 57.

102. (1) Whenever any place liable to search or inspection under this Chapter is closed, any person residing in, or being in charge of such places shall, on demand of the officer or other person executing the warrant, and on production of the warrant, allow him free ingress thereto, and afford all reasonable facilities for a search therein.

Persons in charge of closed place to allow search.

(2) If ingress into such place cannot be so obtained, the officer or other person executing the warrant may proceed in manner provided by section 48.

(3) Where any person in or about such place is reasonably suspected of concealing about his person any article for which search should be made, such person may be searched. If such person is a woman, the directions of section 52 shall be observed.

103. (1) Before making a search under this Chapter, the officer or other person about to make it shall call upon two or more respectable inhabitants of the locality in which the place to be searched is situate to attend and witness the search, and may issue an order in writing to them or any of them so to do.

Search to be made in presence of witnesses.

(2) The search shall be made in their presence, and a list of all things seized in the course of such search and of the places in which they are respectively found shall be prepared by such officer or other person and signed by such witnesses; but no person witnessing a search under this section shall be required to attend the Court as a witness of the search unless specially summoned by it.

(3) The occupant of the place searched, or some person in his behalf, shall, in every instance, be permitted to attend during the search, and a copy of the list prepared under this section, signed by the said witnesses, shall be delivered to such occupant or person at his request.

Occupant of place searched may attend.

(4) When any person is searched under section 102, sub-section (3), a list of all things taken possession of shall be prepared, and a copy thereof shall be delivered to such person at his request.

(5) *Any person who, without reasonable cause, refuses or neglects to attend and witness a search under this section, when called upon to do so by an order in writing delivered or tendered to him, shall be deemed to have committed an offence under section 187 of the Indian Penal Code.*

Amendment.—Sub-section (5) is new. "We think that the power, thus given to the police practically to compel the attendance of respectable witnesses from as near as possible to the place where the search is to be effected, should go far to put an end to the objectionable practice of bringing semi-professional search witnesses from a greater distance, and will also prevent the frustration of searches by the unreasonable refusal of witnesses to attend, which we understand is by no means uncommon. If executive instructions are issued to the police, that with this new sub-section to back them, they are whenever possible, to require the attendance of respectable witnesses from the immediate vicinity, we think that a considerable improvement will be effected." *Sel. Com. Report.*

Object and scope of the section.—The object of the section is to see that searches are conducted properly and that no wrong doing such as planting of articles by Police in the house of accused should take place and thus prevent fabrication of false evidence. Object of the Legislature in requiring the presence of two or more respectable witnesses of the locality is to guard against possible discovery and unfair dealings on the part of officers entrusted with search-warrants and to ensure that anything incriminating which may be said to have been found on the premises searched was really found there and was not introduced by the members of the search party, 27 Cr. L.J. 73=91 Ind. Cas. 249, the intention of the law is to protect the person whose house is searched and to give confidence to the neighbours. In the case of a person whose residence is so easily accessible there will be no difficulty in ascertaining the character and status of the witnesses and in proving that any particular witness is not respectable if in fact he was not, 18 Cr. L.J. 1002=42 Ind. Cas. 753; 5 Ran. 251 at 294. Whether a search is legal or illegal if contraband articles such as arms, ammunition, etc., are found in the possession of the accused no question of the legality of the search or otherwise can be raised by him, 27 A.L.J. 28 at 30 following 23 A.L.J. 354. The provisions of this section are applicable to searches conducted under S. 14 of the Opium Act I of 1878 empowering the officer to enter into a building vessel or place to search and seize opium liable to confiscation but an arrest and search in an open place under S. 15 of the said Act need not comply with the provisions of this section. There are certain kinds of searches permitted by the Code which do not fall within this Chapter and therefore not governed by the provisions of this section and searches under S. 15 of the Opium Act, is an example of this, 28 Cr. L.J. 372=100 Ind. Cas. 580. The provisions of this section and S. 102 *supra* do not apply to a search made under the Excise Act. In view of the provisions of S. 1(2) and S. 5(2) *supra*, there is a special provision in the Excise Act relating to searches made under that Act and so the provisions of this section and S. 102 *supra* cannot apply to such a search. Under the Excise Act a search can be conducted by persons other than police-officers, and the Chapter IX of that Act gives the powers of different persons to make the search of any person or any vessel, vehicle, etc., reasonably suspected to contain any excisable articles. There is nothing in the Excise Act to show that the search is to be conducted under the provisions of this Code, 54 C. 601.

The officer shall call upon two or more respectable inhabitants of the locality.—This section requires the officer about to make a search to call upon two or more respectable inhabitants of the locality in which the place of search is situate to attend and witness the search. It is undoubtedly important that an officer making a search should comply with the provisions of this section, for the credibility of his story may in many cases depend on the support it might receive from the persons accompanying him in the search. But if for any reason the officer making the search is unable to get two or more respectable inhabitants of the locality and a search is effected in the presence of one or more men available at the time leading to the discovery of the articles, the accused who is found in possession can be convicted all the same if the Court is satisfied from the evidence that an offence has been

committed, 24 A.L.J. 173; 23 A.L.J. 354 followed in 27 A.L.J. 23. The intention of the Legislature in laying down the procedure as to house search is to protect the person whose house is searched and to give confidence to the neighbours, 18 Cr.L.J. 1009=42 Ind. Cas. 753, 5 Ran. 231. By this it is intended to operate in favour of the accused and in a densely populated town, it means persons in the immediate neighbourhood and not persons who live couple of miles away and are friends of the police officer conducting the search are to witness the search, 26 Cr. L.J. 827=66 Ind. Cas. 475; one of the essentials of a valid search is the presence of independent witnesses to the search, 23 Cr. L.J. 603=63 Ind. Cas. 837. The police-officer may issue an order in writing to the witnesses to attend and the order is necessary if the witness is to be proceeded against for refusal to attend. There is nothing in this or any other section of the Code to justify the notion that the required witnesses are to be selected by any person other than the officer conducting the search. Assuming what is by no means clear, that the witnesses to the search were not the inhabitants of the locality we do not think that circumstance must necessarily expose the conduct of the police to suspicion or render the evidence of the search inadmissible," 21 M. 81 at 89; 23 M.L.J. 445=(1912) M.W.N. 1111=13 Cr. L.J. 763=17 Ind. Cas. 75; 27 Cr. L.J. 73=91 Ind. Cas. 249, see also 1 Cr.L.J. 933 and 13 M. 349. The intention of the enactment is to ensure that searches are conducted with decency and in order that no wrong doing, such as planting articles by the Police in the house searched should take place. Regularity and proper conduct of searches could be secured only if those should be chosen as witnesses who can be reasonably relied on to secure the desired result and whose trustworthiness and ability towards the conveying out of the particular duty required of them can be felt, 7 Cr. L.J. 479; 12 Cr. L.J. 251=10 Ind. Cas. 756. The stress is upon the word 'respectable' and not on 'locality.' The important point is that the men called in should be persons of some standing whose word can be believed and not of those living within a stone's throw of the house to be searched, 18 Cr. L.J. 1009=42 Ind. Cas. 753; 11 Cr. L.J. 743=3 Ind. Cas. 933; 12 Cr.L.J. 479(1)=12 Ind. Cas. 87. The facts with reference to a search may be proved otherwise than by the production of the search lists, 34 M. 349 (F.B). Failure to call respectable inhabitants of the locality to witness a search is a failure to comply with the provisions of this section but such failure does not make the search illegal, 23 M.L.J. 443=13 Cr. L.J. 763=(1912) M.W.N. 1111=17 Ind. Cas. 75 where 17 M.L.J. 323 is followed; 2 Pat. L.T. 353 where 20 Cr. L.J. 742=53 Ind. Cas. 150 is dissented and 35 A. 353; 31 C.557 and 26 M. 124 are referred to. See also 27 Cr. L.J. 73=91 Ind. Cas. 249; but such illegality will not be a bar to the consideration of the evidence discovered by the search 4 C. 653 followed in 18 Cr. L.J. 49=37 Ind. Cas. 33.

No person witnessing a search shall be required to attend Court as a witness, etc.—The reason for this provision is obvious. Many persons would be unwilling to attend searches if, as a matter of fact, they had to attend Court at the trial of the case, possibly two Courts if the case is committed to the Sessions. The discretion is, therefore, left to the Court to require or not the attendance of such witness. It is equally open to the accused to call them as defence witnesses if they profess to have a high regard for the truthfulness of these witnesses, 46 C.L.J. 368 at 382-83=29 Cr. L.J. 47=106 Ind. Cas. 545 dissenting from 9 C.W.N. 439=2 Cr. L.J. 176.

Sub-section (3).—The Code permits the occupants of the rooms to be searched to be present at the search and if they are not permitted to be present there is a violation of the provision which is one not merely of technicality but of substance in that it is enacted to guarantee the reality of the search and the discoveries made out, 41 C. 350 at 370. The words "occupant of the place searched or some person in his behalf" are not intended to cover every person who happened to be in the place at the time but may refer back to the person mentioned in S 102 *supra*, namely "a person residing in or being in charge of the place." Strictly speaking then the only persons entitled as of right to be present at a search are persons residing in, or in charge of the place, 41 C. 350 at 377. The words are "shall be permitted to attend during the search." The spirit of the provision that the occupant shall be present and he is to be given the option of being present and not that he is to be allowed to be present if he demands it, 41 C. 350 at 377 but this view was dissented

from in, 44 C.L.J. 368 at 382=29 Cr.L.J. 45=106 Ind. Cas. 545, holding that the interpretation put on the word "permitted" occurring in this sub-section could not be accepted as sound.

Occupant of the place to be searched.—These words are not intended to cover any person who may happen to be in the place but they refer back to the person mentioned in S. 102, i.e., a person residing in or being in charge of the place, 41 C. 350 at 377. A cart is not a place within the meaning of the section as held by the Bombay High Court.

List to be signed by the witnesses.—It was held in 26 M. 419 (F.B.) that refusal to sign the search list under this section is not an offence punishable under S. 187, I.P.O.; but now see the new sub-section (5) which enacts that any person who without reasonable cause refuses or neglects to attend and witness a search when called upon to do so shall be deemed to have committed an offence under S. 187, I.P.C. But the order requiring the person to attend must be a written order now see 38 M.L.J. 27=1920 M.W.N. 110=11 L.W. 58=21 Cr. L.J. 33=54 Ind. Cas. 241. Unless the list of things seized is signed by the witness as required by this section, the search would not be legal and each page of the search list must be signed by witness, 7 Cr. L.J. 411. See Ss 165 and 166 *infra* as to mode of making searches by the Police. The Officer's duty is to be present on the spot and to exercise general supervision. This section does not lay down that the officer himself should ransack boxes, examine the roof, dig up the floor, 23 M.L.J. 415 where 21 M. 83 is not followed; see 21 M.L.J. 281 (F.B.)=8 M.L.T. 451=11 Cr. L.J. 576=8 Ind. Cas. 178 and 33 M. 413 as to mode of proving the search list and its contents.

Rules relating to searches.—Whenever possible, the presence of the village-headman should be obtained to witness a search. The witnesses to a search shall enter the premises to be searched and watch the police when they search and before commencing a search the person of the police-officer who is to conduct the search shall be examined before the witnesses. The Code does not require a search to be made by day-light but as a rule day-light should be awaited, the inmates of the place being made to evacuate it and the place sealed and guarded. In conducting the search the place shall be inspected to see whether facilities exist for introducing properties from outside. Under S. 165 (2) an S.H.O., or investigating officer must if practicable search himself, if incapacitated, he must deliver to his subordinates an order in writing. A verbal order given on the spot is not legal. The search list is to be in duplicate with a trifoil, and copy to be forwarded to the Magistrate with case-diary and the other attached to the copy of the case diary forwarded to the District or sub-divisional officer. *Orders Mad. Pol. Ch. XXV, pp. 69 and 70* The sending for shopkeepers selected arbitrarily by the police and making them witnesses to the search of houses of accused persons is a fruitful source of oppression and extortion. It is difficult to prescribe rules for the selection of witnesses to search houses for stolen property but District Superintendents can easily ascertain by questioning the witnesses sent in whether they have been unfairly selected. One respectable house-holder should not be selected a second time till his neighbours have had their turns unless good reason is given for their exemption. Respectable shopkeepers are just as liable to be summoned as other respectable inhabitants of this place, *Beng. Pol. Man.*, p. 403.

E.—Miscellaneous.

Power to impound document, etc., produced.

104. Any Court may, if it thinks fit, impound any document or thing produced before it under this Code.

The section applies only when the document or thing is before the Magistrate in any proceeding before him. Where a Presidency Magistrate on a telegram from a District Magistrate to take possession of certain account books, called upon the person to produce them before him and when they were produced sent them to the District Magistrate, it was held that the Presidency Magistrate acted illegally and without jurisdiction, *Ratanlal 680*.

May impound document or thing produced before it.—A District Magistrate could not impound a document which has been produced in a pending case before a Subordinate Magistrate, 1 A.L.J. 607. A Magistrate can only conduct a search under this section when he is competent to issue a search-warrant under § 96, *supra*, but the issue of a search-warrant by an unauthorized Magistrate is not void, S. 529 (a), *infra*.

Magistrate may direct search in his presence. **105.** Any Magistrate may direct a search to be made in his presence of any place for the search of which he is competent to issue a search-warrant.

See 39 C. 953 (P.C.) as to the scope of this section, and a Magistrate acting under this section is protected, as held by the Privy Council, by Act XVIII of 1850 (Protection of Judicial Officers). When the legislature empowers an officer to delegate an authority to do a certain act to another person it necessarily implies that the original authority to do the act fully and completely vests in the officer himself, but it is necessary for the exigencies of business that it should be done by persons acting under authority derived from him. This principle is adopted by the Legislature in S. 65 and this section, 31 B.438 at 445.

PART IV.

PREVENTION OF OFFENCES.

This Part is headed "Prevention of Offences" and does not provide punishment of offences already committed. It deals with steps to be taken to prevent offences in the future, 26 A.L.J. 813.

CHAPTER VIII.

OF SECURITY FOR KEEPING THE PEACE AND FOR GOOD BEHAVIOUR.

Scope and object of the chapter.—This chapter deals with preventive measures which are generally resorted to, to prevent a breach of the peace and to ensure good behaviour from bad characters. The object of the chapter is not the punishment of offences but the prevention of crime and it is clear that when there was no risk of crime being committed in any particular district by persons who were brought in custody from different places with a view to an enquiry in that district into offences alleged to have been committed by them in that district, it was never contemplated, that the Police should be at liberty to ask the Magistrate to exercise his preventive jurisdiction on failure to prove the specific offences charged, the persons being then within the Magistrate's jurisdiction. Much less can it be supposed that for the purpose of preventing the prisoners from being returned but detained in the lock-up pending enquiry for a lengthened period, the police could ask the Magistrate to institute proceedings on the same evidence which would afterwards be used to prove the specific offences charged with a view to their being required to furnish security and imprisoned on their failure to do so, 1885 P R. Cr. J. 43. The person proceeded against is required to enter into his own recognizance with or without sureties or with both. Security to keep the peace can be demanded (1) from a person actually convicted of an offence involving a breach of the peace, (2) or from a person likely to commit a breach of the peace. Security for good behaviour can be demanded (1) from a person disseminating seditious matter, (2) from vagrants and suspects, (3) from habitual offenders. The provisions are aimed at prevention not as a punishment for past offences. The person proceeded against is required to execute a bond with or without sureties for a definite period and so long as he keeps the peace or remains of good behaviour for the periods specified in the bond, he is safe from all molestation on the part of the authorities. If he fails to execute the bond, he renders himself liable to be imprisoned for his default but the moment he executes the bond, he is released from

jail. The object of the chapter is therefore not to consign bad characters to jail but to prevent them from committing offences and to allay public apprehension, 16 Cr. L.J. 100—27 Ind. Cas. 148. Proceedings under this chapter are inquiries and not trials. All through the chapter the expression used is "inquiries." See S. 117 (2), *infra*. The expression "accused" is not defined in the Code. It is to be noted that nowhere in this chapter is a person called on to give security referred to as an accused person. In chapters dealing with trials and inquiries preliminary to commitment for trial the word "accused" is always used to denote the person proceeded against. *Prima facie*, then a person proceeded against under this chapter would not appear to be an accused person as used in the Code. In 23 C. 493 and 16 B. 661, the word "accused" was held to mean persons over whom a Magistrate or Court was exercising jurisdiction. This interpretation would lead to startling results. A witness compelled by a summons or warrant to appear in Court and give evidence, is clearly a person over whom the Court is exercising jurisdiction, and so a witness would be an accused person and no oath could be administered to him. The learned Judges in those cases were considering S. 340 *infra* and they decided nothing more. A person called on to give security cannot be said to be a person accused of an offence as defined in S. 4 (1) (c), *supra*. There exist grave doubts whether a person proceeded against under this chapter is an accused, 50 C. 485 at 487-90. See also S. 340 (2) *infra* which enacts that any person against whom proceedings are instituted under S. 107 may be examined as a witness, and this will show that the person proceeded against is not an accused person as understood in other portions of the Code. Imprisonment for failure to furnish security to keep the peace is to be simple whereas in good behaviour cases falling under S. 108 be simple but in cases falling under S. 109 or S. 110 *infra* it shall be rigorous or simple according as the Court in each case directs.

A.—Security for keeping the Peace on Conviction.

106. (1) Whenever any person accused of any offence punishable under Chapter VIII of the Indian Penal Code, other than an offence punishable under section 143, section 149, section 153A or section 154 thereof, or of assault or other offence involving a breach of the peace, or of abetting the same, or any person accused of committing criminal intimidation, is convicted of such offence before a High Court, a Court of Session or the Court of a Presidency Magistrate, a District Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class,

and such Court is of opinion that it is necessary to require such person to execute a bond for keeping the peace,

such Court may, at the time of passing sentence on such person, order him to execute a bond for a sum proportionate to his means, with or without sureties, for keeping the peace during such period, not exceeding three years, as it thinks fit to fix.

(2) If the conviction is set aside on appeal or otherwise, the bond so executed shall become void.

(3) An order under this section may also be made by an Appellate Court including a Court hearing appeals under section 407 or by the High Court when exercising its powers of revision.

Amendment—In sub-section (1) for the word '*rioting*' the words '*any offence punishable under Chap. VIII of the I.P.C. other than S. 143, S. 144, S. 153A or S. 154, thereof*' have been substituted thus enlarging the scope of the section and words in sub-section (1) "*or assembling armed men or taking other unlawful measures with the evident intent of committing the same*" have been omitted. In sub-section (3) "*after Appellate Court*" the words '*including a Court hearing appeals under S. 407*' have been added.

Difference between the procedure under S. 106 and S. 107.—The foundation of an order under this section is the *conviction* and that under S. 107 is *information*. Both these sections aim at prevention of a breach of the peace. Under S. 106 the order can be passed on conviction for any of the offences specified in that section but under S. 107 proceedings must be taken, summons in the first instance being issued and evidence recorded as in summons cases (S. 117) to prove that the taking of the bond with or without sureties from accused person for preserving the peace is necessary. Again under S. 106 the Magistrate has already adjudicated on the evidence at the trial in the presence of the accused and facts are found for requiring security for keeping the peace from the accused but under S. 107 the Magistrate proceeds on information the value of which is to be tested in the presence of the accused who must have an opportunity of showing that it is not reliable. He should not form his opinion extrajudicially, 3 C.L.R. 72; 22 W.R. (Cr) 79.

Scope of the section.—This section applies when the offence amounts to or constitutes a breach of the peace, in other words when a breach of the peace is a component part or ingredient of the offence. The very fact that a man commits rioting or assaults constitutes a disorder a disturbance of the king's peace, general peace of the realm. The words "breach of the peace" are the antithesis of the other set of words also occurring in the section "keeping the peace" which connote preservation of the public peace and are direct opposites of the words "breaking the peace." The question in each case is, does the offence brought home to the accused necessarily include or imply a breach of the peace or does it constitute or amount to a breach of the peace. If it does the section applies, 47 M. 846 at 843. The Magistrate is given a wide discretion to proceed under this section but to justify an order, he must find it in clear and explicit terms that in committing the offence the accused also actually committed a breach of the peace or criminally intimidated the complainant or that he committed the offence for which he was convicted in such circumstances that he evidently intended to do so, 43 C. 671; 35 C. 315; 30 C. 13; 33 A. 771; 42 A. 345; 43 B. 554; Weir II, 47; 23 A.L.J. 1053=26 Cr.L.J. 1457=89 Ind.Cas. 1025. Persons against whom proceedings are started under this chapter are accused persons and have a right to be defended by a pleader and notices of the date of hearing should be given to them, 25 A. 376. But they are not accused of an offence and hence an order refusing bail to persons required to execute bonds for keeping the peace under this section is illegal, 7 M.L.T. 104 where 30 A. 334 is referred to. To act under this section without notice to parties concerned is incorrect procedure on general principles, 27 Cr. L.J. 1112=97 Ind. Cas. 424. Action under this section is uncalled for when the accused is convicted and sentenced to a long term of imprisonment say, for seven years, 10 Cr. L.J. 69 (F.B.) at 72=2 Ind. Cas. 531.

Any accused person.—These words are wide enough to include European British subjects also. See 35 C. 163.

Other offences involving a breach of the peace.—The expression "other offences" refers to offences *ajusdem generis* with the offences against public tranquillity and of assaults, etc., mentioned in this section, 47 M. 846; 23 A.L.J. 1053; 49 A. 131; 24 Cr. L.J. 271=71 Ind. Cas. 879. The words "breach of the peace" imply some offence against the public, 24 Cr. L.J. 461=72 Ind. Cas. 895. A superior Magistrate to whom a case is referred by a subordinate Magistrate being of opinion that an order under this section is necessary cannot merely pass an order under this section and send back the case for trial to a subordinate Magistrate, 24 Cr. L.J. 784=74 Ind. Cas. 443. No order can be passed under this section as amended, where an accused is only convicted of an offence under the Indian Penal Code read with S. 149, I.P.C. The amendment is not very happily worded for it speaks of an

offence punishable under S. 149. No offence is punishable under S. 149 alone. There must be some substantive offence charged to be read with S. 149. So an order demanding security where a person was convicted under S. 325 read with S. 149, I.P.C., was set aside by the Patna High Court, 26 Cr. L.J. 426=85 Ind. Cas. 42; see 28 Cr. L.J. 144=99 Ind. Cas. 352 dissenting from, 24 Cr. L.J. 227=71 Ind. Cas. 691; where it was held that the expression clearly included the offence of causing hurt under S. 323, I.P.C., and a person convicted of causing hurt can be ordered to find security under this section, see also 49 A. 131. The words offences involving a breach of the peace in this section must be construed to mean offences into which a breach of the peace necessarily enters as a constituting element, 19 M.L.J. 66. The words "involve a breach of the peace" must receive their ordinary and natural meaning. A thing is involved in another when it is necessarily included or implied in it, 47 M. 846. The word "involve" connotes the inclusion not only of a necessary, but also a probable feature, circumstances antecedent, condition or consequence, 25 Cr. L.J. 71=75 Ind. Cas.=83. The words would probably be taken in their ordinary meaning to indicate an offence in which there had actually been and not in which there was, mere likelihood of there being a breach of the peace. The words "breach of the peace" have been given a wider interpretation, including even creating disturbance or excitement and falling far short of riot, 22 Bom. L.R. 166 at 182; 46 A. 105; 23 A.L.J. 1053; 44 M.L.J. 485=17 L.W. 499=(1923) M.W.N. 314=24 Cr. L.J. 455=72 Ind. Cas. 615; 24 Cr. L.J. 227=71 Ind. Cas. 691; 24 Cr. L.J. 319=72 Ind. Cas. 79. An offence merely provoking or likely to lead to a breach of the peace is not within this section. The offence must be one in which breach of the peace is a necessary ingredient, 26 M. 469, 47 M. 846; 30 C. 366; 43 C. 671; 29 C. 393; 35 C. 315; 29 M. 190; 2 Lah. 279; 27 Cr. L.J. 571=94 Ind. Cas. 139; 4 M.L.T. 468; 20 Cr. L.J. 543=51 Ind. Cas. 783 but the Allahabad High Court in 33 A. 771 dissented from the above view and held that where the offence is such, that it was as a matter of experience often followed by breaches of the peace, an order under this section was proper. A person who interferes with another's premises and uses violence to him and deprives him of his property commits a breach of the peace in the wider sense of the expression, 21 Cr. L.J. 288=55 Ind. Cas. 304; 43 B. 554. In 42 A. 345, it was held that a conviction for criminal trespass where the intent was to commit a breach of the peace, an order under this section may lawfully be passed. See also 20 W.R. (Cr.) 37, 7 W.R. (Cr.) 14, 7 C.W.N. 25. Criminal trespass into a man's house for causing bodily injury to him is an offence involving a breach of the peace and when a conviction is had for such an offence an order under this section is valid, 26 Cr. L.J. 1452=89 Ind. Cas. 1039, but where no such intention was found the trespass being with the object of having illicit intercourse with the complainant's wife, an order under this section was not legal, 23 C. 628; on a conviction for theft, unless it was found, that force was employed, or armed men were present, an order under this section cannot be made, 29 C. 393; 8 C.W.N. 517; wrongful confinement *per se* is not an offence involving a breach of the peace, *e.g.*, locking up a room outside when a man is inside the room thus making ingress impossible. But if the accused in using violence seizes another and ties his hands the offence does involve a breach of the peace, 47 M. 846 where 30 M.L.T. 348 is not followed. See also 24 Cr. L.J. 271=71 Ind. Cas. 879; 4 M.L.T. 468; 29 M. 120; 7 W.R. (Cr.) 14; 20 W.R. (Cr.) 37; 7 C.W.N. 25. The expression is so illusive that it must of necessity attract different interpretations. The words cover two classes of cases—(1) where a breach of the peace actually occurs, (2) where the definition of the offence involves a breach of the peace, *e.g.*, S. 504, I.P.C., 21 Bom. L.R. 270, 20 Cr. L.J. 543, 22 Bom. L.R. 166 at 178; 46 A. 105.

Is convicted of such offence.—A conviction is absolutely necessary before an order for security is passed. The conviction may be in a summary trial, 8 C.W.N. 517; 11 Cr. L.J. 630=8 Ind. Cas. 551. No order for security can be made where the accused is acquitted or discharged, 3 C.L.R. 72. A superior Magistrate to whom a case is sent to pass an order under this section cannot merely pass an order without convicting the accused but send back the case for trial to the subordinate Magistrate, 24 Cr. L.J. 734=74 Ind. Cas. 443. Under this section it is the offence for which a person is convicted and not the facts as put in evidence at the trial which determines whether security can be demanded or not, Weir 11, 43. There must be an express finding to the effect that the act attributed to the

person was likely to cause a breach of the peace, or the evidence must be so clear as to satisfy the Court without an express finding that such was the case, 26 C. 576; 27 C. 283; 30 C. 93 and 366; 29 M. 190; 26 M. 469; 25 Cr. L.J. 1064=81 Ind. Cas. 893. Where at an election the accused and his companions beat a person who refused to vote for the accused and the Magistrate when convicting the accused for assault remarked that the accused appeared to be a very troublesome person and took security from him it was held that the order demanding security was legal although it was contended that there was no finding that there was an apprehension of a breach of the peace, 46 A. 105. To support an order under this section the Court must record as a condition precedent its grounds for demanding security. The mere fact that the accused is convicted of an offence involving a breach of the peace is not alone sufficient, 27 Cr. L.J. 1112=97 Ind. Cas. 424=1927 Pat. 37.

Sub-divisional Magistrate.—A Sub-divisional Magistrate may be a Magistrate of the second class in charge of a sub-division. See S. 13, *supra*. A Sub-divisional Magistrate of the second class has jurisdiction to pass an order under this section calling upon an accused to furnish security for a period exceeding six months independent of the powers of the Magistrate as provided in S. 32, *supra*, 5 Cr. L. Rev. 153=13 A.L.J. 268.

A Magistrate of the first class—A Bench of Magistrates of which one is a Magistrate of the first class can exercise powers under this section, 21 W.R. (Cr.) 12; 2 C.L.R. 348 at 349

Such Court may order.—Demanding security for keeping the peace is discretionary with the Magistrate provided he has materials upon which to proceed, 23 W.R. (Cr.) 58. It is necessary before an order can be made under this section that the party should have the opportunity of answering to an accusation of an offence of the kind upon a conviction for which such an order can be made. Where that requirement is not complied with, the order under this section cannot stand and must be set aside, 25 C. 828 at 630, 27 Cr. L.J. 1112=97 Ind. Cas. 424=1927 Pat. 37. When such opportunity is given, the accused may be able to show sufficient cause why he should not be bound over although he was unable to make a good defence against the charge. But the section is silent on this matter and it is desirable that there should be a provision for an opportunity to show cause similar to the provision in S. 250 *infra*.

Such Court when passing sentence order to execute bond.—An order for taking security under this section must be passed at the time of deciding the original case in the presence of the accused and no notice to show cause why such an order should not be passed is necessary, 21 A.L.J. 839=25 Cr. L.J. 565=81 Ind. Cas. 613. If no such order is then made, subsequent proceedings should be under S. 107, *infra*, after giving the person an opportunity to show cause, 15 W.R. (Cr.) 56; 21 A.L.J. 839=25 Cr. L.J. 565=81 Ind. Cas. 613. The order for security must be passed in the presence of the accused, and any order passed during his absence is illegal, 3 B.H.C.R. (Cr. Ca.) 1. S. 513 *infra* provides that in lieu of executing a bond, money or Government Promissory-note may be deposited, but in cases where security for good behaviour is demanded, the section expressly says that such deposit shall not be made.

When conviction is set aside the bond shall become void.—When the conviction is annulled on appeal or otherwise, the order directing the person to find security abates *ipso facto*, and it is not competent for the Appellate Court to order the security to be continued, 1895 A.W.N. 14; 31 C. 101; 7 N.W.P.H.C.R. 375.

For a sum proportionate to his means.—In fixing the amount of security the Magistrate should consider the station in life of the person concerned and should not go beyond the sum for which there is a fair probability of his being able to find security. The individual should be afforded a fair chance at least of complying with the required condition of security, 4 M.H.C.R. (Appx.) 46; 2 C. 384; 16 B. 372; 23 A. 80. The Magistrate should look to the means of the person called upon to furnish security, not to the means of his master, 22 W.R. (Cr.) 74. A demand for unreasonably heavy security may result in a heavy pecuniary fine in a case of mere suspicion and reputation as the accused might have to pay heavy sums to obtain security, 6 C. 14; 16 B. 372.

Order may be made by Appellate Court including a Court hearing Appeals under S. 407.—The words 'Appellate Court' include Appellate Court other than the High Court, 2 Cr. L.J. 150. The words "including a Court hearing appeals under S. 407" are new. It has been held that an Appellate Court cannot pass an order under this section unless the person convicted has been sentenced by a Court not inferior to that of Magistrate of the first class, see 23 Cr. L.J. 457=67 Ind. Cas. 729. "This result does not appear to have been intended, and it is proposed to remove the restriction"—*St. of Obj. and Reas.*, 35 C. 434; 29 M. 150; 30 M. 43; 24 Cr. L.J. 308=72 Ind. Cas. 68, are no longer law. The amendment is in accordance with the decisions in 33 B. 33; 37 M. 153 (F.B.) and 33 A. 48; 2 Pat. L.J. 21=(1917) Pat. 57. See also 27 Cr. L.J. 1112=97 Ind. Cas. 424 following 2 P.L.R. 21. The power of the Appellate Court is not limited by the fact that the trial Court should have power to take security, 25 Cr. L.J. 657=81 Ind. Cas. 145. The power can be exercised by the Appellate Court even though the actual order was not made when confirming in appeal the sentence already passed by the Magistrate. There is nothing in the section to limit the time when the order can be made by the Appellate Court, so long as it is acting in fact as an Appellate Court, 30 Bom. L.R. 373=29 Cr. L.J. 502=109 Ind. Cas. 230 following 33 B. 33. But when the District Magistrate did not try a case as a Court of appeal, he had no jurisdiction to demand security, 16 A.L.J. 538. The exercise by the Appellate Court of the power under sub-section (3) of this section requiring the appellant to find security to keep the peace after the expiry of the sentence will not amount to an enhancement of the sentence, 2 Cr. L.J. 190; 20 Cr. L.J. 760, and by virtue of S. 423, cl. (1) (d) an Appellate Court has power to set aside an order for security under this section even while upholding the conviction, 30 C. 101; but to enable the Appellate Court to do so, the substantive sentence must be appealable without taking into account the order under this section or S. 415, *infra*. In the absence of a finding that any breach of the peace had occurred, an Appellate Court has no power to direct the accused to enter into a bond under this section, 30 M.L.T. 348. But this view is not followed in 47 M. 846. In an appeal from a conviction under Ss. 147 and 325, I.P.O., the sentences being ordered to run consecutively the Appellate Court while ordering the sentence to run concurrently passed an order binding the accused to keep the peace for 8 years, it was held that such an order was valid under this section, 20 Cr. L.J. 302=50 Ind. Cas. 350.

Appeal.—No appeal lies from an order demanding security under this section; when the conviction is set aside the bond shall become void, see sub-section (2). Even when a conviction is confirmed on appeal, the order under this section may be set aside by the Appellate Court, 30 C. 101; See also 10 Cr. L.J. 69 (F.B.) at 72=2 Ind. Cas. 531.

For form of bond see Sch. V, No. 10 *infra*. No Court-fee is payable on security bonds under this chapter. If any Magistrate not being empowered by law demands security to keep the peace, his proceedings shall be void, S. 530, cl. (c), *infra*.

An order under this section may be made on conviction in a summary trial, 1880 A.W.N. 181, and a Bench of Magistrates invested with first class powers under S. 15, *supra* is competent to make an order under this section, 21 W.R. (Cr.) 12; 2 C.L.R. 348 at 349. The contention that in a summary trial and conviction Court has no power to award under S. 123 *infra* more than three months' imprisonment in default, and so the Court cannot act under this section in a summary trial was not accepted in 53 M.L.J. 762=1927 M.W.N. 788=39 M.L.T. 658. An order demanding security under this section is uncalled for when a sentence of imprisonment or transportation for so long a term as seven years is passed when convicting the accused, 10 Cr. L.J. 69 (F.B.) at 72=2 Ind. Cas. 531.

B.—Security for keeping the Peace in other Cases and Security for Good Behaviour.

107. (1) Whenever a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class is informed that any person is likely to commit a breach of the peace or disturb the public

Security for keeping the peace in other cases,

tranquillity, or to do any wrongful act that may probably occasion a breach of the peace, or disturb the public tranquillity, the Magistrate *if in his opinion there is sufficient ground for proceeding*, may in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for keeping the peace for such period not exceeding one year as the Magistrate thinks fit to fix.

(2) Proceedings shall not be taken under this section unless either the person informed against or the place where the breach of the peace or disturbance is apprehended is within the local limits of such Magistrate's jurisdiction, and no proceedings shall be taken before any Magistrate, other than a Chief Presidency or District Magistrate, unless both the person informed against, and the place where the breach of the peace or disturbance is apprehended, are within the local limits of the Magistrate's jurisdiction.

(3) When any Magistrate not empowered to proceed under sub-section (1) has reason to believe that any person is likely to commit a breach of the peace or disturb the public tranquillity or to do any wrongful act that may probably occasion a breach of the peace or disturb the public tranquillity, and that such breach of the peace or disturbance cannot be prevented otherwise than by detaining such person in custody, such Magistrate may, after recording his reasons, issue a warrant for his arrest (if he is not already in custody or before the Court), and may send him before a Magistrate empowered to deal with the case, together with a copy of his reasons.

(4) A Magistrate before whom a person is sent under sub-section (3) may in his discretion detain such person in custody *pending further action by himself under this chapter*.

Amendment.—The words until the completion of the inquiry herein prescribed have been omitted in sub section (4) as it was thought that the powers conferred by the sub-section as it stood was unnecessarily wide. The Magistrates are now given power to detain the accused in custody pending further action by him under this chapter.

Scope and object of the section—Proceedings under this section are intended to be precautionary and not punitive. The object of the section is not to punish persons for anything they have done in the past but to prevent them from doing in future something that may probably occasion a breach of the peace, 9 C.W.N. 898 at 908, 31 C. 359; 35 C. 674; 26 A. L. J. 813, 36 M. 315. Thus the object of the order for furnishing security is the prevention of crime and not to secure imprisonment of the person concerned, 22 Bom. L. R. 190, 16 Bom. L. R. 138; 1 C. L. J. 616; 3 C. L. R. 72, 23 Cr. L. J. 1226—82 Ind. Cas. 154. A petition under this section contemplates merely an apprehension that an offence is likely to be committed and not the commission of an offence and the power to refer the matter to the police under S. 161 may not apply as Chap. XIV of the Code relates to information as to the commission of a cognizable offence. It is possible to argue that the words "any offence relating to the

dropped, such proceedings not being a case where a person is accused of an offence 1903, P.L.R. (Cr.J) 9 at page 32; 28 Cr.L.J. 604-102 Ind. Cas. 780 where 45 A. 363 is followed.

Whenever a Magistrate is informed.—The report of a Sub-Magistrate is sufficient "information" to authorize the Magistrate to act under this section. 8 114 proviso also shows that the report of a police-officer is information on which a Magistrate could act upon, 2 M.H.C.R. 240 at 242. Credible information is necessary to take action, 12 A.L.J. 336. It is not necessary to call witnesses in support of an information laid before a Magistrate previous to issuing summons to show cause under this section, 11 W.R. (Cr.) 6. A statement by complainant believed by the Magistrate that he expected the person informed against at any time to make an attempt on his person or property is sufficient information; 7 W.R. (Cr.) 30; 17 C.W.N. 238, but there must be something more than a bare possibility, a reasonable likelihood of a breach of the peace taking place, 20 W.R. (Cr.) 57. Information must be clear and definite directly affecting the person to be proceeded against, and should disclose tangible facts and details so as to afford notice to such person what he is to come prepared to meet, 6 A. 26 (F.B.); the nature of the information on which the Magistrate acts must appear on the face of the preliminary order, 6 W.R. (Cr.) 13. Facts and information which formed the subject of a previous enquiry and in which the accused were discharged cannot be relied on for initiating proceedings. There must be fresh materials available on which it can be said that a fresh apprehension of a breach of the peace is likely. The same facts cannot form the basis of repeated proceedings under the Penal Code or under this Code, 41 M. 246. A Subordinate Magistrate should not draw up proceedings merely because the District Magistrate has ordered him to do so. He must use his discretion and if he thinks that it is necessary to do so to prevent a breach of the peace he is entitled to draw up proceedings. If a District Magistrate apprehended a breach of the peace, it is his duty to draw up proceedings and then transfer the case for inquiry to a Subordinate Magistrate, 24 Cr. L.J. 367=72 Ind. Cas. 357.

Is likely to commit a breach of the peace—It is clear that there are two distinct sets of circumstances in which a Magistrate may take action (a) where it appears that a person is

anticipated is a wrongful act. It has been laid down by the various High Courts that the section does not authorize action against a person who is expected to do an act which may cause a breach of the peace unless the act is wrongful and the mere fact that the doing of a lawful act may lead to a breach of the peace while it may authorize the Magistrate to take action against persons expected to commit that breach, does not authorize action against those intending to do the lawful act, unless they themselves are likely to commit a breach of the peace, 18 Cr.L.J. 512 at 514-39 Ind. Cas. 480 where 12 C.W.N. 703=7 Cr. L.J. 504; 32 A. 571; 6 M. 203 are referred to. This section presupposes that the person sought to be proceeded against is likely (not was likely) to commit a breach of the peace, and it cannot be presumed from the fact that the person has done a wrongful act in the past he is likely to do the same again, 6 Bom L.R. 663, 26 A. 150 at 153; 28 Cr.L.J. 719=103 Ind. Cas. 607. Again, a hasty speech likely to cause a breach of the peace does not justify an order under this section against the speaker when all fear of a breach of the peace ceases before the order is made, 7 Cr. L.J. 232. Security cannot be demanded in anticipation of a breach of the peace, 3 C.L.R. 280, 7 A.L.J. 1161, 32 A. 571, 38 A. 468; 37 A. 33, 14 A.L.J. 769; the act of which information is given to a Magistrate and in respect of which security is required must be an act which is shown to be in contemplation at the time when information is given and not merely a repetition which may be expected or apprehended from some misconduct of the kind without anything further, Weir II, 49; 24 Cr. L.J. 230=71 Ind. Cas. 694. See 26 A. 180. Where it was held that on order binding over certain persons with a view to prevent the possibility of their creating a disturbance at the next recurrence of an annually recurring festival was held to be bad. See also 6 Bom. L.R. 663; 8 A.L.J. 1080. Nor can an

order be passed under this section merely on the ground that there was enmity between two parties, 1 A.L.J. 418=29 Cr. L.J. 417=108 Ind. Cas. 517. The fact that the accused is found to be quarrelsome and fights and quarrels with everybody is not sufficient indication of a breach of the peace. Nor can arranging defence of property with the help of the police be held to be an act likely to cause a breach of the peace, 18 A.L.J. 157. Where there is no evidence of the persons proceeded against having committed any overt act, the mere expression of opinion by some persons that there is an apprehension of the breach of the peace and the parties should be bound over is insufficient to sustain an order under this section, 27 Cr. L.J. 1002=96 Ind. Cas. 7859 following 32 A 571. A mere bombast will not justify an order under this section, 9 M.L.T. 271=12 Cr. L.J. 104. A Magistrate must keep out knowledge obtained outside record, and base his decision entirely on the evidence in the case and must also find that the persons proceeded against are likely to commit a breach of the peace, 12 A.L.J. 1246. Evidence as to acts committed in the past may be brought forward to show that while the conditions remain unchanged similar acts may be committed in the future, 1 C.L.J. 616.

To do any wrongful Act.—The expression "wrongful act" was inserted in the 1892 Code. It is now expressly declared that the act which may probably occasion a breach of the peace must be some *wrongful act*. The expression means an act forbidden by the penal statutes of India or declared to be penal and wrongful by such statutes, 21 Cr. L.J. 433=56 Ind. Cas. 437. When a party exercising its right in a lawful manner the opposite party is provoked to commit a breach of the peace the party exercising lawful rights cannot be said to be doing a wrongful act liable to be bound over under this section, 8 Lah. 98; 7 Lah. 782; 23 Cr. L.J. 603=102 Ind. Cas. 781; 27 Cr. L.J. 1002=96 Ind. Cas. 858; 21 Cr. L.J. 651=57 Ind. Cas. 667; 12 C.W.N. 703=7 Cr. L.J. 504; 18 Cr. L.J. 512=39 Ind. Cas. 480; 14 M.L.J. 431. Persons combining together to prevent the *Desai* from recovering his rents and retaining possession of lands which the tenants have given up is not a wrongful act within this section; as also raising subscriptions to petition Government and advising standing security for tenants, 6 Bom. L.R. 663. From the mere fact that the persons proceeded against, viz., tenants were boycotting the servants of the Zemindar it cannot be held that the tenants have done any act likely to cause a breach of the peace necessitating the demanding of security under this section, 14 Cr. L.J. 238=99 Ind. Cas. 334. There can be no question that the right of public discussion is a right which every subject possesses and that in convening a meeting to discuss religious matters, the persons convening such meeting cannot be held to be doing a wrongful act, 18 Cr. L.J. 512 at 514=39 Ind. Cas. 480. The action of a party insisting upon their rights to take a procession along a certain road which was objected by a rival party cannot be said to be a wrongful act within this section, 12 C.W.N. 703=7 Cr. L.J. 504. The mere fact that a person from whom security is demanded has been previously convicted of offences against property will not justify proceedings being taken under this section. There must be evidence that he has done some wrongful act indicating an intention to lapse to his former course of life, 10 B. 174; 12 C. 520. Lawful acts done in a lawful manner cannot be the basis of proceedings under this section even when they are likely to induce others to commit a breach of the peace. Cow-killing by a Mahomedan is not illegal. But it may induce Hindus to break the peace; unless any such act amounts to a public nuisance or is obnoxious to the rules and regulations lawfully promulgated, this section cannot apply, 30 A. 181. Thus when a person who is rightfully entitled to land, wrongfully kept out of possession granted leases of it and the lessees tried to take possession peacefully and not accompanied by force or violence, it does not itself justify an order under this section, 25 C. 793, 7 Cr. L.J. 504; 16 A.L.J. 279, similarly when the accused used his influence to boycott complainant, 7 C.W.N. 32; 3 C.W.N. 463 or when an accused after joining the congregation service in a mosque not set apart for any particular section, in the *bona fide* performance of his devotion calls 'Amen' in a loud tone so as to lead other worshippers to break the peace, 13 A. 419 (F.B.); 9 A 432; 7 A 461 (F.B.); 12 A. 491 (F.B.). But where persons performing a religious ceremony on lands in their occupation but not set apart for that purpose with the deliberate intention of triumphing over, insulting and wounding the religious feelings of their neighbours they were held to have

committed wrongful acts within this section, 33 A. 775. The blowing of a conch in a public place for one's personal amusement, or with any other lawful and innocent motive and without any intention of thereby annoying or hurting the religious feelings of any other persons is not a wrongful act within this section. The blowing of a conch in connection with ceremonial acts of worship, in accordance with established usage in a place fixed for the occasional or periodical performance of such ceremonies or worship, will not as a rule be wrongful act, even though there may be persons within hearing of the sound who find their religious feelings hurt in consequence, 33 A. 775 at 777. A person who asserts a claim and makes preparations for the enforcement of that claim through a servant who goes continuously armed though he keeps himself in the back ground does a wrongful act, 18 Cr. L.J. 374=38 Ind. Cas. 738=1 Pat. L.J. 361. So also a person by doing a wrongful act induces another to do things probably occasioning a breach of the peace will be equally liable to be dealt with under this section, 32 C.W.N. 477 at 490=47 C.L.J. 444 at 447=29 Cr. L.J. 844=111 Ind. Cas. 356. A wrongful act means a definite wrongful act which may occasion a breach of peace. An act however wrongful would not justify action unless it is shown that if it is committed it would in all reasonable probability lead to a disturbance, 7 C.W.N. 32; 6 Bom. L.R. 262; 9 A. 452. The following are some instances of wrongful acts within this section, (1) Building a side-wall upon one's own land, the droppings from the roof of the building when completed, will likely fall on the thatch of the neighbour's house, 19 W.R. (Cr.) 47, (2) Granting lease to tenants of land not in one's possession, 25 C. 728, (3) Using one's influence to stop the service of village barber, washerman, and others to another villager, 7 C.W.N. 32, (4) Uttering 'Amen' in a loud voice during service in a mosque, 7 A. 461 (F.B.) 1902 P.R. (Cr.) 15, (5) Singing ballads in the public street, 1889 P.R. (Cr.) 15, See 34 C. 935 and 12 C.W.N. 703 where it was held that the provisions of this section should not be used to curtail private right of property and the party exercising a legal right should always be protected. See also 1881 A.W.N. 57; 3 C.W.N. 463. A person bound over is entitled to have his right enforced through a Civil Court, 1 Lah. 310. Where there is a dispute about land likely to cause a breach of the peace before the Civil Court passes a decision, action can be taken under this section in a proper case to prevent public danger, 28 Bom. L.R. 488=27 Cr. L.J. 734=95 Ind. Cas. 62.

In manner hereinafter provided.—It has been held times without number that the Magistrate should hold an independent inquiry and should not act on the mere readiness of the accused person to furnish security, 24 A.L.J. 317=27 Cr. L.J. 370=92 Ind. Cas. 882, where 37 A. 30; 54 Ind. Cas. 411 and 784 are *followed*. He must first make an order under S. 112 *infra* and call upon the person to show cause and if the order calling upon accused is vague, the proceedings are illegal, 41 M. 246; 25 Cr. L.J. 89, 47 M.L.J. 689=(1925) M.W.N. 57=26 Cr. L.J. 673=86 Ind. Cas. 49. The power to take action under this section is discretionary and there is no compulsion on the part of the Magistrate to proceed under this section.

Magistrate to proceed under this section, 2 M.H.C.R. 240; 31 C. 350, but if unsupported by other evidence it cannot form the proper basis for a final order under S. 118, *infra*, 6 B.H.C.R. (C-1) 1-5 B.H.C.P. (C-1) 45. A notice issued with reference to S. 112 (1) is not valid.

In this section rendering the subsequent proceedings null and void, 30 M. 282.

Require such person to show cause.—Notice should be given to the person against whom the order is to be made and should specify the particular conduct on his part which is complained of. When such notice was given and the ground of complaint specified in the notice was found by the Magistrate to be unsustainable, the Magistrate could not pass an order on a different ground, 21 W.R. (Cr.) 6. No person can be bound down under this section without any evidence being recorded as to the likelihood of a breach of the peace taking place even though he may consent to be bound over, 25 C. 674, 34 M. 139; 21 Cr. L.J. 176 and 59; 25 Cr. L.J. 710=81 Ind. Cas. 168; 37 A. 30. The statement of the person in answer

to the notice to show cause why he should not be bound over to the effect that he is not a quarrelsome person but he is willing to furnish the security demanded would not justify an order without recording evidence, 21 Cr. L.J. 656=57 Ind. Cas. 67. See also 21 Cr. L.J. 59=54 Ind. Cas. 411; 26 Cr. L.J. 105=83 Ind. Cas. 669; 18 Cr. L.J. 847=41 Ind. Cas. 671. But where after due inquiry and notice, a free consent amounting to a plea of guilty has been given the Court may act on such consent and pass an order under this section, 46 A. 109. When an accused is called upon to furnish security says in terms that no prosecution evidence may be recorded and he is willing to furnish security it is sufficient proof that he should execute a bond for keeping the peace. When the accused appears in Court and expresses his willingness to enter into a bond and the Magistrate without recording evidence takes his statement in his own words and ordered him to execute bonds the procedure adopted is proper and legal and there was full enquiry as laid down in 8 117 *Infra* 25 A.L.J. 819; *referring* 21 A.L.J. 881; 46 Ind. Cas. 415; 24 A.L.J. 317; 37 A. 30; 35 C 674; 30 M. 330. Looking at the matter independently of the authorities all that is necessary to protect the interest of the members of the public who may be summoned, is to make it clear that the Magistrate must be satisfied that the person summoned understands the proceedings and that he is at liberty to show any cause if he wishes to do so, 50 A. 59 at 602. Courts are bound to give a reasonable interpretation to the language of the section. The language of this section puts upon the Magistrate the duty of making up his mind whether further evidence is necessary or not. It is unreasonable to say that he has a statutory duty to take further evidence if he does not consider it necessary and it is equally unreasonable to hold that he is wrong in considering further evidence unnecessary if he has made the person summoned understand what the enquiry is about and has given him an opportunity to show cause if he wants to do so. When the person proceeded against having the contents of the notice issued under this section, based on the information by the police, which he was at liberty to consider or dispute, on being asked whether he had any objection to execute a bond in accordance with the notice, stated that he had no surety and a bond for a reduced amount may be accepted from him, it was held that the procedure adopted in taking security from him without recording evidence was quite proper and reasonable and no objection statutory or in commonsense can seriously be taken against it, 50 A. 599 at 603 *following* 46 A. 109 and *referring* to 34 M. 139; 21 Cr. L.J. 176=54 Ind. Cas. 784. See 30 M. 330, where it was held that an order made on the statement of the accused's vakil without formal evidence being recorded was bad. See also 12 A.L.J. 124 and 23 Cr. L.J. 175=65 Ind. Cas. 639; 25 Cr. L.J. 750. The expression any person within the local limits means any person within the local limits at the time the Magistrate takes action. To give jurisdiction to a Magistrate it is not necessary that the person should be residing within the local limits. A contrary view would defeat the object of the section, *viz.*, to prevent crime, as it would be impossible to deal with wandering gangs of criminals with no fixed residence or with habitual thieves or with desperate characters of foreign territories who infest British India, 36 M. 96; 14 A.L.J. 1074; 14 Bom. L.R. 889; *contra* 27 C. 393. There is no legal prohibition in trying a number of persons together under this section but it is highly unfair and unjust to proceed against them jointly unless they apparently form a gang; ordinarily the case of each person should be considered separately, 21 A.L.J. 881=23 Cr. L.J. 741=69 Ind. Cas. 620.

Scope of sub-section (2).—This sub-section requires that when proceedings are initiated by the District Magistrate, both the person informed against and the place where breach of the peace is apprehended shall be within the Magistrate's jurisdiction. Where no objection as to jurisdiction was raised before the Magistrate and no prejudice is shown to have been caused the irregularity is cured by S. 531 *infra*, 27 Cr. L.J. 1132=57 Ind. Cas. 652. This sub-section does not authorize a Magistrate to bind over a person not residing within the limits of his district; were it otherwise, a Magistrate in one district may take recognizance from a person in any other part of British India in which this Code is in force and *vice versa*. Moreover a person summoned into one district from another, might be subjected to unnecessary expense and inconvenience in obtaining sureties from the District in which he resides, to say nothing of the cost of witnesses he might wish to bring thence, to show that the information given

to the Magistrate was incorrect or untrue and that he was not liable to be called upon for recognizance, 6 A. 26 (F.B.); 23 B. 32; 14 Bom. L.R. 889; 14 A. 49. The proper course for a Magistrate to pursue, when he believes that some persons resident beyond the limits of his district are likely to commit a breach of the peace within his district, is to cause the information of the fact to be given to the Magistrate within whose district such persons reside and to produce evidence in support of his view in order that proceedings may be taken against them in a Court having jurisdiction, 11 C. 737 but in 23 Cr. L.J. 396, it was held that the Magistrate has jurisdiction if breach of the peace is apprehended within the local limits of his jurisdiction from a person residing outside the local limits but such a power should be exercised very carefully, 12 C. 133. See also 31 C. 350 and 13 C.W.N. 580. If during the temporary residence an accused commits acts likely to cause a breach of the peace, a Magistrate has jurisdiction, 24 C. 344; 31 C. 419.

Exception is made in the case of the Chief Presidency Magistrate and the District Magistrate who could take proceedings against a person outside their jurisdiction investigating a breach of the peace within their jurisdiction. The object of this clause is merely to restrict the initiation of proceedings against persons residing outside a district and not to restrict the power of the District Magistrate to transfer such proceedings to a Subordinate Magistrate after initiation, 31 C. 350; 24 A. 151; 22 C. 858; 27 C.L.J. 314. But even at the direction of a District Magistrate, a Subordinate Magistrate has no jurisdiction to draw up proceedings under this section against one who resides outside the local limits; in such a case the District Magistrate must initiate proceedings, 13 C.W.N. 530. S. 351, *infra*, applies to an inquiry under this section and the person proceeded against is entitled to a *de novo* inquiry on the transfer of the Magistrate, 43 M. 511.

But a District Magistrate has no power to make over the initiation of proceedings in a case under this section to a Magistrate who has no local jurisdiction in the matter and the latter Magistrate acquires no jurisdiction by the transfer to him, and his proceeding will be void. A District Magistrate cannot be said to take cognizance of a case under this section, in which he had not issued notice to the person proceeded against, and he has no power under S. 192, *infra*, to transfer such a case to another Magistrate. A District Magistrate is not entitled to initiate proceedings under this section upon facts and information which have already been subject of inquiry under the section, or in connection with charges under the Penal Code brought against the person proceeded against and have ended in a discharge, 41 M. 246.

Power of Magistrate not empowered under sub-section (1).—The power to proceed under sub-section (3) ought to be used with great caution; unlike sub-section (1) where we find the expression "is informed..." we find here "*has reason to believe.*" See B. 26 I. P. C.

Sub-section (3).—Where a Magistrate is not himself competent to take action under this section but has to forward the case to a Magistrate empowered to act, under this section, he can if there is an immediate likelihood of a breach of the peace send the accused under arrest and the Magistrate to whom the accused is sent may in his discretion keep him under arrest under sub-section (4). See B. 530 (c) which enacts that if a Magistrate not being empowered to demand security to keep the peace his proceedings are void.

Scope of sub-section (4).—See the amendment of the last portion of this sub-section. A Magistrate has now power only to detain in custody pending further action by him under this chapter. In 31 M. 315 (F.B.) it was held that where an accused person is sent before the District Magistrate by any other Magistrate under sub-section (3) so as to bring the case under this sub-section, such District Magistrate's order detaining him in custody was one made without jurisdiction. The sub-section can only be put into operation when a Magistrate is not empowered to act under sub-section (1) is led to believe that a person is likely to cause a breach of the peace, etc., and he cannot by any other means prevent it. Then he has power to arrest and send him to the Magistrate empowered to act under this section, 23 Cr. L.J. 825—74 Ind. Cas. 857 where 31 M. 315 and 32 C. 80 are followed. This sub-section is not controlled by S. 496, *infra*, but it makes an exception to the general rule contained in S. 496, which enacts that bail should be given in all bailable offences, 38 M. 315. The new

proviso to S. 496 makes this clear, See 36 M. 474. Reading this sub-section and sub-section (3) of S. 114 with S. 496 *infra* it is clear that an accused person is entitled to be released on bail for his appearance unless detention in custody pending the inquiry is the only way to prevent immediate breach of the peace. See 1 C.L.R. 130; 6 A. 132; 14 A. 45; 32 C. 80

Appeal and revision.—An appeal is now provided for in cases of security to keep the peace as well as in cases of good behaviour by S. 406, *infra*. Although the person is not convicted of an offence, but only bound over under this section, the Appellate Court, when hearing an appeal under S. 406 *infra*, is competent to order a retrial as the order for retrial in such a case is an incidental order which the Appellate Court is empowered to make under S. 423, *supra*, 48 A. 501. Under S. 125, *infra*, a Chief Presidency Magistrate or a District Magistrate, may for sufficient reasons to be recorded in writing cancel a bond taken under this section by any Magistrate in his district not superior to his Court. *No Letters Patent Appeal* lies under S. 15 of the Letters Patent from an order passed in revision, as the proceedings under this section are proceedings in a "*Criminal trial*" within the meaning of the Letters Patent, 27 M. 510; 28 M.L.J. 307. A proceeding under this section does not terminate in an acquittal or discharge of the accused, 36 M. 315 *following* 33 M. 85 and 27 C. 662. The High Court ordinarily will not interfere in the preliminary stage of the proceedings with the discretion of the Magistrates taking action under the preventive sections such as this section and S. 110, *infra*. But where the materials on which the order is based are clearly insufficient to support it, it will interfere, 38 C.L.J. 193; 17 C.W.N. 238=16 C.L.J. 467; 23 Cr. L.J. 741; 41 M. 246.

Further inquiry.—Under this section if a Magistrate responsible for the peace of his division is not satisfied with the advisability of taking proceedings under this section his discretion is not open to interference by a superior Court, 26 Cr. L.J. 1149=81 Ind. Cas. 973; 24 Cr. L.J. 825=74 Ind. Cas. 857, 11 C.W.N. 121 and 415. Where a Magistrate refuses to take proceedings under this section, a Session Judge has no jurisdiction to set aside the order and direct the Magistrate to draw up proceedings under this section, 25 Cr. L.J. 679=81 Ind. Cas. 167, see also 46 A. 235 where it was held that proceedings under this section are not included within the provisions of S. 436, *infra*, and so cannot be revised by a District Magistrate, and the proper procedure for him is to report the result of his examination of the record to the High Court, see also 2 Ran. 30. The change in the wording of S. 436, *infra*, makes this position quite clear. "Any accused person" has been changed into "any person accused of any offence" and this removes the doubt, if any, which existed before and no further inquiry can now be made. In 33 M. 83 it was held after a full consideration of the various provisions of the Code that a person proceeded against under this section is not an accused person and the order under S. 119, *infra*, is not an order of discharge within the meaning of S. 436, *infra*, see also 27 C. 662, under S. 436 *infra* as amended, a District Magistrate has no jurisdiction to revise an order under S. 119 *supra* discharging a person who was called upon to furnish security. The conflict of authority which existed before 1923 has been removed now and the view expressed in 33 M. 83 has been adopted by the Legislature, 51 A. 408. In 36 A. 382 it was held that a person against whom information has been laid under this section is not a "person accused of any offence" within S. 4 (1) (c), *supra* and no order for compensation under S. 250, *infra*, could be passed against the person who petitioned the Magistrate under this section, but the District Magistrate may examine the record of the proceedings and if he finds that an improper order has been passed he may submit the case to the High Court for the exercise of its revisional power, 35 A. 103 see also 44 A. 691; 46 A. 235. S. 250 does not apply to cases where proceedings under this section are instituted at the instance of private persons and in which the accused are discharged, 20 A.L.J. 624 *following* 7 A.L.J. 743 and 15 A. 365, see also 36 A. 382; 25 B. 43.

108. Whenever a Chief Presidency or District Magistrate, or a Presidency Magistrate, or Magistrate of the first class specially empowered by the Local Government in this behalf, has information that there is within the limits of his jurisdiction any person who,

Security for good
behaviour from persons
disseminating sedi-
tious matter.

within or without such limits, either orally or in writing or in any other manner intentionally disseminates or attempts to disseminate, or in anywise abets the dissemination of—

(a) any seditious matter, that is to say, any matter the publication of which is punishable under section 124A of the Indian Penal Code, or

(b) any matter the publication of which is punishable under section 153A of the Indian Penal Code, or

(c) any matter concerning a Judge which amounts to criminal intimidation or defamation under the Indian Penal Code, such Magistrate *if in his opinion there is sufficient ground for proceeding* may (in manner hereinafter provided) require such person to show cause why he should not be ordered to execute a bond, with or without sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit to fix.

No proceedings shall be taken under this section against the editor, proprietor, printer or publisher of any publication registered under, and *edited and printed and published in conformity with, the rules laid down in the Press and Registration of Books Act, 1867, with reference to any matter contained in such publication* except by the order or under the authority of the Governor General in Council or the Local Government or some officer empowered by the Governor General in Council in this behalf.

Scope of the section—This part is headed prevention of offences. It does not provide for punishment of offences already committed, 26 A.L.J. 813. The object of taking security is prevention and not the punishment of offences, 2 A. 835; 3 M. 238; 35 M. 96 at 97; 10 B. 174; 4 C.W.N. 531; 6 Bom. L.R. 34; 27 C. 781. The object is not to punish a person who is suspected for past unproved offences but to prevent him from committing offences and to afford him an opportunity of reforming himself, 25 Cr. L.J. 1226=82 Ind. Cas. 154. To start proceedings under this section there ought to be evidence that, if not prevented, the person accused would continue to act in the way in which he had done, 26 A.L.J. 813 at 816. The provisions of this Chapter are aimed against those who are a danger to the public by reason of the commission, by them of certain offences against the State. The test under this section is whether the person proceeded against has been disseminating seditious matter and whether there is any fear of a repetition of such an offence. In each case it is a question of fact which must be determined with reference to the antecedents of the person and other surrounding circumstances. A printer must be proved to have had knowledge of the matter but a publisher's knowledge is presumed, 47 B. 438; 11 Bom. L.R. 743; see also 11 C.W.N. 1050; 12 Cr. L.J. 243=10 Ind. Cas. 789. It is not sufficient to show that the language used was highly offensive to a community. It must be shown that the accused intended to provoke feelings of enmity or hatred although it is unnecessary that he should have succeeded in carrying through his intention, 12 Cr. L.J. 243=10 Ind. Cas. 789. Proceedings under this section for the prevention of offences under S. 124A or S. 153A may be taken without any such special sanction required by S. 196, *infra*, except in respect of proceedings against the editor or proprietor of any publication specified in the last para. of this section. 11 Bom. L.R. 743. Where substantive offences are committed, the law does not provide for an easy way of dealing with them under this Chapter by taking security from the offender, 26 A.L.J. 813 at 814.

Orally or in writing or in any other manner.—"It has been found that the matters covered by S. 108 have been disseminated either orally or in writing or by gramophone records, and the amendment meets this contingency."—*St. of Obj. and Reasons.*

Disseminates or attempts to disseminate.—The words are "disseminates or attempts to disseminate" and they do not cover a single act on the part of the person proceeded against in which case the words would have been "has disseminated or has attempted to disseminate". If analogy of other sections of this Chapter were applied to bind a person over under S. 110 *infra* a single theft would be insufficient; so also a single beating given by one person to another would hardly be sufficient to bind him over under S. 107 *supra*, 26 A.L.J. 813 at 814.

Sub-section (b).—To justify an order under this clause one has only to find that there are words in the leaflet or in the matter complained of which are likely to provoke feelings of enmity and hatred, and there is no necessity for finding an intention if one finds such words present unlike a trial for an offence under S. 153A. I.P.C., 43 C 591, but in 54 C. 59 the rule laid down in 43 C 591 was held to be inadmissible, holding that where the legislature has passed upon the matter and drawn the line in its own way, it is not for the criminal courts to abandon the intention—the old statutory test—and put in peril of their process persons of innocent intention.

Sub-section (c).—The criminal intimidation or defamation must be concerning a Judge. The term "Judge" has the meaning assigned to it by the Indian Penal Code. See last para. of S. 4, *supra*; it denotes not only every person who is officially designated as a Judge, but also every person who is empowered by law to give in any legal proceeding civil or criminal a definitive judgment, or who is one of a body of persons empowered by law to give such judgment, S. 19, I.P.C.

With reference to any matter contained in such publication.—This is newly added. "This amendment is merely designed to make the intention of the Legislature clearer as regards the proceedings which require sanction prior to their institution"—*St. of Objects and Reasons.* The mere fact that this section is applicable to a particular case will not necessarily make S. 110, *infra*, inapplicable, 23 C.W.N. 193.

May require such person to show cause.—When a person is called upon to show cause why he should not be required to give security for good behaviour he must be ready with his evidence when he appears in obedience to the notice. This is the meaning of the expression "to show cause" in law. If he has been unable to bring the evidence with him on account of the shortness of the notice or other reasonable cause, it is his duty when he appears, to apply at once for summonses to the witnesses he proposes to call, 9 Bom. L.R. 1385 to 1386-87; 6 A. 214; 23 W.R. (Cr.) 9. The procedure applicable to cases under this section is that prescribed for warrant-cases except that a charge need not be framed, and this is clear from S. 117 (2). The prosecution has to establish the truth of the information and the person against whom an order requiring security for good behaviour is sought, is entitled to take the position that the prosecution should prove affirmatively the authorship of the pamphlet, 47 B 438 at 443.

Security for good
behaviour from vag-
rants and suspected
persons.

109. Whenever a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class receives information—

(a) that any person is taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction, and that there is reason to believe that such person is taking such precautions with a view to committing any offence, or

(b) that there is within such limits a person who has no ostensible means of subsistence, or who cannot give a satisfactory account of himself,

such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding one year, as the Magistrate thinks fit to fix.

Vagrants.—Vagrants or vagabonds are described in old English Statutes as “persons who wake in the night and sleep in the day and haunt customable taverns and ale houses and routs about; and no man knew from whence they came and whither they go”. The phrase rogues and vagabonds is applied to a large class of wandering, disorderly or dissolute persons without the means of honest livelihood.

Scope and object of the section.—This section makes provision for taking security from persons lurking within the local limits of the Magistrate's jurisdiction who have no ostensible means of subsistence or cannot give a satisfactory account of themselves. They need not be suspected of any particular offence. The object is to enable Magistrates to take action against suspicious strangers lurking within their jurisdiction, 39 C. 456 at 462; 53 C. 343. The salutary provisions of this section are often turned into an engine of oppression upon old convicts who are thrown helpless upon the world with none to take them into their company or help them to turn out an honest penny for a living. The fact that a man does not work or has been previously convicted for bad livelihood will not justify a Magistrate without being satisfied from the evidence that since his release he had no ostensible means of livelihood, to demand security for good behaviour, 41 C.L.J. 142=26 Cr. L.J. 842=86 Ind. Cas. 686 where 5 C.W.N. 28 is followed. A person who deliberately prepares to commit burglary but he is caught by the police and admits his intention to do the act cannot be dealt with under this section, 49 A. 844. An attempt to avoid a police patrol does not bring the person within the ambit of this section, he being a shop-keeper and resident of the place, 27 Cr. L.J. 573=94 Ind. Cas. 141; 6 Pat. 177. Bare suspicion of complicity in isolated cases is not sufficient. The fact that the Police suspected a person of having been concerned in various burglaries is no ground for demanding security, 29 Cr. L.J. 479=109 Ind. Cas. 127; nor is this section intended to cover a case where a person has been tried and convicted of an offence and no other evidence is available to start proceedings against him under this section, 29 Cr. L.J. 1043=112 Ind. Cas. 467. This section refers to a continuous act and therefore does not apply to a case where there is a momentary effort at concealment to avoid detection or arrest, nor can it apply to a case of a person brought under arrest, for it cannot be said of such a person that he is taking precautions to conceal his presence, 22 C.W.N. 163 at 165, but see 6 Pat. 177 which takes a different view. The object of the order for furnishing security for good behaviour is the prevention of crime and not to secure imprisonment of the person concerned, 22 Bom. L.R. 190; 16 Bom. L.R. 138; 1 C.L.J. 616. See 5 Cr. L.J. 377 where it was held that the object of this Chapter is not to get every suspected person confined in jail and thus save trouble to the police, but it is only when the ordinary means of detection and prevention of crime and for ensuring good behaviour have been adopted and have failed, resort should be had to the special means provided here. It is notorious that accusations under this section are constantly made with the object of blackening an enemy's character and of satisfying feelings of spite and hatred and the Magistrates cannot be too cautious in making sure that the provisions intended for securing the peace of the community are not utilized for wreaking private vengeance under the aegis of a crown prosecution, 33 C. 156 at 169. Care should be taken to prevent the abuse of the salutary provisions of this section which may be made an engine of oppression, 53 C. 345. Security cannot be demanded both under this section and S. 110 *infra*, 38 M. 555; 6 M.L.T. 158=14 Cr. L.J. 243=3 Ind. Cas. 77; 11 Cr. L.J. 80=5 Ind. Cas. 156. But the Madras High Court

did not hold the bond to be void but merely set aside the order under this section and confirmed the order under S. 110, *infra*, 27 Cr. L.J. 333=33 Ind. Cas. 743.

Receives information.—Magistrates are competent to act under this section when they have credible information that a person has no ostensible means of livelihood or is unable to give a satisfactory account of himself, 31 C. 557; 26 M. 124; 6 A.L.J. 253.

Taking precautions to conceal his presence, etc.—The object of the concealment must be for committing some offence. Mere concealment with a view to avoid observation is no offence at all. A person cannot be called upon to furnish security for an alleged concealment in his father's house unconnected with any intention to commit an offence nor any previous concealment outside the jurisdiction of the Magistrate who initiates proceedings under this section, 39 C. 456. This sub-section refers to the case of a continuous act and not to the case of an isolated effort at concealment, 50 C.L.J. 181 following 22 C.W.N. 163=27 C.L.J. 382 and 41 C.L.J. 142=26 Cr. L.J. 842=86 Ind. Cas. 666. The provisions of this section must be used with discretion and cannot apply to one who was merely found talking with bad characters at a public place. It is not necessary to show that the accused followed a continuous course of conduct to conceal his presence, 6 Pat. 177. Where the only evidence against a person proceeded against under this section was that he was seen coming out of a sugar-cane field near his village at 10 P.M. in the night and when challenged by two persons he tried to run away it was held that on these facts he cannot be bound over under this section and the revision on behalf of the Government was dismissed, 26 A.L.J. 896 (F.B.)=29 Cr. L.J. 864=111 Ind. Cas. 448. The greatest criminal in the world is not liable to be questioned as to his presence in his own house, 39 C. 456 at 452; 23 C.W.N. 163, action cannot be taken under this section against a person who on being questioned by the police gives a false name and then corrects it. In such a case there is nothing to show that he was taking precautions to conceal his presence, 21 A.L.J. 847. There must be some definite attempt at concealment by taking precautions with that object in view whether it be by disguise or otherwise indicating a desire to hide the fact of his presence within the local limits, 6 Pat. 177. Where a person gives a false name and secretly delivers letters inciting the commission of a crime or demanding money, he can be dealt with under this section, 15 Cr. L.J. 255=23 Ind. Cas. 207. The provisions of cl. (a) must be read together. See in this connection S. 55 (1) (a) *supra*. See also 26 A.L.J. 1257 at 1260 (F.B.).

Within the limits of the Magistrate's jurisdiction—It is an entire mistake to read this sub-section as applying to any person who takes steps to conceal himself, in the sense of concealing his presence in the way in which a criminal conceals his presence when he goes out in the dark, or by a deserted road or by some other select means to commit a crime in his own neighbourhood. The section does not contemplate such a situation and has no application to it and was clearly in contemplation of a totally different situation. This sub-section says that the power is to be exercised in the case of "any person taking precautions to conceal his presence within the local limits of such Magistrate's jurisdiction." If it was intended to deal with anybody either a habitual resident or a person well known in the neighbourhood trying to conceal himself, it would have been natural to employ the expression "conceal himself" and it is impossible to attribute to the expression "within the local limits of such Magistrate's jurisdiction", a direction as to the jurisdiction of the Magistrate over the offence, because for that purpose the words would be superfluous, the jurisdiction of the Magistrate for offences committed in his district being clearly established by other provisions of the law. It is an elementary principle of interpretation of statutes that you must give a reasonable meaning to every expression used and we have therefore to interpret the passage "within the local limits of such Magistrate's jurisdiction." It is part of the predicate to "conceal his presence" and the offence contemplated is that a person probably, although not necessarily coming from outside the jurisdiction into the Magistrate's jurisdiction for some nefarious purpose and taking precautions to conceal the fact that he is present in that jurisdiction. The words are free from ambiguity, 49 A. 240 following 8 A.L.J. 1097; 17 A.L.J. 891 and 432. This decision is followed in 25 A.L.J. 679=28 Cr. L.J. 567=103 Ind. Cas. 503. Before a person is called upon to execute a bond it must

be shown that he was taking precautions to conceal his presence within the local limits of the Magistrate's jurisdiction and further such precautions were taken with a view to commit an offence. A person within a Magistrate's jurisdiction whether of good or bad character who merely avoids the police by running away on their approach cannot be said to be within the mischief of this section, 6 Pat. 177, see also 50 A. 909 (F.B.) following 49 A. 240 and 844; 8 A.L.J. 1097; 27 C.L.J. 332; 17 A.L.J. 432 and 891; 39 C. 456 and 6 Pat. 177; 41 C.L.J. 142, where it was held that this sub-section is only applicable where the person concealing his presence within the jurisdiction of the Magistrate and he need not necessarily be a stranger to the jurisdiction.

Has no ostensible means of subsistence.—The law requires that before a person is called upon to furnish security it should be proved that he has no *ostensible means* of subsistence. The mere fact that a person does not work coupled with an admission of a previous conviction for bad livelihood will not justify a Magistrate demanding security under this section, 5 C.W.N. 28; merely to be penniless or out of work is not an offence. Many an honest man may find himself in either predicament and in a country where there are workless people but no work houses and casual labourers but no casual wards, if it were the law that persons are exposed to proceedings under cl. (b) of the section merely because they cannot give a satisfactory account of the manner in which they are eking out a precarious existence, the Magistrate's hands would be full indeed and much injustice might be done to innocent persons, 53 C. 345; 41 C.L.J. 142. If a person is unable to prove the source of his livelihood he ought not to be ordered to execute a bond unless there is reasonable ground for suspecting that he is sustaining himself by some dishonest means, for such an order can only be made where it is necessary for keeping the peace or maintaining good behaviour, 53 C. 345; old convicts whether they are lawfully engaged or otherwise naturally shun the police and this of itself does not show that the person where he was found was there for some unlawful purpose. Having no home is the condition of a very large number of perfectly honest persons and it is extremely difficult to prove that a person works as a cooly. The floating population mostly of the cooly class have no place of abode and they spend the nights in verandahs and door ways and eat where they can. For such people to prove to the satisfaction of the Court that they have work is well nigh impossible. They may be working quite honestly but it is very difficult, if not impossible to prove it. To call upon such persons to give security is to perpetuate a farce and no one is going to stand surety for a homeless cooly. The logical result of demanding security will be that such persons will be spending their lives in jail for various terms of imprisonment for failing to give security, 41 C.L.J. 142; 26 Cr. L.J. 842=86 Ind. Cas. 666; 6 Pat. 177. The fact that a person belongs to a wandering tribe is not a sufficient reason for demanding security from him, Weir II, 53, but in 6 A.L.J. 253=9 Cr. L.J. 527=2 Ind. Cas. 219 it was held that the language of cl. (b) was very wide and that a Magistrate who demanded security from one who belonged to a gang frequenting *melas* and carried on a *ring game* was acting legally upon the evidence before him, 40 C. 702. Again a young man out of employment living with his father, a man of means and able to support his son, does not come within the phrase '*person without ostensible means of substance*' as the object of cl. (b) is to enable Magistrate to take action against suspicious strangers lurking within his jurisdiction, 39 C. 436; 22 Cr. L.J. 739=64 Ind. Cas. 141. See 17 C.W.N. 883 where it was held that a person earning his livelihood by *ring game* cannot be dealt with under this section. See also 18 A.L.J. 321; 17 A.L.J. 432. Mere proof of want of ostensible means of subsistence is not by itself sufficient to bring the case under this section. The Magistrate is further bound to consider whether the order is really necessary to secure good behaviour which is entirely within the Magistrate's judicial discretion, Ratanlal 723. To justify an order under this section there must be a good basis of fact. Mere suspicion is not sufficient, 17 A.L.J. 432=20 Cr. L.J. 431=51 Ind. Cas. 161.

Who cannot give a satisfactory account of himself.—The expressions "who has no ostensible means of subsistence" and "who cannot give a satisfactory account of himself" are widely different from each other. In practice, they are very often taken as meaning one and the same thing and this leads to a misapplication of the provisions of the

section. The expression 'give a satisfactory account of himself' does not mean that the person should satisfy how he spends his time but it means that he has no satisfactory account for his presence within the Magistrate's jurisdiction. It means that if a person is present within such limits or is present at a place within such limits to which he does not belong and there are circumstances justifying the suspicion that he is there not for an innocent purpose, he has got to explain his presence, 41 C.L.J. 142=26 Cr. L.J. 842=86 Ind. Cas. 666, but see 6 Pat. 177 which dissents from this view. Where a man who is a Kabiraj and a dealer was found in association with two others at midnight with house-breaking implements in their possession and on being discovered fled and when arrested remained silent and the explanation which he gave subsequently to the Magistrate was false, it was held that the case did not fall within this section, 22 C.W.N. 163=27 C.L.J. 332 followed in 50 C.L.J. 181. To the effect that failure to give a satisfactory account will not bring a person within the purview of this section. This does not refer to a person who spends his time or at least his leisure moments in an unsatisfactory manner 41 C.L.J. 142=26 Cr. L.J. 842=86 Ind. Cas. 666; 53 C. 313. It is obviously true that this sub-section does not justify broadly calling upon any person to satisfactorily account for how he spends his leisure, but if there is definite evidence that he has been caught spending a portion of that leisure in a manner giving rise to grave suspicion and can have no satisfactory account of the incident, there is no reason why this sub-section should not apply. There is no justification for limiting the plain, natural and unambiguous meaning of the words 'cannot give a satisfactory account of himself.' If a house-holder catches a man in his garden in the middle of the night armed with a *jemmy* and that man cannot explain what he was doing at that hour of the night armed with a *jemmy* in somebody else's garden, surely it is not using language in any other than its simple and straightforward sense to say 'he cannot give a satisfactory account of himself'. These words do not refer to his domestic relations, or his normal daylight orthodox occupation but require him to give a satisfactory account of himself in relation to the circumstances which led up to his being called upon for an explanation, 50 A. 999 (F.B.) at 933. A municipal employee whose occupation and place of residence are known but who according to the Magistrate prowls about at night, associates with bad characters, arms himself with a *lathi* cannot be dealt with under this section, 8 A.L.J. 1097=12 Cr. L.J. 536=12 Ind. Cas. 304. When a person was found away from his house in the house of a dangerous political conspirator, an order requiring such person to give an account of himself was justified, 13 Cr. L.J. 239=14 Ind. Cas. 431, but the prosecution must satisfy the Magistrate that suspicion against the person proceeded against attaches to him because of his failure to give a satisfactory explanation when called upon to account for his presence in the place where he is found, e.g., if he fails to account for his being discovered in the company of person living a dishonest criminal life or detected in some place where he has no legal right to be. The poor, the outcast and the old offender must somewhere live and move and have their being, and, a person who during the morning hours was passing the time at a particular locality to all outward appearance innocently and in a manner void of suspicion cannot be brought within the ambit of cl. (b) of this section and S. 118, *infra* merely because he was unable to prove that he was working for his living, 53 C. 343. See 6 Pat 177. This clause covers suspected persons who are classed in Europe as rogues and persons of any class who cannot give any satisfactory account of themselves, 13 Cr. L.J. 239=14 Ind. Cas. 431.

There is within his limits a person.—To give jurisdiction to a Magistrate to proceed under this section it is not necessary that the person proceeded against should be residing within the local limits of Magistrate's jurisdiction, 36 M. 96; Weir II, 53; 39 A. 139; 43 C. 153; 27 Cr. L.J. 1261=98 Ind. Cas. 109, see also 49 A. 240. The meaning of the expression '*any person within the local limits*' is any person who is within the local limits of the Magistrate's jurisdiction at the time of taking action. The object of the section is the prevention of offences and that object would be liable to be defeated if its scope were restricted to persons residing within the Magistrate's jurisdiction, 36 M. 96; when a person was put up before the Magistrate for action under cl. (b) of this section but the Magistrate discharged the accused holding that the arrest was not legal and the accused was not

properly brought before the Court, held, setting aside the order, that how the accused was brought before the Magistrate was immaterial and the Court was bound to proceed with the case, 31 C. 557. See also 35 B. 223; 26 M. 124; 23 Cr. L.J. 1039=112 Ind. Cas. 673.

To execute a bond with sureties.—Under this section and S. 110 *infra* surety is not optional, as in the case falling under Ss. 106, 107 and 108 *supra* where the bond may be with or without sureties but it is indispensable. In the case of a minor the bond may be executed only by his sureties, S. 113, *infra*. The amount of the bond should not be excessive and a fair chance of complying with the required conditions of the security should be afforded, Weir II, 52; 16 B. 372; 23 A. 80. Restrictions of caste and residence of surety is illegal, 1 Bom L.R. 520. So also the condition that the surety should be an immediate neighbour of the person bound over, 17 Cr. L.J. 93=32 Ind. Cas. 687. The sufficiency of surety should be considered from a general view of his stability and property houses and not merely from the point of view of his moveables, 17 Cr. L.J. 97=32 Ind. Cas. 687. Government Promissory-notes cannot be accepted in addition to or in lieu of bond under this section. See S. 513, *infra*. In fixing the amount under this and S. 110, *infra*, the Magistrate should consider the station in life of the accused and should not go beyond a sum of which there is a fair probability of his being able to find surety, 4 M.H.C.R. Appx. xlv. See also the proviso to S. 181, *infra*. When once a surety offered has been accepted by the Magistrate he has no power subsequently to enhance the security bond, though he might be of opinion that such surety is an unfit person, 1 C.W.N. 394; 2 Cr. L.J. 278. A person should not be called upon to enter into a bond both under Ss. 109 and 110, 38 M. 555. But a bond so taken is not void, and the High Court merely set aside the order under this section and confirmed the order under S. 110, *infra*. See 27 Cr. L.J. 326=92 Ind. Cas. 742. See also 36 C. 562 where it was held that the object of requiring a surety bond is not to insure the recovery of the amount of the bond from the principal but to serve as an additional security for his keeping the peace or being of good behaviour, and therefore double payment both from the principal and the surety may be demanded. This decision was not approved in 5 Lah. 448 where it was held that more than the amount mentioned in the bond can be recovered from the principal or sureties individually or collectively. See also 12 Cr. L.J. 404=11 Ind. Cas. 593; 1894 P.R. (Cr.) 26. The provisions of S. 517 *infra* apply to proceedings under this section although there may be no proof that any offence had been committed with reference to that property, 31 C. 347; 20 Cr. L.J. 133. As to form of bond see form No. 11 of Sch. V.

110. Whenever a Presidency Magistrate, District Magistrate, or Sub-divisional Magistrate or a Magistrate of the

Security for good
behaviour from
habitual offenders.

first class specially empowered in this behalf by the Local Government receives information that any person within the local limits of his jurisdiction—

(a) is by habit a robber, house-breaker, thief, or forger, or

(b) is by habit a receiver of stolen property knowing the same to have been stolen, or

(c) habitually protects or harbours thieves or aids in the concealment or disposal of stolen property, or

(d) habitually commits, or attempts to commit, or abets the commission of, the offence of kidnapping, abduction, extortion, cheating or mischief, or any offence punishable under Chapter XII of the Indian Penal Code, or under section 489A, section 489B, section 489C or section 489D of that Code, or

(e) habitually commits, or attempts to commit, or abets the commission of, offences involving a breach of the peace, or

(f) is so desperate and dangerous as to render his being at large without security hazardous to the community,

such Magistrate may, in manner hereinafter provided, require such person to show cause why he should not be ordered to execute a bond, with sureties, for his good behaviour for such period, not exceeding three years, as the Magistrate thinks fit to fix.

Amendment.—In sub-section (a) habitual forgers are included, and in sub-section (d) all offences under Chap. XII, I.P.C., kidnapping, abduction and offences under Ss. 489A, 489B, 489C, 489D, are also included.

Scope and object of the section.—The object of this section like that of Ss. 106 and 107 *supra*, is prevention of crime and not punishment. It is only for the purpose of securing future good behaviour that the power vested in Magistrates should be exercised. Any attempt to use it for punishing past offences is unwarranted and is not sanctioned by law, 27 C. 781; 31 C. 350; 17 C.W.N. 238; 9 C.W.N. 898 at 903; 1 C.L.R. 268; 10 B. 174; 6 Bom. L.R. 34; 3 M. 238; 16 Cr. L.J. 100 and 474; 1914 P.R. (Cr.) 6. The section is enacted as a protection to the public against a repetition of crimes by which the safety of property is menaced and not the security of the person alone is jeopardised, 2 A. 835; 17 C.W.N. 238. What this section desires to guard against is the freedom of a dangerous person without security and not freedom entirely. Proceedings started were therefore improper when he had already been placed under security by another Magistrate as there was no hazard to the community till the period for which security is taken by the first Magistrate, 30 Cr. L.J. 756 (1)=117 Ind. Cas. 343. This section provides six categories of cases within one or more of which the offender's case must come in order that a penalty may be imposed in accordance with this section. On general principles when a man is sought to be proceeded against under this section, it must be made clear under which of the sub-sections he is charged. It has been laid down a number of times that mere suspicion is not admissible evidence and cannot form the legitimate basis for an order under this section, 26 A.L.J. 99 at 101=29 Cr. L.J. 92=106 Ind. Cas. 684. But a witness may have a suspicion against a person in respect of whom he is giving evidence and if he has such suspicion he ought to be able to give the ground of that suspicion and the value of the facts stated can then be weighed by the Magistrates, 26 A.L.J. 99 at 102=29 Cr. L.J. 92=106 Ind. Cas. 684. It is not enough to assert that he is a man of criminal tendencies or that he is suspected of having committed certain crimes. The prosecution must charge that the accused habitually commits one of the offences mentioned in sub-sections (a) to (d) or that he habitually commits, or attempts or abets the commission of offences involving a breach of the peace, sub-section (e) or that he is so desperate and dangerous as to render his being at large without security hazardous to the community, sub-section (f). It must be specifically stated under which of these categories the accused's case is alleged to fall and the omission to do so causes obviously hardship to him as he received no notice of the precise case he has to meet. It is not enough to charge a person generally of having committed an offence, under this section without specifically stating under which of the sub-sections the case is alleged to fall, 26 Cr. L.J. 1377=19 Ind. Cas. 513. The powers under this section are to be exercised very sparingly and only in those cases where the evidence is very clear and precise, 23 Cr. L.J. 507=68 Ind. Cas. 43; 38 C. 156. In cases of security proceedings the Courts ought to approach the consideration of them in a fair way, having regard to the interests not only of the prosecution but also of the accused, 26 Cr. L.J. 99=83 Ind. Cas. 659. The security law is a hard law and one easily used as an instrument of oppression and is to be enforced with caution and impartiality. Where the evidence for the defence is as weighty as the evidence for the prosecution, the order demanding security for good behaviour is not justified. Where security is demanded on evidence of general repute there should be no doubt as to what his general repute is, 1901 P.L.R. (Cr. J.) 18

at page 52. Mere suspicion and bare allegation that a person is of bad repute is not sufficient to base an order under this section, 27 Cr. L.J. 1037=87 Ind. Cas. 43. Where respectable witnesses testify to accused's good character and the prosecution evidence is meagre no order for security should be passed, 9 Lah. 133; ordinarily speaking a case under this section will be governed by exactly the same rules of evidence as govern any other cases. A witness cannot say what he suspects. If the prosecution know that the witness does suspect the accused of having taken part in a theft, the prosecution can question the witness before he is put in the witness box and ask him his reasons for suspecting. They can themselves ascertain from the witness what facts are within his knowledge and then put him in the box to give evidence as to those facts and it will be for the Magistrate to determine whether those facts alone or supported by other evidence create such a conviction in his mind as to justify taking security. But a witness's "Suspicion" and his "allegations" that the accused is a thief, etc., are worth nothing and should not be admitted, 30 Cr. L.J. 562 at 553=116 Ind. Cas. 23. The object of the section is *preventive* and not *punitive*, 16 Bom. L.R. 139=15 Cr. L.J. 268=23 Ind. Cas. 476; 31 C. 333; 47 C. 154; 27 C.W.N. 781; 9 C.W.N. 893; 17 C.W.N. 238; 1 C.L.R. 269; 3 M. 329; 6 Bom. L.R. 34; 2 A. 835; 27 Cr.L.J. 933=96 Ind. Cas. 391; 16 Cr. L.J. 100, 335, 438 and 479; 1914 P.R. (Cr.) 6. Any attempt to use it for punishing for past offences is wrong and not sanctioned by law, and this section should be invoked only in cases where positive evidence of the commission of crime is available against the person proceeded against, 3 M. 238; 27 C. 781; 31 C. 330; 17 C.W.N. 238; 13 C.W.N. 318; 20 C.L.J. 30; 7 A. 67 at 72; 42 A. 563; Weir II, 832, 19 B. 174; 6 Bom. L.R. 35; 16 Cr. L.J. 100=27 Ind. Cas. 143; 14 Cr. L.J. 5; 12 Cr. L.J. 323. The Legislature does not provide by means of this section a means of punishment, 23 Cr. L.J. 597=69 Ind. Cas. 43. The intention of the law is not that the person called upon to furnish security should be sent to jail but that, if possible he should be kept out of jail, 16 Bom. L.R. 139=21 Cr. L.J. 377, 22 Bom. L.R. 190. It is undoubtedly true that in cases where proceedings under this section follow soon after discharge or an acquittal the Court before binding the person proceeded against must be satisfied that the proceedings under this section were not instituted with a view to get one punished, when the police had failed to secure his conviction for a substantive offence and as such, the Courts are called upon to scrutinize the evidence with the greatest care, 28 Cr. L.J. 515=102 Ind. Cas. 211 where 23 Cr. L.J. 119=62 Ind. Cas. 551 is followed. The object of the law as to security for good behaviour is not to fill the jails with bad characters, but to bring reasonable pressure to bear on such persons to respect the law, 5 Cr. L. Rev. 145. The salutary provisions of this section were enacted for protecting society from habitual offenders and was never intended to be applied to coerce landlords to adopt efficient management of their estates. 17 C.W.N. 238=16 C.L.J. 467=14 Cr. L.J. 5=18 Ind. Cas. 143. This section is inapplicable to a landlord whose tenants are of bad character and who through his tenants commits acts of extortion, the proper course is to prosecute for specific acts of oppression and not to proceed under this section, 27 C. 731; 6 C.L.J. 711. The institution of proceedings under this section against persons registered under the Criminal Tribes Act is not necessarily inexpedient. The control obtained over a person by registering him as a member of a criminal tribe is sufficient to prevent him from committing acts for which preventive action may be necessary. Notwithstanding such control he has enough of liberty left to pursue a career of crime bringing him within some of the clauses of this section. Each case has to be scrutinized on its merits, information on which proceedings are asked for being scanned, and the question whether preventive action is called for or not being considered due regard being had to the consequences which in most cases inevitably follow, viz., failure to furnish security, 54 C. 279, see also 23 Cr. L.J. 39 Ind. Cas. The object of the section is not to obtain money for the Crown by forfeiture of the bonds taken, but is only to secure good behaviour, 29 A. 203. The provisions of the section ought not to be employed to punish past offences but only to be used for future good behaviour; where a person is proceeded against for a substantive offence and has given bail to the satisfaction of the Magistrate, he cannot be proceeded against simultaneously under this section, 1 C.L.R. 258 at 271; 7 A. 67 at 72; 10 B. 174. Where the information received shows a likelihood of a breach of the ~~is illegal to~~ demand security under this section, 6 A. 132. This ~~to~~

public against repetition of crimes in which *the safety to property* is menaced and not if the *security of persons* alone is jeopardised, 2 A. 835 at 837. Mere proof of bad character will not justify an order under this section, 8 M.L.T. 245=11 Cr. L.J. 638=8 Ind. Cas. 320. Powers under this section are to be exercised with great caution and discrimination. They are not to be applied too freely and to persons whose cases are not within the spirit of the provisions of this section, 4 N.W.P.H.C.R. 117; 6 A. 214; 14 A. 15. This section is not intended to afford means to the police to detain a suspected person in custody till they are liable to work out a case against him. If the police arrest a person for starting proceedings under this section it should be specified under what clause or clauses of S. 55, *supra*, the action is taken, 27 Cr. L.J. 628=94 Ind. Cas. 404. A Magistrate should not detain a man in custody unless he has the necessary information to pass an order in

827=17 Ind. Cas. 571.

which he was suspected, it is always necessary to make it clear that proceedings were not taken as a means of indirectly punishing a man who the police was convinced was guilty, 6 A.L.J. 487=9 Cr. L.J. 528=2 Ind. Cas. 225. Mere suspicion is not sufficient to bind down a person to be of good behaviour, 25 Cr. L.J. 35=75 Ind. Cas. 723; 30 Cr. L.J. 693=116 Ind. Cas. 801; 27 Cr. L.J. 1067=97 Ind. Cas. 43. Unless the record upon which an order binding down a person is passed is such that it proves conclusively the charge read out and explained to him, the order passed is bad in law, 28 Cr. L.J. 8=99 Ind. Cas. 40. There must be some independent evidence of the charge against the accused under cl. (a), (d) and (f) of this section and when the evidence given is vague, general and of hearsay character and not legally admissible for purposes of proving the charges, the order under this section is bad in law, 26 Cr. L.J. 738=86 Ind. Cas. 274. Immediately after the acquittal of a person of an offence under S. 411, I.P.C., an order under this section ought not to be passed against him unless a very strong case is made out and the High Court in revision cancelled the order so passed, 27 Cr. L.J. 190=91 Ind. Cas. 1006. When a person is repeatedly convicted and imprisoned before his release proceedings may be initiated against him under this section. The Court in 6 W.R. (Cr) 18 remarked thus: "If, upon being set at liberty he should return to the former course of life and show that he continues to be, after being set at liberty, a person of dangerous and desperate character, whom it is hazardous for the community to leave at large, no doubt he may again be brought before the Magistrate and after the evidence of his proceedings have been laid before the Magistrate, a further order may be passed requiring him to furnish security. It does not appear that, without having set at liberty and without a fair chance of leading a new life, orders demanding security should be passed one after another." See also 12 C. 520. "The greatest thief is entitled to *locus penitentiae* when he has served out his punishment. It is only when he outrages that grace which is extended to him and therefore shows he is unreformed, that the machinery of the Act should be brought into operation, in order to obtain a substantial guarantee for security, that he will not commit any further depredations upon it," 2 A. 835; 10 B. 175. A person who has served out a term of imprisonment should be given a chance of reformation and start with a clean sheet from the date of his discharge and should not be proceeded against under this section immediately he emerges from jail, 43 C 1128; 31 C. 783; 22 C.W.N. lx. Security cannot be demanded both under S. 109 and this section, 33 M. 553; 6 M.L.T. 158=10 Cr.L.J. 233=3 Ind Cas 77; 11 Cr. L.J. 80=5 Ind Cas 156. But the bond is not void and even in the Madras Case the High Court merely set aside the order under S. 109 *supra* and confirmed the order under this section, 27 Cr. L.J. 326=92 Ind. Cas. 742. Ordinarily under this section every person has to be tried separately for the offence enumerated herein and a joint trial is only permissible when one or more persons have been associated together for committing offences specified herein, 23 Cr. L.J. 100=65 Ind. Cas. 484; 8 L.W. 461; 43 M. 430. It is essential to prove what each accused has done and definite evidence must be adduced against each accused, 35 C. 929; 8 C.W.N. 180; 10 Cr. L.J. 591 and specific finding should be recorded against each accused, 37 C. 91; 6 A. 214. See the subject fully dealt with at p. 153 'Joint inquiry.' Security cannot be taken on evidence of general repute unless it is proved to be universal, 16 Cr. L.J. 106=27 Ind. Cas. 154.

Within the local limits of his jurisdiction.—The words are not equivalent to residing within local limits. It is sufficient to give the Magistrate jurisdiction if the evil habits of the accused are practised and evil reputation acquired within the local limits of his jurisdiction, 19 C.W.N. 1022; 43 C. 215; 33 A. 83. The expression 'any person within the local limits of his jurisdiction' are obviously not intended to apply to persons undergoing imprisonment and consequently the Magistrate has no power to commence proceedings under this section, 7 Cr. L.J. 417=4 L.B.R. 145; 23 Cr. L.J. 812=111 Ind. Cas. 335. Persons to be proceeded against must be residing within the local limits of the Magistrate's jurisdiction and must be found to answer to one of the descriptions given in (a) to (f). When a person resides outside such limits, a Magistrate cannot initiate proceedings and issue a warrant under this section against him, 43 C.L.J. 143. The reputation a man has must necessarily be the reputation in the neighbourhood of his residence and not at some place far away from his home, 27 C. 993. Occasional residence is enough to confer jurisdiction under this section, 31 C. 419. And the fact that it would be inconvenient for the person proceeded against to summon and to have his witnesses from the place of his permanent residence is no ground for not proceeding with this case where it was initiated, 27 Cr. L.J. 1261=93 Ind. Cas. 103. It was held in 23 A.L.J. 43=23 Cr. L.J. 93 that permanent residence within the locality is not essential to give jurisdiction to a Magistrate. It is enough if the person practises his career as thief, housebreaker, etc., within such jurisdiction, see also 43 C. 153; 23 C.W.N. 193; 23 Cr. L.J. 133; 27 C. 993; 35 M. 93; 33 A. 139. The Magistrate who is in executive charge of the local area, is the best person to judge whether there is any likelihood of a breach of the peace within the local limits of his jurisdiction and whether it is necessary or desirable that preventive proceedings should be taken, and the Legislature has purposely left it to the discretion of such a Magistrate to say whether proceedings ought to be taken or not, 41 M. 246; 1918 M.W.N. 731. The expression 'any person within local limits' is advisedly used to exclude the necessity of proving anything approaching a permanent residence and leave it in the power of Magistracy to deal with most dangerous criminals who wander from place to place and who have no well-known residence, 9 Bom. L.R. 244. The words person within the local limits, etc., will include a person undergoing a sentence of imprisonment in a jail within the local limits of the Magistrate's jurisdiction, 17 Cr. L.J. 83=32 Ind. 683. When an inquiry was held at a place outside the local limits of the Magistrate's jurisdiction, it was held the proceedings were void and passed without jurisdiction, 3 C.L.J. 195. Unless a sub-divisional Magistrate's jurisdiction is restricted under S. 12 *supra* he has jurisdiction over the whole district and therefore a Magistrate is entitled to take proceedings under this section upon a police report in respect of a person residing outside his local jurisdiction irrespective of how the police report came before him, 21 Cr. L.J. 321=53 Ind. Cas. 593. A person residing within the Magistrate's jurisdiction can be proceeded against under this section even though he was arrested outside the Magistrate's jurisdiction under S. 55 (1) (c) *supra* 17 Cr. L.J. 319=35 Ind. Cas. 495.

Whenever a Magistrate receives information.—This information is the foundation of the whole proceeding and there is no limit to the nature or source of information on which a Magistrate might initiate proceedings under this section, 27 A. 172; nor is a Magistrate bound to inform the person proceeded against, the source of his information or the nature of the information. There is nothing in the section which specifies what the nature of the information should be. In 42 A. 648 the learned judges appeared to be of opinion that the information must be detailed information containing the nature of the evidence which it was proposed to bring against such a person. There is nothing in the section laying down any quantum of information, as a necessary condition for the Magistrate to take action. Undoubtedly a prudent Magistrate might not consider information sufficient to cause him to take action unless it gave sufficient details against the person in question. The High Court is concerned only with the legality of the Magistrate's action and not with his prudence. If a Magistrate empowered to receive information of the barest kind to the effect that person who is a habitual thief is within his jurisdiction, it is certainly within his powers to take action under this Chapter and the legality of his action cannot be questioned.

2 Luck, 157. The information may to some extent be of a hearsay and general description, 6 A. 132. The information which a Magistrate inquiring into a case under this section already possesses concerning a person cannot be used as substantive evidence, but it may form a check which the trial Court may legitimately use in order to test the nature of the evidence which it has to deal and to negative, *e.g.*, a suggestion that the police investigation had been unfair, 43 A. 749 *distinguishing* 21 A.L.J. 513. All that the Magistrate is bound to state is, the substance of the information, 23 C. 332; but he is not bound to give a list of witnesses in support of the proceedings, 33 C. 243. A Magistrate who initiates proceedings on his own personal knowledge is not competent to inquire into the truth of the information under S 117 *infra*, 29 C. 392. The person who gives information is not liable to be dealt with under S. 250 *infra*.

By habit a robber, etc.—This section does not provide any person being called upon to furnish security for being by habit a dacoit and belonging to a gang of dacoits. It is not for the Courts to find out the motive for the omission by the Legislature but if it were necessary it is this. Being a member of a gang of dacoits is a definite offence under S. 400, I.P.C., and it was for that reason that under the preventive sections, action could not be taken for having committed a specific offence. Instead of proceeding for the specific offence it cannot be permitted to indirectly punish persons by proceeding against them under the preventive section. It was urged that if a person can be called upon to furnish security being a habitual robber, there is no reason why a man should not be bound over for being by habit a dacoit. A man may be by habit a robber and so long as he is not charged with a definite act of robbery he may be bound over under the preventive section. But as soon as it is said that he along with four others or more, habitually commits robbery, he becomes at once a member of a gang of dacoits and thereby commits a definite and specific offence under S 400, I.P.C. This section therefore deliberately omitted dacoity out of its purview, 23 A.L.J. 18 = 26 Cr. L.J. 745 = 83 Ind. Cas. 232. But see 47 A. 733 where 23 A.L.J. 18 is *distinguished*. The words "habit" and "habitually" are not used in the narrow sense, meaning "inclined by nature" but must be taken as meaning persistence in doing an act, a fact which is capable of proof by adducing evidence of the commission of a number of similar acts. "Habitually" must be taken to mean 'repeatedly' or 'persistently,' 25 Cr. L.J. 60 = 75 Ind. Cas. 764. *Habit* is to be proved by an aggregate of facts, 6 M.H.C.R. 120; 29 Cr. L.J. 574 = 109 Ind. Cas. 510. Persons are said to commit habitual extortion only when they are in the habit of committing as individual members of the community and not when certain acts amounting to extortion are committed by them as mere agents of a zamindar because the moment they cease to be the agents they become divested of their capacity and are not likely to commit extortion as individual members of the community. The proper course therefore is to prosecute the perpetrators of these extortions and not to proceed under this section, which is intended to *prevent crime* and *not to punish for offences*, 27 C. 781. Vague and general information that a man is a habitual offender is not sufficient evidence on which an accused person might be bound over under this section, 1 A.L.J. 616. To sustain an order under this section the evidence should be of such a nature as would lead to a reasonable and definite ground for coming to the conclusion that the persons are habitual offenders, 8 C.W.N. 543. When the witnesses are examined as to general character, their evidence is not of much value as to the habits of the person concerned, unless they support their opinion by specific instances, but it is not absolutely necessary that unless specific instances are given the evidence could not be acted upon to base an order under this section, 6 Bom. L.R. 34. Where the evidence against certain persons consisted in that of certain respectable witnesses none of whom knew the accused personally but only stated what they heard from others whose names they could not give no order under this section could be passed on such evidence, 29 C. 779. The term "habit" must be distinguished from the term "repute" which refers to the common belief of the respectable inhabitants of the locality where the person resides. But habit apparently requires a more specific evidence of bad character. Under S 117 (3) the fact that a person is a habitual offender may be proved by evidence of general repute. Mere evidence of suspicion against the accused is not sufficient, 75 Ind. Cas. 723; 27 Cr. L.J. 1067 = 97 Ind. Cas. 43. There must be independent evidence to have the charge against the

accused under cl. (a), (d) and (f) and where the evidence given is vague, general, and of hearsay character and not legally admissible for purpose of proving the charges, the order under the section is bad in law, 23 Cr. L.J. 733=88 Ind. Cas. 274. Evidence going to show that a substantive offence has been committed or which might form the basis of a charge of a substantive offence is not necessarily to be included in proceedings under this section and can form the basis of an order under S. 112 *infra* and a finding under S. 118, *infra*. Previous acquittals on the evidence on two occasions will not enable the accused to have the evidence excluded but it is a question of the value of the acquittals and may be put in evidence for what they may be worth, 47 A. 733 where 23 A.L.J. 18 is distinguished. See also 23 Cr. L.J. 515=102 Ind. Cas. 211.

Habitually protects or harbours thieves.—This section deals with only harbouring thieves. A person cannot be called upon to give security for harbouring dacoits. It is always interesting to discover how legislation as to particular sections of a certain Code came into effect in order to understand the meaning thereof. Dacoity is a very serious crime and therefore an attempt to commit it, even preparation to commit it, and being a gang of dacoits are all separately made punishable under different sections of the I.P.C. At the time of the framing of the Indian Penal Code it was overlooked that dacoits might be helped by men honest to the outside world, not joining them or belonging to their gang but giving shelter to them when needed to escape pursuit. In 1891, S. 216A, I.P.C., was enacted to meet such a case. In 1891 Code there was no provision for calling upon a person to furnish security for habitually harbouring thieves. In the 1893 Code provision was made herein only to bring in persons who are habitually harbouring thieves as harbouring dacoits had already been dealt with under the substantive provision under S. 216A, I.P.C. So a person who habitually harbours dacoits should be dealt with for the substantive offence under S. 216A, I.P.C., and not under this section, 39 Cr. L.J. 691=116 Ind. Cas. 804. The acts which amount to harbouring must be done with the intention of screening the offender from legal punishment or to prevent him from being apprehended. If a person from mere motives of humanity and without any intention of enabling the fugitive to escape from justice gave food to a starving man or gave medical aid to one who was wounded, knowing his character he commits no criminal act. The expression "protecting" or "harbouring" seems to contemplate cases where assistance is rendered to screen an offender from legal punishment, etc., but does not refer to acts done with motives of humanity. The clause is designed to meet cases of professional receivers, etc., who protect thieves from discovery and prevent their arrest and help them in disposing off stolen property, 11 Cr. L.J. 490=7 Ind. Cas. 462.

Commits offences involving a breach of the peace.—These words "*offences involving a breach of the peace*" mean offences in which a breach of the peace is an ingredient and not offences provoking or likely to lead to a breach of the peace, 30 C. 366 followed in 38 C. 156. Therefore a person who behaves indecently and immodestly towards women and who is of immoral habits, tries to seduce women cannot be bound over under clause (c) of this section, 30 C. 366; see also 25 C. 628; 26 M. 459; 29 M. 190. A zamindar who employs *lathials* to threaten his tenants and uses forces in unyoking their bullocks, and burn their houses for compelling them to pay enhanced rents brought himself within the mischief of this clause, 31 C. 419 approved in 33 C. 156. But indecent overtures to boys passing by the shop of a person cannot come within this clause, 16 Cr. L.J. 582=30 Ind. Cas. 134. The words "*involving a breach of the peace*" occur in S. 106 (1) *supra* and give rise to a number of rulings pointing out the difficulty in construing these words. See notes under S. 106 (1) *supra* at pp. 127-128.

So desperate and dangerous as to be hazardous to the community.—"A man of desperate and dangerous character" under cl. (f) means a man who has a reckless disregard of the safety of the persons or the property of his neighbours; and under that clause evidence of general repute is not admissible. Evidence of general repute is also excluded by Ss 112 and 117 *infra*, and a finding that a man is of so desperate and dangerous a character must be based on evidence of facts. It is not sufficient to do so by some vague and general evidence that some one was robbed or assaulted and people say that the accused was responsible for it,

3 Cr. L.J. 290; 5 C.W.N. 249; 11 C.W.N. 788. When a person is charged under cl. (f) only evidence of general repute is inadmissible. 34 M. 255; 225 A. 273; 11 C.W.N. 789; 13 C.W.N. 244; 29 C. 779; where the evidence produced against a person amounts to no more than that he is a nuisance to his neighbours, refuses to pay his debts, abuses people who sell goods to him and makes indecent overtures to school-boys who passed by his shop, it was held, these will not justify an order under clause (f) of this section, 16 Cr. L.J. 582=30 Ind. Cas. 124. Evidence of repute must be evidence given by respectable persons of the neighbourhood acquainted with the accused. Mere evidence of suspicion that the accused did certain acts is not generally of value, 16 Cr. L.J. 553=29 Ind. Cas. 825. The burden of proving an accused's bad character is on the prosecution, and therefore when the evidence on both sides is of an indifferent and interested character, the prosecution must fail. Cases should be decided on evidence taken in Court and not on the personal knowledge of the Magistrate 27 C. 731; 11 A.L.J. 461=41 Cr. L.J. 437=20 Ind. Cas. 231.

Require such person to show cause.—Showing cause is not merely putting in a written statement, or making a verbal statement but the supporting of that statement by such evidence as the party may be able to produce. He may bring his witnesses with him or he may apply for summons to them, 22 W.R. (Cr) 9. When a person is called upon to show cause he must be ready with his evidence when he appears in Court in obedience to the notice. That is the meaning of the expression to show cause. If he is unable to bring the witnesses with him he must immediately apply for summons to them, 9 Bom. L.R. 1385. By this expression the legislature did not intend that all the fundamental principles of jurisprudence in connection with criminal cases should, by dint of such an ambiguous phrase, be reversed. It is not for him who is free and who has not transgressed the law to show why he should remain free and why his freedom should not be qualified. It is for him who wishes to take away that freedom or wishes to qualify it, to establish circumstances which, by the force of law, would operate either in defence of, or in derogation of that freedom. Such has been the rule of law of all civilized nations pre-eminently of the English people; and words of most undoubted and express import are required before one can be convinced that the British rule, in legislating for the Indian people, intended to alter the principle of criminal law which it may be presumed to have brought from England, and which, indeed, it found in full force extant in India itself as a doctrine of the Muhammadan criminal law, which constituted the common law of the land at the advent of the British rule and which till comparatively recent times, was maintained as almost the only available guide in criminal cases, 9 A. 432 at 450 referring to 9 B.L.R. (F.B) 46 and 2 N.W.P.H.C.R., p. 431. See also 27 C. 731. Reasonable time should be allowed to the person proceeded against to show cause he must have sufficient time to bring the witnesses and have their evidence recorded, 31 C. 808. It has been held times without number that under S. 107, *supra*, Magistrate should hold an independent inquiry and should not act on the mere readiness of the accused to furnish security. In principle there is no distinction between proceedings under S. 107 and under this section. In either case it is the duty of the Magistrate to hold an inquiry and not to bind down a person merely because he agrees to furnish security, 24 A.L.J. 317=27 Cr. L.J. 370=92 Ind. Cas. 882. See also 37 A. 30; 34 M. 139; 35 C. 674; 25 Cr. L.J. 710=81 Ind. Cas. 193; 54 Ind. Cas. 411 and 784; 23 Cr. L.J. 173=65 Ind. Cas. 633; 30 M. 330. But see 46 A. 109, where it was held that where after due inquiry and notice a free consent amounting to a plea of guilty has been given, the Court may act on such consent and pass an order. See also 25 A.L.J. 819 which takes the same view as was taken in 46 A. 109. See also 50 A. 599 at 603. Before an order is passed the accused should be given an opportunity of entering on his defence and he should be clearly informed of the accusation he has to meet, 11 C. 13. It is incumbent on the Magistrate under S. 112, *infra*, to make an order setting forth the substance of information, etc., mentioned in this section; mere information to an accused that he is a suspect is hardly sufficient, 42 A. 646. Section 117 *infra* requires that proceedings under this section should be conducted as nearly as may be practicable in conducting trials and recording evidence as in warrant cases except no charge need be framed. The reason for this exception is what is equivalent to a charge has already been framed in the preliminary order under

S. 112 *infra* already served on the accused. There is no reason why the provisions of Ss. 254 and 255 *infra* should not be applied to these proceedings. If the Magistrate is satisfied that a *prima facie* case is made out and the accused elects to defend, the Magistrate is bound to ask the accused whether he wishes to cross-examine any of the prosecution witnesses and if he says yes, then the Magistrate is bound to give him an opportunity to do so. This procedure may cause inconvenience in many cases as it is more convenient to the Magistrate to insist upon accused cross-examining immediately whether he wishes to do so or not, but it is plainly not the law and the accused is entitled to have an opportunity of cross-examining in accordance with law. Such reasonable opportunity should be given to the accused, 50 A. 71 at 73-74 where 35 C. 213 and 10 A.L.J. 382 are referred to. Thus S. 256 *infra* is applicable to these proceedings but the accused although he is entitled to cross-examine the prosecution witnesses, he has no right of further cross-examination of the witnesses before entering on his defence as in warrant-cases, 35 C. 243; 1916 P.R. (Cr. J.) 1; 17 Cr. L.J. 84=32 Ind. Cas. 676; 23 Cr. L.J. 239=99 Ind. Cas. 1039. See also 7 Lah. 263 following 33 C. 243 and 17 Cr. L.J. 84. In 43 M. 511 (F.B.) it was held that S. 117 (2) *infra* attracts to itself all the provisions relating to the trial of warrant-cases and so the accused had the right of further cross-examination of the prosecution witness under S. 256 *infra*. The question as to this right has now been referred to a Full Bench, 56 M.L.J. (Sh. n.) 43, which after hearing full argument has reserved Judgment. For the decision of the F.B. see notes under S. 256, *infra*. In case detailed information as to the nature of the evidence to be adduced by the prosecution is not given to the person proceeded against in the notice issued to him and he is taken by surprise, the accused is entitled to ask the Magistrate to give him sufficient time to commence the cross-examination, 20 Cr. L.J. 436=51 Ind. Cas. 260. When fresh proceedings are taken after the expiration of the period of a bond for good behaviour previously taken, such proceedings must be confined to facts and circumstances alleged after release from last security, 19 C.W.N. 223.

To execute a bond with sureties.—There is no provision of law empowering a Magistrate to call upon a person to provide sureties for good behaviour without his giving his own bond at the same time, 27 A. 262. The object of requiring sureties for good behaviour is that sureties should have an interest in seeing that the person from whom security is taken does behave well and they should also be in a position to exercise their influence over the man, 1893 A.W.N. 140; 20 A. 206, but a Magistrate has no power to impose arbitrary conditions, 22 Cr. L.J. 393=61 Ind. Cas. 253; in fixing the amount of security a Magistrate should consider the station in life of the person concerned, and should not go beyond a sum for which there is a fair probability of his being able to find security, 1901 P.L.R. (Cr. J.) 24 p. 69. In 33 C. 400 it was held that the test is not whether the surety can supervise the person bound over but whether the surety is of sufficient substance to warrant his being accepted. See also 30 C.W.N. 791; 23 Cr. L.J. 10=99 Ind. Cas. 42. The fact that the sureties are relatives of the accused far from being a disqualification is an additional qualification, provided they are in other respects suitable, 25 A. 131. When once a surety-bond is accepted it cannot be cancelled on the information that the surety is not a man of means, 29 C. 433. As to the form of bond see Sch. VI, No. 11. See S. 514, *infra*, as to forfeiture of bond. When a person forfeits his bond by reason of his having been convicted for an offence involving a breach of the peace, he cannot be forthwith committed to prison for the unexpired portion of the term for which security was demanded but the amount of the forfeited bond might be exacted, 28 A. 629.

Joint inquiry.—The principle of misjoinder of charges and of persons applies to inquiries under this chapter, 8 C.W.N. 193; 9 A. 432 at 437; 4 M.H.C.R. Appx. 46; a number of persons should not be tried together unless they are confederates or partners in the affair, 21 A.L.J. 641=23 Cr. L.J. 632=81 Ind. Cas. 600; 45 A. 109 at 111. Ordinarily every person has to be tried separately under this section. A joint inquiry is only permissible when two or more persons have been associated together for the purpose of committing offences mentioned in cls (a) to (f) which are under inquiry, 13 C.W.N. 244=10 Cr. L.J. 460=4 Ind. Cas. 10, unless this circumstance is established a joint inquiry is illegal, [1923] Pat. 8; 45 A. 109; Weir II, 52; 9 A. 432; 1881 A.W.N. 23; 13 Cr. L.J. 760=17 Ind. Cas. 72;

16 Cr. L.J. 136=27 Ind. Cas. 203=1914 P.R. (Cr.) 21; 37 C. 91; 22 C.W.N. 1x; 13 C.W.N. 244; 14 Bom. L.R. 373; 20 Cr.L.J. 221. See sub-section (5) of S. 117, *infra*. Although sub-section (4) permits joint inquiry against several suspects associated together, it is the duty of the Magistrate to consider the case of each suspect individually on its own merits and come to a separate finding with regard to each of them, 25 Cr. L.J. 1377=83 Ind. Cas. 337. It is not permissible to take proceedings under this section against several persons jointly unless such persons are confederates or partisans or against whom all the evidence is equally applicable, 45 A. 109; 8 L.W. 461; 10 L.W. 267=(1919) M.W.N. 639=20 Cr. L.J. 763. Where the persons proceeded against formed one gang with one purpose and each act spoken to is an act prompted by that common object and directed towards accomplishing it, a joint trial is proper, 51 M. 515 *distinguishing* 47 M.L.J. 689; 27 C. 781 and 45 A. 109. Where proceedings were taken against two persons not only for their conduct coming within cl. (d) and (e) of this section, but also under cl. (f) for the reason that they were so desperate and dangerous as to render their being at large without security hazardous to the community and both the persons proceeded against were tried jointly and evidence relating exclusively to the nefarious acts of each of them was let in, in addition to the evidence regarding the events in which it was alleged that they were associated together and the Magistrate passed an order against both, on a consideration of the entire evidence thus introduced into the record against both, it was held that the joint trial was bad and prejudiced them. Without laying down any rule or consulting any section, commonsense and common justice dictates that proceedings against a person for *badmashi* should be confined to himself alone unless the case is that he has a confederate or a partner to whom all the evidence is equally applicable, 45 A. 109 at 111 *followed in* 47 M.L.J. 689; 26 Cr. L.J. 378=89 Ind. Cas. 910. But where by holding such inquiry no prejudice has resulted and the lower Court had excluded from consideration evidence which did not apply directly to the case of each accused such joint enquiry was held to be not illegal, 26 Cr. L.J. 1114=38 Ind. Cas. 282 where 45 A. 109 is *distinguished*. Persons belonging to two contending factions should not be legally dealt with and bound over in one proceeding. Such persons cannot be said to be associated together in the matter under inquiry within the meaning of S. 117, *infra*. A joint inquiry is therefore bad and vitiates the entire proceeding, 9 Cr. L. J. 560=2 Ind. Cas. 240 where 11 C.W.N. 472, 5 Cr.L.J. 197 and 31 M. 276 are followed.

Transfer.—A case under this section can be transferred by a District Magistrate as under S. 192, *infra*, he is entitled to transfer any case cognizable by a Criminal Court. The words 'any case' in S. 192 include a case under this section. Even if the Magistrate has no such power to transfer but does so erroneously and in good faith S. 529 (f) declares that his proceedings will not be void, 35 C. 243; 24 Cr. L.J. 31=71 Ind. Cas. 79, but it has been held that when a transfer is made to the file of a first Class Magistrate who has ordinarily, jurisdiction throughout a district but not specially empowered under this section, he cannot exercise jurisdiction under this section, 23 C. 898. It has been doubted whether S. 192 or S. 526 *infra*, would apply to proceedings under Ch. VIII and Ch. XII of the Code. The decisions in 31 C. 350; 26 M. 188 remove the doubt but 25 B. 179 took a different view. It was held in 16 A. 9; 30 A. 47; 19 A. 291 that proceedings under this section cannot be transferred to any Court outside the district within such proceedings have been instituted but see the later rulings in, 32 A. 642; 12 A L J. 736 which hold that proceedings can be transferred by the High Court. See 36 A. 239 as to grounds sufficient for a transfer. In 17 C.W.N. 536 the Court remarked as to the inconvenience of transferring security proceedings from one district to another thus. "As a rule it would not be at all in accordance with our view of our duty to transfer any preventive proceedings from one district to another. It must be an extremely exceptional case that could justify the interference of this Court with the jurisdiction of the Magistrate of the district taking preventive action within his own boundaries and imposing such foreign and extraneous duty on the Magistrate of another district. It would always involve the employment of no less an authority than the District Magistrate himself, for it is impossible for a Subordinate Magistrate in a foreign district to take cognizance of proceedings of the District Magistrate of his district. This would cause the greatest inconvenience and dislocation of judicial work."

Proceedings taken under this section should be disposed of by the Magistrate who initiated the same. He cannot after recording evidence send up the case to the District Magistrate without passing final orders and the District Magistrate has no jurisdiction to dispose of the case so sent up, 14 Bom. L.R. 713=13 Cr. L.J. 749=17 Ind. Cas. 60.

Appeal and revision.—An appeal lies to the High Court from final orders passed by a Presidency Magistrate, and from all other Magistrates the appeal lies to the Sessions Court, but, Local Government is empowered to notify that in any District appeal from Magistrates shall lie to the District Magistrate and not to Court of Session. S. 406 *infra*. If a Subordinate Magistrate refers a case to the Sessions Judge under S. 123 (2) *infra* then the final order being that of the Sessions Judge, no appeal lay to the District Magistrate. Orders passed by a District Magistrate under this section can be revised by the High Court on the same grounds on which revisional powers are exercised in non-appealable sentences and orders. The High Court is not a Court of appeal in proceedings under this section and the responsibility of administering that section does not rest with it. The High Court will not weigh evidence, but will only see that the Courts below have approached the question in a fair way and when the lower Courts have not approached the case from proper standpoint, it will interfere in revision, 13 A.L.J. 1046=16 Cr. L.J. 803=31 Ind. Cas. 821; 23 Cr. L.J. 515=102 Ind. Cas. 211 where, 13 A.L.J. 1046 is *followed*. Although it is not the practice in revision to look into the evidence in cases under this section in exceptional cases the High Court will do so, for example when a person is bound over on evidence that he was suspected of having committed murders such class of evidence being wholly inadmissible for binding over a person under this section the High Court set aside the order of the lower Court in revision 28 Cr. L.J. 8=99 Ind. Cas. 40 where 11 A.L.J. 451=14 Cr. L.J. 437=23 Ind. Cas. 231 is *followed*. Although the High Court is not a Court of appeal in cases under this section and the responsibility of administering that section which ought to be administered with scrupulous care both by the Court of first instance and by the appellate Court, it only when something appears unsatisfactory and unusual, the High Court will look into the record to examine if the order had been properly passed, 28 Cr. L.J. 532=101 Ind. Cas. 836. Before affirming an order under this section the High Court must be satisfied that the evidence in the case was of such a character which made it imperative in the interests of public security to pass an order under S. 118 *infra*, 28 Cr. L.J. 515=102 Ind. Cas. 211 where 22 A.L.J. 678=25 Cr. L.J. 1172=82 Ind. Cas. 36, is *referred to*. The High Court being thus not a Court of Criminal appeal in cases under this section its duty is not to weigh the evidence given on behalf of one side or other but only to see whether the Court below has approached the case in a fair way having regard to the interest not only of the prosecution but also the accused, 25 Cr. L.J. 1293=89 Ind. Cas. 147; 13 Cr. L.J. 9=13 Ind. Cas. 102; 13 A.L.J. 1046=16 Cr. L.J. 803=31 Ind. Cas. 821. In 6 A.L.J. 487=9 Cr. L.J. 528=2 Ind. Cas. 225, it was held that the High Court will not interfere in revision on the merits with an order under this section, provided the appellate Court under S. 406, *infra* has really considered the evidence on record. The High Court ordinarily does not interfere in the preliminary stage with the discretion of Magistrates taking action under this section, but where the materials on which the order is based are clearly insufficient to support the order, it does interfere, 38 C.L.J. 198; 17 C.W.N. 233=16 C.L.J. 457. See also 41 M. 246. No Letters Patent Appeal lies against the order of a single Judge of the High Court as proceedings under this Chapter are criminal trials, 39 M. 539.

Further inquiry.—Before the amendment of S. 436 *infra* it was held that, a District Magistrate was competent to direct a further inquiry into the case when a first class Magistrate discharged an accused against whom proceedings were taken under Chap VIII, as such person was an accused person within S. 436, *infra*, 21 A. 107; 15 B. 561; 24 A. 143, 27 C. 662 and S. 436 *infra* was not intended for having a review of the proceedings under this section, merely because the District Magistrate took a different view of the evidence, from that taken by the trying Magistrate especially when no further evidence is available, 44 A. 691. The change effected in S. 436, *infra* is very significant. The words "any accused person" has been altered

into "any person accused of an offence" and certainly a person proceeded against under this section cannot be said to be a person accused of an offence and the information against him will not amount to a complaint within the meaning of S. 4 (1) (b) *supra*, 23 Cr. L.J. 89=76 Ind. Cas. 23. Consequently if a Magistrate responsible for the peace of his division is not satisfied with the advisability of taking proceedings under this section his discretion is not open to interference by a superior Court, 25 Cr. L.J. 1149=81 Ind. Cas. 973; 2 Ran. 30; 24 Cr. L.J. 825=74 Ind. Cas. 857; 50 A. 408. The recent amendment removes the doubt if any which existed before and no further inquiry can be made now. An order under S. 113 by an Additional District Magistrate in a proceeding under this section is appealable to the District Magistrate, 48 C. 874. When proceedings were set aside on appeal by the District Magistrate he has no power to order further inquiry in proceedings under this section, 33 C. 8. In an appeal from an order, the appellate Court can either alter or reverse it under S. 423 (1) (c) *infra*. So a District Magistrate on appeal from an order demanding security could either reverse it or alter it *e.g.*, by reducing the amount of security. An order for further inquiry does not fall under either category. So an order for retrial is illegal, 30 Cr. L.J. 491 (1)=115 Ind. Cas. 544 See 33 M. 83, where it was held that no order for further inquiry could be made if the case resulted in a discharge under S. 119 *infra*, see also 35 M. 313. See S. 590, cl. (d) which declares that if a Magistrate not empowered acts under this section his proceedings are void.

111. [Proviso as to European vagrants] *Repealed by Act XII of 1923, section 8.*

112. When a Magistrate acting under section 107, section 108, section 109 or section 110 deems it necessary to require any person to show cause under such section, Order to be made. he shall make an order in writing, setting forth the substance of the information received, the amount of the bond to be executed, the term for which it is to be in force, and the number, character and class of sureties (if any) required.

Object of the section.—This section provides that notice should be given to the accused as to the case he has to meet. He is entitled as a matter of right, as any person accused of a substantive offence to have a reasonable opportunity of defending himself, 27 Cr. L.J. 935=96 Ind. Cas. 391. Each accused is entitled to have a separate notice and not a joint notice with others. Charges which are going to be made against one should not be confused with charges they are being made against somebody else, 30 Cr. L.J. 532 at 564=115 Ind. Cas. 25. The party proceeded against should have due notice of the facts on which the Magistrate proposed to proceed against him. The notice should very effectually show under which of the sub clauses of S. 103 or S. 110 the case falls, so that the accused may know more clearly what is the case he has to meet. Merely telling an accused person that he is a suspected thief, is not a compliance with the imperative provisions of this section, because that does not give the person alleged to be of that character not the slightest intimation as to what are the grounds upon which it is based. If such a notice is sufficient, all that would be necessary would be to call upon anybody in India to show cause on a mere statement that he is suspected by the police to be a habitual thief, but the procedure clearly requires something in the nature of an indictment or charge containing substantial particulars indicating the grounds upon which the police have given the information to the Magistrate, 42 A. 645. It is clear that merely setting out in a notice under this section that a man is a habitual thief or robber and having the prosecution witnesses ready there and then to go on with the case is not what the Legislature contemplated. However guilty a man may be, he is entitled, to a trial which is not a sham but a real trial where the accused knows something about what is happening to him, 49 A. 5 where 42 A. 645 is followed. If this is not made clear in the notice the final order is liable to be

set aside, 30 M. 282; 11 C. 13. The order under this section stands in the place of a charge in the trial of a warrant case and it is the intention of the Code that an accused person should have at his own house the fullest information as to the reasons why his liberty is liable to be endangered, 14 A. 43; 6 A. 25; but a Magistrate is not bound to disclose the source of his information or which he is acting, 27 A. 172. The parties must be in a position to bring their evidence to rebut the truth of the information, 6 A. 214; 11 C. 13. But omission to set forth the substance of the information received may not necessarily vitiate the proceedings if as a matter of fact the accused had clear notice of the case against him and had ample reason and opportunity to let in evidence, 23 Cr. L.J. 42—64 Ind. Cas. 668; 27 Cr. L.J. 575—94 Ind. Cas. 143.

Deems it necessary.—The Magistrate is bound to state before issuing process that in his opinion a breach of the peace is likely to take place, 6 A. 26 at 30.

Shall make an order in writing.—The provisions of this section are *imperative*, not merely *directory*. If a Magistrate before taking action under §. 107, *supra* omits to issue a notice in writing as required by this section, his omission was a non-compliance with an express provision of law rendering his subsequent proceedings void, 30 M. 282. It has been again and again pointed out to the police and the Magistrates the general desirability of proceeding in security cases strictly in accordance with the provisions of the Code but the advice repeatedly given is as regularly ignored. The proceedings ought to commence with what purports to be an order under this section by which it is sought to give notice to the accused of the charges he had to meet, 26 A.L.J. 519 at 523. See also 47 M.L.J. 689. But a different view was taken in 1891 A.W.N. 40; 15 W.R. (Cr.) 43; see also 11 Bom. L.R. 742—10 Cr. L.J. 373—3 Ind. Cas. 774. The order is only a preliminary notice, 30 M. 282, and is not in the nature of a rule nisi implying that the burden of proving innocence is on the person proceeded against. In drawing up the preliminary order the Magistrate should specify in what way and with reference to what matter the person proceeded against is likely to commit a breach of the peace. A proceeding which merely reproduces the words of §. 107, *supra* without giving any particulars is vague and cannot be supported, 30 Cr. L.J. 492—115 Ind. Cas. 545. The onus lies always on the prosecution to establish circumstances justifying the action taken, 9 A. 452; 12 W.R. (Cr.) 60; 4 B.L.R. 46 (F.B.); 3 Bom. L.R. 269. The preliminary order must state the amount of the bond to be executed and the term for which the bond is to be in force, 2 Ran. 524. Omission to state the amount of the bond to be executed is only an irregularity, 8 C. 724. It is only after an order in writing under this section has been passed the Magistrate is empowered to issue a warrant against a suspect to prevent the commission of an offence, 27 Cr. L.J. 935—96 Ind. Cas. 391.

Require him to show cause.—The object of serving the preliminary order on the person proceeded against is to acquaint him with the details of the order itself and to enable him to defend himself against the allegations upon which the order was made. The preliminary order must state the amount of the bond to be executed and time for which it is to be in force, 2 Ran. 524. If the person proceeded against was absent and the preliminary order was not served on him it is a sufficient compliance with law, if the order is read out to him in Court when he appears, 23 Cr. L.J. 132—76 Ind. Cas. 228; but in 47 M.L.J. 689, it was held that the object being to enable the accused to prepare his defence and to summon his witnesses before the hearing commences the defects in the notice cannot be remedied by explanations given by the prosecuting inspector at the commencement of the trial. The issue of a preliminary order is not a formal matter. It is a judicial act to be exercised after due consideration of the materials placed before the Magistrate. Where the notice issued was very meagre and did not contain sufficient details regarding the charges brought against the persons proceeded against the whole proceedings are vitiated, 47 M.L.J. 689; (1925) M.W.N. 57—26 Cr. L.J. 673—88 Ind. Cas. 49; 12 A.L.J. 336; 27 Cr. L.J. 318—92 Ind. Cas. 702; 45 A. 109; 49 A. 5 but see 27 Cr. L.J. 575—94 Ind. Cas. 143, where it was held that the High Court ought not set aside the final order for non-compliance strictly of the provisions of this and §. 118 *infra* when the accused had been sufficiently informed of the allegations

against him. See also 27 Cr. L.J. 1132=97 Ind. Cas. 652. The notice must show under which sub-section the person is sought to be proceeded against. A mere statement that he is one of criminal tendencies or is suspected of having committed crimes is insufficient and violates proceedings, 26 Cr. L.J. 1377=89 Ind. Cas. 513. "When a person is called upon to show cause why he should not be required to give security for good behaviour, he must be ready with his evidence when he appears in obedience to the notice. That is the meaning of the expression 'to show cause.' If he is unable to bring the evidence with him on account of the shortness of the notice or other reasonable cause, it is his duty when he appears, to apply at once for summonses to the witnesses he proposes to call, 9 Bom. L.R. 1333. 'Showing cause' is not merely filing a written statement or making a verbal one but the supporting of that statement by such evidence as the party may be able to produce, 23 W.R. (Cr.) 9 at 11. Accused should be given ample opportunity of obtaining legal assistance before evidence is adduced for the prosecution, 42 A. 645. He must have time to bring his witnesses, 41 C. 806. A notice to show cause why security should not be taken for keeping the peace cannot form the basis of an order passed for security for good behaviour or vice versa, 25 C. 793; 30 M. 282.

Setting forth the substance of the information received.—The substance of the information received must be more than a bare statement that a man is a habitual thief, or a habitual committer of mischief, or is so desperate and dangerous as to render his being at large without security hazardous to the community or whatever may be brought against him and it is obligatory for the Magistrate to set forth the particulars, 42 A. 616; 49 A. 5; 47 M.L.J. 689. The words should not be interpreted to mean anything more than the gist of the information. It is not necessary to state anything more than which will show the person against whom proceedings are taken, the particular sub-section on which it is proposed to proceed against him. The words cannot be read as requiring in law, the particulars which the above decisions consider it necessary. The information which justifies taking action under this section may be the barest information. It may be lacking in details and in particulars. If for example, a Magistrate receives information from a police officer that a certain person is a habitual thief, the Magistrate has a right to proceed to the next stage and issue a notice to him. He may be unwise in taking such action without carefully checking the information. It may be lacking in details but he has a legal right to take such action, and if his information is meagre, the substance of his information would be meagre. Nevertheless it is sufficient for him to state it to make his order under this section valid. If he has taken action on insufficient information, the proceedings may on the evidence be found to have been without justification. No ill results will follow from the adoption of this view. Subsequent procedure under this chapter when examined shows that inquiry proceeds as in warrant cases (S. 117 (2) *infra*) except no charge need be framed. In warrant cases when a man is put on his trial he receives no information as to the nature of the charge against him until a considerable amount of prosecution evidence has been recorded. It is then that a charge is framed but in many instances the actual wording of the charges gives very little information of the nature of the case. In a charge of theft, the owner of the property stolen need not be stated and it need not state what the subject of theft is. The information is bare to a degree (See Form XXVIII (1) 3, Sch. V). Yet it is all the information which the Legislature considers it necessary to give to the accused on that charge. Once an accused has heard the evidence against him he is not put to any real hardship by reason of the brevity of the charge. Therefore a person against whom proceedings are started under this section as a habitual thief cannot have any grievance because the notice read out to him states simply 'it is alleged you are a habitual thief' by reason of lack of particulars, 2 Luck. 157.

Amount of the bond to be executed.—The amount should not be excessive, 16 B. 372 and the Magistrate is not entitled to demand a larger amount than that specified in the notice to show cause. The order under this section must be such that if a suspect has a *bona fide* intention to be of good behaviour it will not be impossible for him to find sureties and the order should also be clear in its provisions. It is not unreasonable to stipulate that the surety should be at least of equal standing to the accused, 16 Cr. L.J. 100.

Number, character and class of sureties required.—Arbitrary conditions as to sureties are not warranted by law. The condition that sureties should be respectable land-holders, 4 M.H.C.R. (App.) 46, that the sureties should not be from the accused's village and must be of a particular class, 1 Bom. L.R. 52, are equivalent to saying that he must go to jail; where a Magistrate required sureties being persons of respectability and substance not related to the accused and residing within one mile of his house and as a matter of fact no person of respectability resided within a mile, it was held that to impose such arbitrary conditions was tantamount to saying that the accused shall not furnish any security at all but must go to jail, 22 W.R. (Cr) 37. A condition that a surety should be willing to pledge his landed estates and immovable properties is, in majority of cases compelling a man to do that which he will never be able to do, and tantamount to a sentence of imprisonment, 7 N.W.P.H.C.R. 219. There seems to be some conflict of decisions as to whether sureties should be persons who will be able to supervise and control the accused and whether a surety offered, who is unable to control the principal should be accepted or not. The Allahabad High Court in 20 A. 206; 24 A. 471; 8 A.L.J. 793; 10 A.L.J. 354, took the view that a surety who is unfit to control the behaviour of the accused being a non-resident of the village ought not to be accepted. But the Calcutta High Court in 24 C. 133; 4 C.W.N. 797; 6 C.W.N. 593; 37 C. 433 and 91 took a different view. In the later decision of the Calcutta High Court in 13 C.W.N. 82, the correctness of the decisions in 4 C.W.N. 797; 6 C.W.N. 593, are doubted. See also 41 C. 764; 33 C. 400; 23 Cr. L.J. 10=93 Ind. Cas. 42.

The term for which it is to be in force.—An order requiring a person to give security for a longer term than that specified in the notice issued under this section is illegal, 26 M. 471; see 6 A. 213 as to the principles which should guide Courts in fixing the term. The term for which security is taken should cease with the necessity, e.g., taking security, when disturbance is apprehended at a fair which is to last only for a fortnight. The period for which security is given commences not from the date of the preliminary order but from the date of the final order under S. 118 *infra*, 51 M. 515.

113. If the person in respect of whom such order is made is present in Court, it shall be read over to him, or, if he so desires, the substance thereof shall be explained to him.

Procedure in respect of person present in Court.

Is present in Court.—Mere presence is sufficient. If the person is present in Court it is sufficient to read out to him the substance of the proceedings, 21 Cr. L.J. 325=53 Ind. Cas. 593. When a person appears in Court to show cause in pursuance of an order passed under S. 112 *supra*, served on him, the Magistrate passed a different order under S. 112 *supra* demanding higher security from him and he read out to him the later order passed under S. 112 *supra* as required by this section it was held the procedure adopted was proper 28 Cr. L.J. 815=104 Ind. Cas. 255. The question whether he was brought there legally or illegally or was under arrest or not is quite immaterial, 12 Cr. L.J. 833=12 Ind. Cas. 331; 6 N.W.P.H.C.R. 336; 2 B.L.R. (Appx.) 23; 35 B. 225; 31 C. 557; 26 M. 121.

Issue a warrant.—A warrant cannot be legally issued under this section unless the person proceeded against be actually and physically present in the district, the object being to prevent commission of future offences; this object can equally be served by a person voluntarily banishing himself out of the district, 14 Bom. L.R. 889=13 Cr. L.J. 796=17 Ind. Cas. 540.

114. If such person is not present in Court, the Magistrate shall issue a summons requiring him to appear, or, when such person is in custody, a warrant directing the officer in whose custody he is, to bring him before the Courts:

Summons or warrant in case of person not so present.

Provided that whenever it appears to such Magistrate, upon the report of a police-officer or upon other information (the substance of which report or information shall be recorded by the Magistrate), that there is reason to fear the commission of a breach of the peace, and that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, the Magistrate may at any time issue a warrant for his arrest.

Shall issue a summons requiring him to appear.—The object of serving a notice on the suspect while under police custody is this: the police can arrest a suspected criminal under S. 55 *supra* and they may proceed against him either for a substantive offence or under this Chapter for taking security from him and it is for that reason, this section contemplates a notice to the suspect, 27 Cr. L.J. 623=94 Ind. Cas. 404. It is clear from this section that it is not necessary to serve a copy of the proceedings on a person who is present in Court. It is sufficient to read it out to him under S. 113 *supra*, 21 Cr.L.J. 321=55 Ind. Cas. 593. Reasonable time should be given to the person summoned to meet the charge against him and to have his evidence adduced, 41 C. 806; 6 A. 214.

For form of summons, see Sch. V, No. 12, *infra*.

Proviso to the section.—The proviso contains two stringent elements obviously directed against any ill-considered precipitancy on the part of the Magistrate. (1) A Magistrate must be of opinion that the only way to prevent a breach of the peace is to commit the person to custody, (2) the Magistrate must record the substance of the police report or other information on which he is acting, 24 Cr. L.J. 829=74 Ind. Cas. 861. The words here "there is reason to fear the commission of a breach of the peace" seem to suggest that the proviso applies only to cases falling under S. 107, *supra*. The Calcutta High Court in 32 C. 80 doubted whether the proviso applied to the case where a Magistrate re-arrested a person who had already appeared before him and was admitted to bail. Even granting that the Magistrate had power to re-arrest, the accused ought not to be remanded but must be released on bail except in the special circumstances referred to in cls. (3) and (4) of S. 107, *supra*; when the Magistrate has not followed the procedure prescribed by this proviso an order of committal to custody cannot be supported, 31 M. 315. The question whether the proviso applied to the case of a person who is present in Court, was left undecided in the above case; not only must the Magistrate have "reason to fear the commission of a breach of the peace" but that such breach of the peace cannot be prevented otherwise than by the immediate arrest of such person, 6 A. 132 at 133; 14 A. 43. It is only after the Magistrate has passed an order under S. 112 *supra* and satisfied himself that there is reason to fear a breach of the peace which ought to be prevented, he can issue a warrant against a suspect, 27 Cr. L.J. 935=96 Ind. Cas. 391. A warrant cannot legally be issued under this section unless the person proceeded against be actually and physically present in the district. The object being to prevent commission of future offences it is equally served by a person voluntarily banishing himself out of the district, 14 Bom. L.R. 889=13 Cr. L.J. 796=17 Ind. Cas. 540; but see 46 C. 215 which takes a different view.

Revision.—The High Court has jurisdiction to revise orders passed under this section, 25 C. 233; 22 C. 131; 20 B. 543; 1891 A.W.N. 219; 11 Cr. L.J. 393=6 Ind. Cas. 626.

115. Every summons or warrant issued under section 114 shall be accompanied by a copy of the order made under section 112, and such copy shall be delivered by the officer serving or executing such summons or warrant to the person served with, or arrested under the same.

Copy of order under section 112 to accompany summons or warrant.

Shall be accompanied by a copy of the order under S. 112.—The order in writing setting forth the substance of the information upon which the Magistrate professes to act should always, except in cases in which action has been taken under S. 55, *supra* accompany the summons issued under this section and in no case should a Magistrate acting under S. 112 issue a warrant of arrest except upon the clearest grounds for belief that unless he issues such warrant a breach of the peace is inevitable. It is the intention of the Code that any man called to meet the exceptional procedure laid down in this Chapter should at his own house have the fullest information, compatible with the circumstances of the case as to the reasons why his liberty is in danger of being interfered with. Only when a breach of the peace is imminent should the action taken under this Chapter be of a prompt and vigorous nature. To deprive any person of his liberty is a most serious step to take, and it is hardly too much to say that every step in the process should show extreme deliberation and care and if a person has to be arrested previous to inquiry he should be given the option of release upon proper bail, 14 A. 43 at 47. When a warrant was not accompanied by a copy of the order under S. 112, *infra* as required by this section the proceedings of the Magistrate were held illegal, Weir II, 55; 17 M.L.J. 438, but see 11 Bom. L.R. 740=10 Cr. L.J. 375=3 Ind. Cas. 774 which takes a different view and holds that S. 537, *infra* cures the irregularity. See also 21 Cr. L.J. 321=55 Ind. Cas. 593.

Such copy shall be delivered.—See Ss. 70 and 71 as to the mode of service of summons. The serving officer is to certify to the delivery of the copy of the order.

116. The Magistrate may, if he sees sufficient cause, dispense with the personal attendance of any person called upon to show cause why he should not be ordered to execute a bond for keeping the peace, and may permit him to appear by a pleader.

Power to dispense with personal attendance.

May dispense with personal attendance.—There is a marked distinction made in the Code between proceedings under S. 107, *supra* and those under S. 108 or 109 or 110 *supra*. Personal attendance can be dispensed with only in proceedings under the former section to keep the peace, Weir II, 54. When proceedings are taken against a person who is at a distance and there was no special ground making his personal attendance necessary, it would be an unwise exercise of jurisdiction to require him to appear personally as the Magistrate has power to allow him to appear by a pleader, 12 C. 133 at 136.

117. (1) When an order under section 112 has been read or explained under section 113 to a person present in Court, or when any person appears or is brought before a Magistrate in compliance with, or in execution of, a summons or warrant issued under section 114, the Magistrate shall proceed to inquire into the truth of the information upon which action has been taken, and to take such further evidence as may appear necessary.

Inquiry as to truth of information.

(2) Such inquiry shall be made, as nearly as may be practicable where the order requires security for keeping the peace, in the manner hereinafter prescribed for conducting trials and recording evidence in summons-cases; and where the order requires security for good behaviour in the manner hereinafter prescribed for conducting trials and recording evidence in warrant-cases, except that no charge need be framed.

(3) *Pending the completion of the inquiry under sub-section (1) the Magistrate, if he considers that immediate measures are necessary for the prevention of a breach of the peace or disturbance of the public tranquillity or the commission of any offence or for the public safety, may, for reasons to be recorded in writing, direct the person in respect of whom the order under section 112 has been made to execute a bond, with or without sureties, for keeping the peace or maintaining good behaviour until the conclusion of the inquiry, and may detain him in custody until such bond is executed or, in default of execution, until the inquiry is concluded :*

Provided that —

(a) *no person against whom proceedings are not being taken under section 108, section 109, or section 110, shall be directed to execute a bond for maintaining good behaviour, and*

(b) *the conditions of such bond whether as to the amount thereof or as to the provision of sureties or the number thereof or the pecuniary extent of their liability, shall not be more onerous than those specified in the order under section 112.*

(4) *For the purposes of this section the fact that a person is an habitual offender or is so desperate or dangerous as to render his being at large without security hazardous to the community may be proved by evidence of general repute or otherwise.*

(5) *Where two or more persons have been associated together in the matter under inquiry, they may be dealt with in the same or separate inquiries as the Magistrate shall think just.*

Amendment.—Sub-section (3) is new "This clause enables a Magistrate in emergent cases to take immediate steps to preserve the public peace or for the public safety by taking security pending the detailed inquiry." *St. of Obs. and Reasons.*

Scope of the section.—Proceedings under this Chapter are not trials but only inquiries and the person proceeded against is not an accused person as the expression is used and understood in the Code. A person proceeded against cannot be said to be accused of an offence and any information laid against him will not amount to a complaint within the meaning of S. 4 (1) (h) *supra*. The provisions of S. 342 *infra* cannot therefore apply to an inquiry under this section and the omission on the part of the Court to examine the person proceeded against will not vitiate the proceedings, 50 C. 985; but the provisions of S. 350 *infra* apply to an inquiry under this section, 52 C. 470 and 632. The inquiry must be a judicial inquiry and order to be passed should be based upon legal evidence duly taken, 6 B. H. C.R. (Cr. Ca.) 1; 8 B. H. C.R. (Cr. Ca.) 162; 4 M. H. C.R. Appx. xxii; 18 W.R. (Cr.) 18; 10 W.R. (Cr.) 45; 18 W.R. (Cr.) 2; 11 W.R. (Cr.) 50, 1 C. L.R. 48; 2 N.W.P. H.C.R. 431 1889 A.W.N. 114; 10 B. 173.

The Magistrate shall proceed to inquire.—The power given under this section is no doubt for the purpose of suppression of crime. But once the proceedings come into Court, this section provides that the inquiry should be a full judicial inquiry, evidence being

taken in the presence of the accused and opportunity given for cross-examination of witnesses, 4 M. H. C. R. Appx. xxii; 18 W.R. (Cr) 2; 5 C.W.N. 249. The Magistrate is bound to compel the attendance of the defence witnesses unless he considers the application is made for purposes of vexation or delay or defeating the ends of justice and if he refuses, then he should record in writing the grounds of refusal as required by S. 257, *infra*, 26 B. 418. A proceeding under this section is an inquiry within the meaning of S. 517 *infra* and the Court is therefore empowered to pass an order with regard to property produced before it, 42 M. 9. The inquiry in cases requiring security to keep the peace shall be the same as in summons cases, S. 355, *infra*, 26 Cr. L. J. 430=85 Ind. Cas. 46, and the inquiry in good behaviour cases as in warrant cases S. 356, *infra*. This section requires the Magistrate to satisfy himself as to the truth of the information before making an order for the execution of a bond and when no enquiry was made the order is bad in law, 34 M. 139. A report of a Subordinate Magistrate cannot be the basis of an order under this section, 6 B.H.C.R. (Cr. Ca.) 1; 5 B.H.C.R. (Cr. Ca.) 105, although such a report might be sufficient information upon which notice to show cause might be issued. Legal evidence must be recorded to found an order under this section. 8 B.H.C.R. (Cr. Ca.) 162. It is impossible to accept the proposition that evidence tending to show the commission of a substantive offence or which might form the basis of a charge of a substantive offence is necessarily to be excluded in proceedings under this section and cannot form the basis of an order under S. 112 *infra* and a finding under S. 118 *infra*. The fact that a person proceeded against under this section was acquitted in two cases put in evidence against him will not entitle him to have all the evidence excluded of the incidents which formed the subject of his trial. It is entirely a question of value of acquittals which ought to be put in evidence for whatever value they may be worth, 47 A. 733 followed in 23 Cr. L. J. 515=102 Ind. Cas. 211. Evidence in previous cases of rioting cannot form the basis of an order under this section. The Magistrate is bound to make an inquiry as to the truth of the information received and the order passed without such inquiry is bad in law, 37 A. 30. An order demanding security cannot be passed simply because the person proceeded against agrees to furnish the required security, 24 A.L.J. 317=27 Cr. L.J. 370=92 Ind. Cas. 882 but see 25 A.L.J. 819 which takes a contrary view and holds that when the accused's statement is recorded wherein he expresses his willingness to enter into a bond to keep the peace, there was sufficient compliance with this section and the order passed is perfectly legal even though no evidence for the prosecution had been recorded. See also 50 A. 599 to the same effect.

Truth of information upon which action is taken—What constitutes the action referred to herein is (1) the making of the preliminary order under S. 112, (2) *supra* the reading over or explaining the substance of it under S. 113, (3) *supra* the issuing of a summons or warrant under S. 114 *supra*. The Magistrate is directed expressly by this section to inquire into the truth of the information upon which action is taken. One method of inquiry into the truth of the information is to draw the attention of the person concerned to the matters contained in the notice and to ask him whether he has any cause to show or whether he desires further inquiry or whether he disputes the allegations, or whether he is willing to be bound over on the strength of such allegations and it would be a farfetched and unreasonable interpretation to hold that a Magistrate asking such questions and inviting the person summoned to state to the Court his attitude with regard to the summons was not taking reasonable steps to inquire into the truth of the information, 50 A. 599 at 601. When a person stated he was a poor man and he had very little expectation of getting any benefit by fighting the case and therefore agreed to be bound down it was held that there was no evidence that he was about to break the peace, 35 C. 674; 30 M. 330; 7 M.L.T. 304=1910 M.W.N. 228=11 Cr. L.J. 393=6 Ind. Cas. 662. Where the person proceeded against admits the allegations in the preliminary order under S. 112 when read over to him the Magistrate cannot pass an order against him at once but should proceed to record evidence as in warrant cases. People proceeded against are often illiterate and ignorant and a mere admission is not conclusive proof, that they are persons to be bound over. The whole Chapter vests extraordinary powers in the police and Magistracy and to prevent its forming an instrument of intolerable oppression it must be worked with utmost

discretion, 26 Cr. L.J. 1041=87 Ind. Cas. 961, but see 50 A. 599 and 23 A.L.J. 317. The statement of the person proceeded against that he is of bad character and he had been to jail is not sufficient, 3 Bom. L.R. 269. It is for the prosecution to prove the case. The order to show cause is not in the nature of a rule nisi throwing the *onus* upon the person called upon to prove his innocence, 9 A. 452; 12 W.R. (Cr) 60; 4 B.L.R. 46 (F.B.).

Take such further evidence as may appear necessary.—Such further evidence refers to evidence *ejusdem generis* with the evidence already recorded, *i.e.*, the evidence as to the circumstances of the case and as to the position in life and means of the person proceeded against to fix the period of security and the amount of the bond, 15 Cr. L.J. 212=22 Ind. Cas. 996. Courts are bound to give a reasonable interpretation to language of the kind which puts on the Magistrate the duty of making up his mind whether further evidence is necessary or not. It is unreasonable to say that he has a statutory duty to take further evidence if he does not consider it necessary and it is equally unreasonable to hold that he is wrong in considering further evidence unnecessary if the Magistrate has made the person summoned to understand what the enquiry is about and has given him an opportunity of showing cause, if he wants to, and on the other hand has accepted his content to be bound over as an intimation that he has no complaint to make of the information acted upon by the Magistrate, 50 A. 599 at 600.

Sub-section (2).—Before making an order directing security for good behaviour the person proceeded against should be informed of the accusation which he has to meet and he should be given an opportunity to enter upon his defence, 11 C. 13; 6 A. 132. Under this sub-section the inquiry should as nearly as possible be in the manner prescribed for trial of summons cases in proceedings under S. 107 *supra*, 26 Cr. L.J. 430=85 Ind. Cas. 46 and that prescribed for warrant cases, in good behaviour cases, 12 Cr. L.J. 89=9 Ind. Cas. 468. This sub-section requires that proceedings under S. 110 *supra* should be conducted as nearly as may be practicable in the manner hereinafter prescribed for conducting trials and recording evidence in warrant cases except that no charge need be framed. The reason for this exception is obvious as what is equivalent to a charge has already been framed in the preliminary order served on him under S. 112 *supra*. According to S. 254 *infra* at any stage of the prosecution case the Magistrate may frame a charge. According to S. 255 *supra* the charge shall then be read and explained to the accused and he shall be asked whether he is guilty or has any defence to make. There is no reason why the provisions of these two sections should not be applied to an inquiry under this section except the framing and reading it over the charge to the accused; in other words at any stage of the prosecution the Magistrate if he is *prima facie* satisfied that there is a case against the accused, may interrogate the accused. If the accused does not plead guilty and elects to defend, the accused shall be asked which of the prosecution witnesses he wishes to cross-examine and he must be given an opportunity to cross-examine. If the Magistrate wishes to hear all the prosecution witnesses before asking the accused whether he wishes to plead guilty or to defend himself, he is of course at liberty to do so. But when the stage is reached of asking the accused whether he pleads guilty or to defend himself, he must be allowed an opportunity to cross-examine. This procedure may in some cases be inconvenient and it may be much more convenient for the Magistrate to insist upon the accused cross-examining any witnesses immediately whether they wish to do so or not and whether are represented or not but that is plainly not the law and the accused are entitled to an opportunity to cross-examine in accordance with law, 50 A. 71, but in 7 Lah. 265 *following* 35 C. 243 and 1916 P.R. (Cr. J.) 1 and in 17 Cr. L.J. 84=32 Ind. Cas. 676 an opposite view that the accused had no right to further cross-examine prosecution witness has been taken. The Madras High Court in 43 M. 511 (F.B.) held that this section attracts to itself all the provisions in the trial of warrant cases and the accused had the right to further cross-examine the Prosecution witnesses under S. 256 *infra* but the question has recently been referred to a Full Bench for decision, see 56 M.L.J. (Sh. n.) 40. The Full Bench in Cr. R. C. No. 491 of 1928 has heard full arguments and has reserved judgment. For the decision of the Full Bench see notes under S. 256 *infra*. The provisions of S. 350 *infra* apply to proceedings under this Chapter and the accused is entitled to a *de novo* enquiry, 23 Cr. L.J. 1380=83 Ind. Cas. 340; 43 M. 511 (F.B.).

Sub-section (3).—This sub-section empowers the Magistrate pending the completion of the inquiry under sub-section (1), if he considers immediate measures necessary for preventing a breach of the peace to direct the person proceeded against to execute a bond with or without sureties until the conclusion of the inquiry and may detain him also in custody until the execution of the bond or until the completion of the inquiry. The object of this sub-section is to empower the Magistrate to direct the person against whom an order under S. 112 *supra* has been made to execute a bond until the conclusion of the inquiry. The power so to direct depends upon the Magistrate holding that immediate measures are necessary for the purpose mentioned herein. The reasons for exercising the power should be recorded in writing and if reasons are recorded the provisions of the section are complied with without further evidence being adduced. 27 Cr. L.J. 1030=96 Ind. Cas. 982. Under the proviso to this sub-section an *interim* order of security should not be more onerous than one made under S. 112 *supra* *Ibid*. A Court acts within its jurisdiction when it requires pending an application for transfer of the proceedings to another Court, the accused to execute a bond under this sub-section and S. 626 (8) *infra* cannot apply, 28 Cr. L.J. 173=26 A.L.J. 393=93 Ind. Cas. 605.

Sub section (4).—The mere record of previous convictions on account of which a person has undergone punishment does not satisfy the requirements of this section, 10 B. 174. Evidence of general repute means with reference to a man's character, evidence as to his general character founded on the general opinion of the neighbourhood where he lives. The evidence as to general disposition founded on opinion of particular witnesses on personal knowledge is also admissible. Generally repute need not be general opinion of the neighbours and need not be personal knowledge of neighbours generally, and general opinion need not be publicly expressed, 26 Cr. L.J. 1283=89 Ind. Cas. 147 where 6 Cr. L.J. 256 and 97 *referred to*. See also 6 Cr. L.J. 97 at 99; 12 A.L.J. 937=15 Cr. L.J. 705=26 Ind. Cas. 133.

Evidence of general repute.—Victor Hugo says "In villages it is the custom to collect all petty details of a man's career and when they are put together the sum total constitutes his "reputation." Reputation is that which generally has been and what many people said and thought of a man. As to what constitutes a man's general repute or general reputation as stated in S. 55, Ind. Ev. Act, the idea conveyed by these words is well understood. Every man is certainly conscious to what his general reputation is and by necessary association of ideas he is also conscious of the limited or the extensive circle, as the case may be, within which reputation generally exists. Now the opinion held by the body of persons within the circle as to his character is, his general reputation. The evidence which discloses the opinion of such persons collectively is, therefore evidence of proof of general reputation and what that circle is, is capable of being proved. It is impossible however to define the limits of the circle. It must vary according to the position and circumstances of every particular individual. As stated before the whole idea is better understood than could be defined with any logical precision "General reputation consists in what is generally thought of one by those among whom he resides, and with whom he is chiefly conversant. Common opinion in which there is a general concurrence, the prevailing opinion in that circle where one's character is best known; what is generally said by those among whom he associates and by whom he is known, common report among those who have the best opportunity of judging of his habit and integrity; common reputation among his neighbours and acquaintances,—are so many forms of expression by which an effort has been made to define wherein consists general reputation" when it is said that reputation must be general it is meant that the community as a whole must be agreed on this opinion in order that it may be regarded a reputation. If the estimates vary and public opinion has not reached the stage of definite harmony, the opinion cannot be treated as sufficiently trustworthy. On the other hand it is impossible to exact unanimity for there are always dissenters. To define precisely that quality of public opinion thus commonly described as *general reputation* is therefore a difficult thing. There is on this subject often an attempt at nicety of phrase which amounts in effect to mere quibbling because the witnesses will not ordinarily appreciate the

discrimination. Such requirements of definition should be avoided as unprofitable", 21 Cr. L.J. 810 at 812-813=58 Ind. Cas. 632, quoting from *Wigmore on evidence*. Evidence of repute must be of persons who are acquainted with the accused and live in the neighbourhood are themselves aware of his reputation. It must be the opinion formed by witnesses from specific cases coming to their knowledge and not merely from reports or rumours from others, 25 Cr. L.J. 985=81 Ind. Cas. 633. When a witness comes into Court and says 'This man is by general repute a habitual thief etc.', whether his evidence is worth anything will depend upon his position, his partiality or impartiality and whether defence have by cross-examination been able to show that the witness has no real grounds for saying that he has knowledge of his general reputation. There should really be little difficulty in prosecuting these cases if the police and the Magistracy keep clearly in view the terms of the various clauses of S. 110, *supra*, and the provisions of this sub section and if they bear in mind that the allegations in S. 110 can only be proved by direct evidence of people who have knowledge of facts to which they depose with the exception contained in cl. (f); a witness may say "I know the general reputation of a man to be so and so." Such evidence of general repute does not offend against the rule as to hearsay evidence. This is not hearsay but direct evidence based on knowledge of facts—the fact that people are talking about a man in a certain way and the fact that he has such and such general reputation, 26 A.L.J. 99 at 102=29 Cr. L.J. 92=106 Ind. Cas. 684. Evidence of general repute is admissible only in cases of good behaviour falling under cl. (f) of S. 110 and this is made clear by the addition made to cl. (d) of this section of the words of cl. (f) of S. 110, *supra*. The rulings in 25 A. 273, 29 C. 779; 5 C.W.N. 249 are no longer law. Under the provisions of S. 109 and this section, if a person is unable to prove the source of his livelihood he ought not to be ordered to execute a bond unless there is reasonable ground for suspecting that he is sustaining himself by some dishonest means, for such an order can only be made where, it is necessary for keeping the peace or maintaining good behaviour, 53 C. 315. Evidence need not be given to prove that the person proceeded against has been convicted of any of the offences mentioned, 3 M. 238. A wide discretion is given to the Magistrate as to the evidence which he may admit in proceedings under S. 110, *supra*, 1904 A.W.N. 140=1 Cr. L.J. 3. See also 6 Bom. L.R. 34=10 Cr. L.J. 315=3 Ind. Cas. 681 evidence of general repute, though hearsay, was held admissible in proceedings under this Chapter, but in 1 A.L.J. 611 and 613 it was held that a rumour of bad character is no evidence of general repute. A man's general reputation is that which he bears among the fellow townsmen or in the neighbourhood in which he lives. There should be no doubt what a man's general reputation is where a large body of respectable witnesses of the neighbourhood testify to his good character as against the evidence of police-officers, no security is to be demanded, 9 Lah. 133 following 11 Cr. L.J. 603=8 Ind. Cas. 249; 1901 P.L.R. 18; 1898 P.R. (Cr. J.) 2. General reputation may be good or bad. It is the general opinion of persons who have known the accused or have heard of him. It is certainly not rumours and has stronger basis than rumours which are generally hearsay. Hearsay is not admissible evidence, 8 GO Ind. Ev. Act but it was held in 6 Bom. L.R. 34 that hearsay evidence amounting to evidence of general reputation is admissible in proceedings under this section. Evidence of general reputation involves to a certain extent evidence of opinion but that is the belief or opinion of a body of persons which is essentially different from individual opinion. The general rule therefore that individual opinions are inadmissible in proof of facts holds good even with reference of evidence of character, 8 Q.B.D. 491 followed in 21 Cr. L.J. 810=58 Ind. Cas. 682. It is hardly necessary to say that evidence of rumour is merely hearsay, and hearsay evidence of particular fact. Evidence of repute is a totally different thing. A man's general reputation is the reputation which he bears in the place in which he lives amongst all the townsmen, and if it is proved that a man who lives in a particular place is looked upon by his fellow townsmen, whether they happen to know him or not, as a man of good repute, that is strong evidence that he is a man of that character. On the other hand, if the state of things is, that the body of his fellow townsmen who know him look upon him as a dangerous man and a man of bad habits, that is strong evidence that he is a man of bad character; but to say that there are rumours in a particular place among a certain class of people that a man has done particular acts or has characteristics of a certain

kind, those rumours are in themselves evidence under this section, is to say what the law does not justify us in saying, and consequently we think that the evidence of general repute is of little or no value," 23 C. 621 at 628. The law allows evidence of general repute of the accused to be given. This does not mean that the prosecution may place before the Magistrate a heterogeneous mass of more or less vague and general statements by any witness who can be produced to say something on hearsay or otherwise, label it 'general repute' and ask the Magistrate to call for security on the strength of it. Yet this is a very general practice. A man's general repute whether deserved or not, is just as much a fact as any other fact which can be proved by a witness. If a witness is a witness to general repute he may say 'the accused has the general reputation of being a man who habitually commits such and such offences.' In addition to this he may properly be put a few questions to show that he himself is in a position to know what the general reputation of the accused is. Further than this, on the mere question of 'general repute' it is unnecessary and generally undesirable to go in examination-in-chief. If the accused is defended his counsel, if he sees fit, can ask any questions that may go to show whether the witness is really telling the truth when he says that the accused's 'general repute' is so and so. He may question if he thinks fit as to when and what circumstances he has heard the character of the accused discussed. He may in fact test the credibility of the witness as to the real existence of the alleged general reputation in such legitimate way. The Magistrate too is at liberty to ask similar questions and when the accused is undefended or when the Magistrate is not satisfied with the cross examination he should satisfy himself by asking such questions as he thinks desirable, 27 A.L.J. 261=30 C.L.J. 562 at 565 66=116 Ind. Cas. 25. It has been repeatedly held that mere suspicion of complicity in this or that isolated offence is not evidence of general repute. If the person proceeded against is not convicted of any offence and he was never specifically named by any one as having committed any offence, he ought not to be proceeded against under S. 110 *supra* even though the police suspected him on various occasions 9 Lah. 586 following 9 Lah. 133. See also 30 Cr. L.J. 220=113 Ind. Cas. 909. In proceedings under s. 110 *supra* it is not enough to prove by evidence to the general character that a man is by general repute a habitual thief, etc., but it must further be proved that he is a habitual offender though the fact may be proved by evidence of general repute and it is not always possible or necessary to prove bad character by proof of actual previous convictions. Where actual convictions are not relied upon, great care should be taken to test the evidence on behalf of the prosecution with a view to ascertain what the witnesses's means of knowing the facts stated by them, the accused's movements, his constant companions, his way of earning his livelihood, his antecedents, etc., 2 Bom. L.R. 57 at 58. When security is taken on evidence of general repute only, it should be proved to be universal and there should be no doubt about it, 1915 P.L.R. 215=16 Cr. L.J. 106; 1907 P.R. (Cr. J.) 2. Association with bad characters is evidence of general repute but such association must be with proved bad characters and not with reputed bad characters, 13 C.W.N. 18; evidence of general repute is not admissible in cases falling under cl. (f) of S. 110 *supra*, 6 C.W.N. 789; 29 C. 279; 11 C.W.N. 789; 13 C.W.N. 244; 6 Bom. L.R. 34; 34 M. 255; 19 Cr. L.J. 871=47 Ind. Cas. 67. Where evidence of general repute has been given the fact that a person has been suspected in a large number of cases may be admissible as corroboration, 23 Cr. L.J. 486=77 Ind. Cas. 886, but evidence of instances in which a person was suspected will not certainly be evidence of general repute to demand security, 24 Cr. L.J. 608=73 Ind. Cas. 352; 26 Cr. L.J. 1283=89 Ind. Cas. 147; 2 Ran. 686. Points to be borne in mind in connection with evidence of general repute (1) that the witnesses should themselves be of good character and in a position really to know the reputation of the accused, (2) that they should be drawn if possible, from different classes of the community and not only from the village of the accused but also from neighbouring village (3) that they should be free from any suspicion or grudge against the accused. In particular, if party faction exists in the village it must be clear that the evidence against the accused is not due to faction *Ben. Pol. Reg.* 1915, Vol. V. p. 248. Evidence of general repute may be corroborated by proof of (1) previous conviction, (2) want of any known means of livelihood or manner of living in excess of such means, (3) association of accused with bad characters, (4) absence of accused

from his house especially at night, (5) occurrence of crimes at or near the place visited by the accused coincident with such absence, *Ben. Pol. Reg. 1915 Vol. V p 248*.

Or Otherwise.—Inquiries under this Chapter are governed by ordinary rules of evidence and therefore evidence not admissible under the Evidence Act cannot be admitted under this section, 12 A.L.J. 937. Evidence of general repute is permitted to be adduced here as a special case in direct contravention to the provisions of S. 54, Ind. Ev. Act. Hence the expression or otherwise may mean by other evidence admissible under the Evidence Act, e.g., by adducing evidence of specific acts, previous convictions or association with bad characters. See 28 A.L.J. 519 at 523. The legislature seems to have left to the Magistrate a vast amount of liberty in relation to the admission of evidence. According to the general rule of interpretation the words "or otherwise" must be read as meaning something *ejusdem generis* with the particular or particulars alleged above it. It seems difficult to interpret the word 'otherwise' in the sense in which the law would ordinarily read it. Applying the *ejusdem generis* principle of interpretation the nearest approach to the particular general repute would be hearsay not amounting to general repute, 1904 A.W.N. 142.

Sub-section (5)—Although this sub-section permits joint trial of persons associated together with regard to S. 110 (d) and (e), *supra* certainly it will not justify joint trial when S. 110 (f) is also charged as there cannot be a connection between the persons in regard to their characters so as to make them dangerous persons and thus render them hazardous to the community, 47 M.L.J. 689 at 693. The words associated together do not imply that the persons to whom they may be separately applied must have been acting in concert but the persons associated in the matter of an inquiry must be persons shown to have been acting together in the various matters charged against them as grounds for binding them over; where there is no such association together, a joint inquiry is improper if not illegal and such an inquiry prejudices the accused, 1 C.L.J. 616 following 8 C.W.N. 180. By the expression 'associated together' is meant concerted action of persons whether due to mutual agreement amongst themselves or to the order of a common master, 9 C.W.N. cclxx. As to proof of association see 23 Cr.L.J. 531 = Ind. Cas. 27 C. 781; 18 Cr. L.J. 617—39 Ind. Cas. 935; 1893 P.R. (Cr.J.) 1; 1 C.L.J. 616 at 623. Persons belonging to two contending factions cannot be dealt with in one inquiry as they cannot be said to be associated together in the matter under inquiry within the meaning of this section and consequently the whole proceeding is bad, 9 Cr. L.J. 560—2 Ind. Cas. 243; 11 C.W.N. 472; 31 M. 276. This sub-section was inserted to remove doubts as to legality of joint proceedings under Ss. 107 and 110, *supra*. The legality of a joint trial must depend on what is alleged for the prosecution and not on findings of fact arrived at subsequently. The dictum of the Privy Council in 23 M. 61 as to violation of an express provision of law being an illegality applies to cases where joint trials are held contrary to the provisions of law and there is no provision in the Code which directs separate inquiries under this section, 25 C.W.N. 334. The Magistrate has a discretion to proceed with the matter jointly or separately even where the association of the several accused is clearly established, 27 C. 781. There must be a separate finding with regard to each accused, when the trial is held jointly, 35 C. 929. Where parties have been in conflict with one another, they cannot be said to be associated together in the matter under inquiry within this clause, and a joint trial is illegal. The main principle applicable to joinder of charges and joint trial of accused may well be held applicable to inquiries under this Chapter, 31 M. 276; 8 C.W.N. 180, 11 C.W.N. 472; [1923] Pat. 8; 16 Cr. L.J. 252=28 Ind. Cas. 108. Although there is no direct prohibition against trying a number of persons together yet such proceedings are improper and should be confined to one person alone unless the case be that each accused was a confederate or partner with the other persons to whom all the evidence would be equally applicable. Even then the case of each accused should be considered separately and individually, 43 A. 109; 25 Cr. L.J. 1377—83 Ind. Cas. 337; [1923] Pat. 8; 4 Pat. L.J. 7; 37 C. 91; 13 C.W.N. 244; 1 C.W.N. 394; 6 Bom. L.R. 34.

Order to give security. 118. If, upon such inquiry, it is proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be,

that the person in respect of whom the inquiry is made should execute a bond, with or without sureties, the Magistrate shall make an order accordingly :

Provided—

first, that no person shall be ordered to give security of a nature different from, or of an amount larger than, or for a period longer than, that specified in the order made under section 112 :

secondly, that the amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive :

thirdly, that, when the person in respect of whom the inquiry is made is a minor, the bond shall be executed only by his sureties.

If upon inquiry it is proved.—It is desirable that very clear and full evidence with as much detail as possible should be required by the Magistrate before making an order under this section read with S 110, *supra*. Magistrates cannot be too careful before passing orders to require and place on record, evidence of a cogent and convincing and reliable kind and they are not to make up for carelessness, supineness or incompetence on the part of the police to bring home a specific crime to a particular person, calling on the accused to find the amount of security which he cannot provide and then by reason of his default to commit him to jail, 1839 A.W.N. 114. An order under this section to execute a bond for keeping the peace or to be of good behaviour cannot be made without following the procedure laid down by Ss 112 and 117, *supra* Weir II, 56; 34 M. 139. Where a man called upon to furnish security appeared before the Magistrate and pleaded poverty and requested that a bond for a small amount should be taken from him and the Magistrate bound him down without recording any evidence and without recording a finding that he was likely to cause a breach of the peace the order was set aside, 33 C. 674; 34 M. 139; 54 C. 59. It is not sufficient that the Magistrate is morally satisfied but he should give reasons for his finding based on legal evidence that the accused should be bound over 10 B. 174. When an accused person is called upon to produce a surety such surety must be accepted or if rejected, it must be rejected on tangible evidence recorded and considered by the Magistrate who ordered him to find security, 18 A.L.J. 321; 44 B. 335. The provisions of S. 122 *infra* make this clear. It is not competent to a Magistrate who has passed an order under this section to delegate to another the duty of inquiring into the fitness of a surety tendered by the person against whom the order is made. He should make the inquiry himself. A Magistrate cannot insist that respectable gentlemen residing in the same or neighbouring village in which the accused lives should be given as sureties and such a demand is quite unwarranted as long as the sureties offered could exercise their proper influence over the person bound over, 8 A.L.J. 785=12 Cr. L.J. 472=11 Ind. Cas. 1008

Magistrate shall make an order.—The Code requires that the Magistrate who initiated proceedings should pass the final order himself and he has no power to send up the case to the District Magistrate and the District Magistrate has no jurisdiction to dispose of the case, 14 Bom L.R. 713 at 714. The date from which security commences is the date of the final order under this section and not from the date of the preliminary order under S 112, *supra*, 51 M. 515.

Proviso (1).—It is illegal to require a bond for good behaviour when the notice issued was to show cause why a bond for keeping the peace should not be taken, 23 C. 798. A Magistrate cannot make an order for a longer period than that mentioned in the notice issued, under S. 112, *supra*, 28 M. 471; 1906 A.W.N. 276; where heavier security is thought necessary fresh summons should be issued, 9 B.L.R. Appx. 44=18 W.R. (Cr.) 61. But after

from his house especially at night, (5) occurrence of crimes at or near the place visited by the accused coincident with such absence, *Ben. Pol. Reg. 1915 Vol. V p 218*.

Or Otherwise.—Inquiries under this Chapter are governed by ordinary rules of evidence and therefore evidence not admissible under the Evidence Act cannot be admitted under this section, 12 A.L.J. 937. Evidence of general repute is permitted to be adduced here as a special case in direct contravention to the provisions of S. 54, Ind. Ev. Act. Hence the expression or otherwise may mean by other evidence admissible under the Evidence Act, e.g., by adducing evidence of specific acts, previous Convictions or association with bad characters. See 26 A.L.J. 519 at 522. The legislature seems to have left to the Magistrate a vast amount of liberty in relation to the admission of evidence. According to the general rule of interpretation the words "or otherwise" must be read as meaning something *ejusdem generis* with the particular or particulars alleged above it. It seems difficult to interpret the word 'otherwise' in the sense in which the law would ordinarily read it. Applying the *ejusdem generis* principle of interpretation the nearest approach to the particular general repute would be hearsay not amounting to general repute, 1904 A.W.N. 140.

Sub-section (5)—Although this sub-section permits joint trial of persons associated together with regard to S. 110 (d) and (e), *supra* certainly it will not justify joint trial when S. 110 (f) is also charged as there cannot be a connection between the persons in regard to their characters so as to make them dangerous persons and thus render them hazardous to the community, 47 M L.J. 699 at 633. The words associated together do not imply that the persons to whom they may be separately applied must have been acting in concert but the persons associated in the matter of an inquiry must be persons shown to have been acting together in the various matters charged against them as grounds for binding them over; where there is no such association together, a joint inquiry is improper if not illegal and such an inquiry prejudices the accused, 1 C.L.J. 616 following 8 C.W.N. 180. By the expression 'associated together' is meant concerted action of persons whether due to mutual agreement amongst themselves or to the order of a common master, 9 C.W.N. colxx. As to proof of association see 23 Cr.L.J. 531 = Ind. Cas. 27 C. 781; 18 Cr. L.J. 617—39 Ind. Cas. 935; 1893 P.R. (Gr. J.) 1; 1 C.L.J. 616 at 623. Persons belonging to two contending factions cannot be dealt with in one inquiry as they cannot be said to be associated together in the matter under inquiry within the meaning of this section and consequently the whole proceeding is bad, 9 Cr. L.J. 560—2 Ind. Cas. 243; 11 C.W.N. 472; 31 M 276. This sub-section was inserted to remove doubts as to legality of joint proceedings under Ss. 107 and 110, *supra*. The legality of a joint trial must depend on what is alleged for the prosecution and not on findings of fact arrived at subsequently. The dictum of the Privy Council in 23 M. 61 as to violation of an express provision of law being an illegality applies to cases where joint trials are *held* contrary to the provisions of law and there is no provision in the Code which directs separate inquiries under this section, 25 C.W.N. 331. The Magistrate has a discretion to proceed with the matter jointly or separately even where the association of the several accused is clearly established, 27 C. 731. There must be a separate finding with regard to each accused, when the trial is *held* jointly, 35 C. 929. Where parties have been in conflict with one another, they cannot be said to be associated together in the matter under inquiry within this clause, and a joint trial is illegal. The main principle applicable to joinder of charges and joint trial of accused may well be held applicable to inquiries under this Chapter, 31 M. 276; 8 C.W.N. 180, 11 C.W.N. 472; [1929] Pat. 8; 16 Cr. L.J. 232=28 Ind. Cas. 108. Although there is no direct prohibition against trying a number of persons together yet such proceedings are improper and should be confined to one person alone unless the case be that each accused was a confederate or partner with the other persons to whom all the evidence would be equally applicable. Even then the case of each accused should be considered separately and individually, 43 A. 109; 23 Cr. L.J. 1377=83 Ind. Cas. 337; [1923] Pat. 8; 4 Pat. L.J. 7; 37 C. 91; 13 C.W.N. 244; 1 C.W.N. 394; 6 Bom. L.R. 34.

118. If, upon such inquiry, it is proved that it is necessary for keeping the peace or maintaining good behaviour, as the case may be,

Order to give security.

that the person in respect of whom the inquiry is made should execute a bond, with or without sureties, the Magistrate shall make an order accordingly :

Provided—

first, that no person shall be ordered to give security of a nature different from, or of an amount larger than, or for a period longer than, that specified in the order made under section 112 :

secondly, that the amount of every bond shall be fixed with due regard to the circumstances of the case and shall not be excessive :

thirdly, that, when the person in respect of whom the inquiry is made is a minor, the bond shall be executed only by his sureties.

If upon inquiry it is proved.—It is desirable that very clear and full evidence with as much detail as possible should be required by the Magistrate before making an order under this section read with S 110, *supra*. Magistrates cannot be too careful before passing orders to require and place on record, evidence of a cogent and convincing and reliable kind and they are not to make up for carelessness, supineness or incompetence on the part of the police to bring home a specific crime to a particular person, calling on the accused to find the amount of security which he cannot provide and then by reason of his default to commit him to jail, 1839 A.W.N. 114. An order under this section to execute a bond for keeping the peace or to be of good behaviour cannot be made without following the procedure laid down by Ss 112 and 117, *supra* Weir II, 56 ; 34 M. 139. Where a man called upon to furnish security appeared before the Magistrate and pleaded poverty and requested that a bond for a small amount should be taken from him and the Magistrate bound him down without recording any evidence and without recording a finding that he was likely to cause a breach of the peace the order was set aside, 33 C 674 ; 34 M. 139 ; 54 C. 59. It is not sufficient that the Magistrate is morally satisfied but he should give reasons for his finding based on legal evidence that the accused should be bound over 10 B. 174. When an accused person is called upon to produce a surety such surety must be accepted or if rejected, it must be rejected on tangible evidence recorded and considered by the Magistrate who ordered him to find security, 18 A.L.J. 321, 41 B. 335. The provisions of S. 122 *infra* make this clear. It is not competent to a Magistrate who has passed an order under this section to delegate to another the duty of inquiring into the fitness of a surety tendered by the person against whom the order is made. He should make the inquiry himself. A Magistrate cannot insist that respectable gentlemen residing in the same or neighbouring village in which the accused lives should be given as sureties and such a demand is quite unwarranted as long as the sureties offered could exercise their proper influence over the person bound over, 8 A.L.J. 785=12 Cr. L.J. 472=11 Ind. Cas. 1008

Magistrate shall make an order.—The Code requires that the Magistrate who initiated proceedings should pass the final order himself and he has no power to send up the case to the District Magistrate and the District Magistrate has no jurisdiction to dispose of the case, 14 Bom L.R. 713 at 714. The date from which security commences is the date of the final order under this section and not from the date of the preliminary order under S. 112, *supra*, 51 M. 515.

Proviso (1).—It is illegal to require a bond for good behaviour when the notice issued was to show cause why a bond for keeping the peace should not be taken, 23 C. 798. A Magistrate cannot make an order for a longer period than that mentioned in the notice issued, under S. 112, *supra*, 26 M. 471 ; 1906 A.W.N. 276 ; where heavier security is thought necessary fresh summons should be issued, 9 B.L.R. Appx. 44=15 W.R. (Cr.) 61. But after

the expiry of the period of the first order if a likelihood of a breach of the public peace still exists then further security could be demanded on fresh proceedings being taken, 4 C.W.N. 12, but sufficient *locus penitentie* must be allowed to the person before fresh proceedings are started, 1903 A W.N. 83; 31 C. 783.

Amount of bond shall not be excessive.—The character and reputation of a suspect are not the sole considerations on which the amount of security should be determined and fixed. It should not be excessive or prohibitive and it should be fixed considering the station in life of the accused, 12 Cr. L.J. 110=9 Ind. Cas 651 following 16 B. 372. Where a Magistrate made an order that a person should pledge all his proprietary right in land worth Rs 200, the order was declared illegal, 7 N.W.P.H.R. 249. For cases of excessive security see 2 C. 110 and 384; 1 C.L.R. 48. Fair chance of complying with the order should be allowed to the accused by fixing the amount of security considering the station in life of the person concerned, 4 M.H.C.R. Appx. 44 followed in 2 C. 384. The Magistrate should look to the means of the party concerned and not to that of his master, 22 W.R. (Cr.) 74.

Proviso(3)—The reason for proviso(3) is the incapacity of a minor to contract, and the bond may in such a case be executed by sureties only, 6 Cr. L.J. 123. See in this connection S. 29 (4) of the Children Act, Mad. Act IV of 1920 which enacts that where a child or young person (under 16 years and 14 years or upwards) has been ordered by a Court to give security under S. 106 or 118 *infra* and has failed to do so, the Court which passed the order may order such child or young person to be sent to a junior or senior certified school respectively.

Appeal.—Now an appeal lies in cases where security is demanded for keeping the peace also. See the amendment of S 406, *infra*. The order of a Sessions Judge under S. 406 discharging a person under security under this section is not an original or appellate order of acquittal within S. 417 *infra*, and the Local Government has no right of appeal against such an order, but may, move the High Court in revision, 27 Cr. L.J. 626=94 Ind. Cas 402 following 21 A. 107; 24 A. 148; 36 A. 147. An appeal will also lie when the order under this section is passed by a District Magistrate to the Court of session; when a first class Magistrate sends up a case to the Sessions Judge under S. 123, *infra*, no appeal lies to the District Magistrate. An appeal lay against an order under this section made by an additional District Magistrate to the District Magistrate, 43 C. 874; but this is no longer law, See S. 406, *infra*. No appeal lies under cl 41 of the Calcutta Letters Patent to His Majesty in Council from an order of the High Court on the appellate side under this section, 18 C.L.J. 119.

119. If, on an inquiry under section 117, it is not proved that

Discharge of
person informed
against.

it is necessary for keeping the peace or maintaining good behaviour, as the case may be, that the person in respect of whom the inquiry is made should execute a bond, the Magistrate shall make an entry

on the record to that effect, and, if such person is in custody only for the purposes of the inquiry, shall release him, or, if such person is not in custody, shall discharge him.

Shall discharge him.—'Discharge,' under this section has been used in a non-technical sense and merely means permission to depart when a person from whom security is demanded, by evidence adduced by him satisfies the trying Magistrate that he ought not to be put under security. The Code does not contemplate a further inquiry by a superior Magistrate into the matter, 33 M. 85 but see 35 B. 401. It is no bar to fresh proceedings being taken upon fresh information received, 27 C. 662. In 24 A. 148 it was held that it was competent to a District Magistrate to institute fresh proceedings against a discharged

person on the self-same record before the 1st Class Magistrate who inquired into the matter under S 117, *supra*. There were conflicting decisions as to whether further inquiry could be ordered under S. 436 *infra* in the case of a person discharged under this section. But the words newly introduced in S. 436, *infra*, "accused of an offence," make the point beyond all doubt and no further inquiry can be ordered by the superior Court. See notes under S 110, *supra*, further enquiry at p. The decisions in 35 A. 147; 35 B. 421 took the view that S 436 applied, while 33 C. 8; 33 M. 83 took a different view, see also 44 A. 691, See 43 A. 235; 51 A. 403. S. 250 *infra* does not apply to cases of discharge under this section and no compensation could be awarded even though the information furnished to the Magistrate might be vexatious, 15 A. 353.

C.—Proceedings in all cases subsequent to Order to furnish Security.

120. (1) If any person, in respect of whom an order requiring security is made under section 106 or section 118, is, at the time such order is made, sentenced to, or undergoing a sentence of, imprisonment, the period for which such security is required shall commence on the expiration of such sentence.

(2) In other cases such period shall commence on the date of such order unless the Magistrate, for sufficient reason, fixes a later date.

Scope of the section.—If on the date of the order demanding security, the suspect is undergoing imprisonment for a substantive offence then sub-section (1) applies and the period of security does not commence till the suspect has served out his sentence of imprisonment. He has time to furnish security required up to the date on which the period of security commences and therefore till the expiry of the period of imprisonment no order for his detention in prison for failure to furnish security can legitimately be passed. The proper procedure is to postpone further proceedings till the substantive sentence is served out and in order to secure the attendance of the suspect in Court on the date of his release from jail, the Magistrate should request the jail authorities to inform him of the probable date of release and to intimate to them that the suspect is to be produced in Court unless he has before that date furnished the required security. If on the date of the order under S. 118, *supra*, the suspect is not undergoing imprisonment for a substantive offence, his case does not fall within the purview of sub-section (1). If on the date the suspect asks for time to furnish the required security it is open to the Magistrate to inquire from the police whether the suspect is undergoing a trial for a substantive offence and if so, it is open to him to refuse to grant any time for furnishing security and to take immediate action under S 123, *infra*. If, however, the Magistrate does not make the necessary inquiry and does not get any definite information, and in the exercise of his discretion he grants time to furnish the security and before the expiry of that period, he is convicted to imprisonment neither sub-section (1) nor sub-section (2) applies. In that case the Magistrate should pass immediate detention in person of the suspect till he furnishes the required security. This detention would *ipso facto* run concurrently with the substantive offence which he is undergoing. In order to avoid any doubt being raised as to the question whether the two sentences are to run concurrently the Magistrate will be well advised to give express direction on that point, which he is even otherwise competent to do under the provisions of S. 297 *infra* which section as now amended in 1923 treats the detention of the suspect under S. 123 *infra* as a sentence of imprisonment, 23 Cr. L.J. 431 at 432—101 Ind. Cas. 463 where 28 Bom. L.R. 1038=27 Cr. L.J. 1163=97 Ind. Cas. 747 and 27 Cr. L.J. 865=93 Ind. Cas. 113 are followed. See also 23 Bom. L.R. 790=23 Cr. L.J. 652=103 Ind. Cas. 108 (1) as to the effect of a sentence of imprisonment for failure to furnish security overlapping a subsequent sentence of imprisonment for a substantive offence.

Commencement of period for which security is required.—The period for which security is required commences from the date of the order, i.e., the final order under S. 118, *supra*, 51 M. 515 unless the Magistrate for sufficient reasons fixes a later date. The party must execute his bond with or without surety at once, or he is committed to prison in default. The power to fix a later date was given only recently, 37 M. 125 at 143. A Magistrate has power under this section to postpone the date from which the security bond should take effect, that is, give the accused time within which to produce it. Until it is seen when the accused could give the security, or an order would have to be passed referring the case for the final orders of the Sessions Judge, it cannot be said that the proceedings in the Magistrate's Court had finally terminated so as to put an end to the liability of the sureties responsible for the accused's attendance, 24 A.L.J. 327=27 Cr. L.J. 377 (2)=92 Ind. Cas. 889, (2) Security cannot be asked until the period of imprisonment which the accused is undergoing ends. The order under S. 123 *infra* should not be passed until the expiry of the term of imprisonment, 4 Bom L.R. 934; 4 N.W.P.H.C.R. 154. An order that the period of imprisonment imposed on an accused under S. 118, *supra*, was to run concurrently with the sentence which the accused was actually at the time undergoing in another case is illegal and opposed to the terms of this section, 46 Cr. L.J. 272; 6 Cr. L. Rev. 437=28 Ind. Cas. 160. See also S. 123 (1), *infra*.

Sub-section (2).—It is somewhat difficult to ascertain precisely the intention of the Legislature in enacting this sub-section 27 Cr. L.J. 265=96 Ind. Cas. 113. This sub-section authorizes a Magistrate to give time to the person bound over to find sureties. It is not the object of this sub-section to enable the Magistrate to postpone the operation of the second order he passes, while the first order is still in force, otherwise, a Magistrate by making several orders for security each for a period less than one year might bind over a person for an aggregate period over one year without submitting the case to the Sessions Court as required by S. 123 (2), *infra*. Such a course will be obviously illegal, 4 C.W.N. 121. This sub-section lays down clearly that the period for which security shall be given is to commence on the date of the order under S. 118, *supra*, that is the date of the final orders 51 M. 515. S. 123 provides that security must be given *on or before* the date on which the period of such security commences. See 27 Cr. L.J. 505=96 Ind. Cas. 113. For form bond see form No. 42, Sch. V. The terms of the security bond given in the form are wide enough to include the successor of the Court in which the case originally was. Any other view of the law would produce most inconvenient results, 24 A.L.J. 327=27 Cr. L.J. 377 (2)=92 Ind. Cas. 889 (2).

121. The bond to be executed by any such person shall bind him to keep the peace or to be of good behaviour, as the Contents of bond case may be, and in the latter case the commission or attempt to commit, or the abetment of, any offence punishable with imprisonment, wherever it may be committed, is a breach of the bond.

Scope of the section.—The conditions under which security bonds are taken under this chapter are given here. The word 'commission' in this section does not necessarily imply a conviction although a conviction is ordinarily considered necessary to establish that an offence has been committed. At the same time there is no authority for the extreme view that the commission of an offence cannot be proved otherwise than by a conviction, e.g., flight of a person accused of an offence from British India will raise a strong presumption of his participation in the offence. In such a case the bond is liable to be forfeited provided evidence is produced to show that prior to his absconding he committed an offence in British India and during the period of the bond, 24 Cr. L.J. 588=73 Ind. Cas. 332. This section deals with two kinds of bonds, one for keeping the peace and the other for good behaviour. A distinction is drawn between the two kinds of bonds. A bond to keep the peace cannot be enforced on conviction for any offence other than offence involving a breach of the peace. For example, a conviction for theft or

extortion will not justify the forfeiture of such a bond, 18 W.R. (Cr.) 63; 19 W.R. (Cr.) 49, but in the case of a bond for good behaviour it is expressly provided that the commission or attempt to commit or abetment of any offence, punishable with imprisonment, wherever it may be committed, is a breach of the bond, 11 Cr. L.J. 252—5 Ind. Cas. 827; 16 Cr. L.J. 549—29 Ind. Cas. 821. What constitutes a breach of the bond is the commission or attempt to commit or abetment of any offence punishable with imprisonment. The law lays down definitely what would constitute a breach of the bond given under an order passed under S. 118, *supra*, and a bond cannot be forfeited for other offences not mentioned herein. Absconding to avoid arrest under a warrant is not an offence under S. 172 I.P.C. and is not one of the offences mentioned herein for the commission of which alone can a surety bond be forfeited, 50 A. 666 following 8 W.R. (Cr.) 7; 2 C.L.J. 623; 7 N.W.P.H.C.R. 302; 4 N.W.P.H.C.R. 97 and *dissenting* from 1913 P.R. (Cr. J.) 15. See S. 514 *infra* as to the procedure on forfeiture of bond. A bond under S. 110, *infra*, can be forfeited on a conviction under S. 823, I.P.C., 4 Lah. 452.

Shall bind him to keep the peace.—All that is necessary to show before calling upon the executant of the bond to show cause why the penalty should not be levied, is that some act was done which was likely in its consequence to provoke a breach of the peace and it is not material to consider whether the person bound did act himself with his own hand or, made use of other persons to do it, 2 M. 169 at 173.

Wherever it may be committed.—Breach of the bond need not necessarily be confined to the district in which the accused was bound over. The word used is "*wherever*." If A executes a bond to keep the peace towards B in one district and subsequently A is convicted of having assaulted B in another district, A would forfeit the bond and the Magistrate who took the bond could proceed against him under this section, although the breach did not take place in his district, 2 B L.R. (Ap. Cr.) 11. The commission of an offence in a native state, *e.g.*, receipt of stolen property may also work a forfeiture, 11 Cr. L.J. 635—8 Ind. Cas. 333. An accused person ought to be afforded an opportunity to show cause before a bond is forfeited, 4 C. 835. There must be actual proof of the commission of an offence and not a suspicion, Weir II, 57, and the offence justifying an order of forfeiture should correspond to the particular kind of offence mentioned in S. 110, 28 A. 629; and in the case of a surety, evidence must be taken in the presence of the surety before the bond is forfeited, 25 C. 440; and fresh security cannot be taken without fresh proceedings, 7 M.L.T. 90.

Is a breach of the bond.—When convicting a person for an offence involving a forfeiture for keeping the peace, a Magistrate knowing, that the person convicted has by his conduct forfeited the bond, does not make an order for forfeiture under this section, he must be taken to have declined to take action in respect of the particular breach and he cannot afterwards re-consider and add to his order a direction forfeiting the bond, 1 Cr. L.J. 1100; 1 C.L.R. 134; 3 C.L.R. 406; 16 Cr. L.J. 194—27 Ind. Cas. 754.

122. (1) A Magistrate may refuse to accept any surety offered, or may reject any surety previously accepted by him or his predecessor under this Chapter on the ground that such surety is an unfit person for the purposes of the bond :

Provided that, before so refusing to accept or rejecting any such surety, he shall either himself hold an inquiry on oath into the fitness of the surety, or cause such inquiry to be held and a report to be made thereon by a Magistrate subordinate to him.

(2) Such Magistrate shall, before holding inquiry, give reasonable notice to the surety and to the person by whom the surety was

offered and shall in making the inquiry record the substance of the evidence adduced before him.

(3) *If the Magistrate is satisfied, after considering the evidence so adduced either before him or before a Magistrate deputed under sub-section (1), and the report of such Magistrate (if any) that the surety is an unfit person for the purposes of the bond, he shall make an order refusing to accept or rejecting, as the case may be, such surety and recording his reasons for so doing :*

Provided that, before making an order rejecting any surety, who has previously been accepted, the Magistrate shall issue his summons or warrant, as he thinks fit, and cause the person for whom the surety is bound to appear or to be brought before him.

Amendment.—This section has been re-drafted. The inquiry as to fitness of surety is to be on oath and the Magistrate is bound to record the substance of the evidence. A right of appeal is also provided, see Ss. 406A and 514A newly added.

The Magistrate may refuse.—This section confers a wide discretionary power on a Magistrate to refuse sureties offered ; when a surety is offered the Magistrate is required to consider the matter judicially and to state his reasons for not accepting the surety, 22 Bom. L R 190. The proceedings in which the Magistrate comes to this determination are judicial proceedings, and the question whether a person is fit to be a surety or not is left to the Magistrate's unfettered discretion, 44 C. 737 ; 37 C. 446 ; 13 C.W.N. 80 ; 12 A. L.J. 1004 = 16 Cr. L.J. 754 = 25 Ind. Cas. 645 ; 23 Ind. Cas. 743 ; 44 B. 385. He must hold an independent inquiry before accepting or refusing a surety and then exercise his discretion. He cannot refuse a surety merely relying on a police report, 12 A.L.J. 1004 = 16 Cr. L.J. 754 = 25 Ind. Cas. 645 ; 13 Cr. L.J. 760 = 17 Ind. Cas. 72. See also 24 C. 155. The amended section gives very wide powers to the Magistrate for rejecting sureties. A Magistrate before rejecting a surety is bound to take evidence on oath and inquire into the fitness of the surety or cause an inquiry to be made by a Subordinate Magistrate and to report to him. The Magistrate is bound to give notice to the parties and record the substance of the evidence adduced before him. Inability of surety to control the person bound over to keep the peace is a good ground for rejecting the surety, 41 C 764 ; 23 Cr. L.J. 796 = 81 Ind. Cas 316 ; 15 Cr. L.J. 378 = 23 Ind. Cas. 745 ; 27 Ind. Cas. 148. When a Magistrate refused the surety offered, without recording any reasons, the High Court set aside his order and directed the sureties to be accepted, 10 C.W.N. 1027 ; 18 A.L.J. 324 ; 27 A. 293 ; 44 B 385.

Refuses on the ground that the surety is unfit—In all cases under this section, it is the duty of the Magistrate to examine the sureties offered as to their fitness and to take such other evidence as the accused may adduce on the same point. If he asks the police to report, it should be with a view merely of enabling them to collect and call evidence where a Magistrate bases his order on a police report he abrogates the functions imposed on him by law and allows the decision of the case to vest on the police. In every case the Magistrate's order must proceed on a consideration of the evidence before him and not on the police report, 10 Cr. L.J. 225 = 10 Cr. L.J. 231. The ground for refusal to accept the surety tendered must be valid and reasonable, 22 W.R. (Cr.) 37 ; 41 C 764 ; 44 C. 737. Mere conjectures and surmises are not sufficient. The fact that the surety offered was once convicted does not of itself disqualify him for ever to be a surety, 26 A. 189. The fact that the surety offered lives at a distance from the place where the person for whom he stands as surety lives is by itself no sufficient ground for refusing to accept the surety and that fact becomes of less importance where the sureties are relations and presumably persons of standing, 30 Cr. L.J. 45 = 112 Ind. Cas. 909, relying on 43 C. 1021 and *distinguishing*

20 A. 206 the fact that the sureties tendered are relations of the accused, far from being a disqualification, is a circumstance which would be an additional qualification, 25 A. 131; 43 C. 1024 The unfitness is not limited to pecuniary unfitness, 13 C.W.N. 80=8 Cr. L.J. 388=4 Ind. Cas. 560 but when the sureties were brothers of the accused, who could not control the accused sufficiently to ensure to his future good behaviour they were rightly rejected, 41 C. 764; 44 C. 737, mere solvency of surety is not invariably sufficient to ensure good conduct of the person bound over. Surety must be in a position to keep the person under personal supervision and control, 21 Cr. L.J. 793=74 Ind. Cas. 539. A surety executing a bond undertakes to guarantee the good conduct of the person for whom he stands surety, and the test of his fitness is his ability to perform his contract of guarantee, and to enforce the good conduct of his principal. This is clear from the expression "*character and class of the sureties required*" in S. 112 *supra*. In addition to solvency, the Magistrate, is to consider the character of the surety, and of his ability to influence the conduct of the person bound over, 8 Cr. L.J. 166. The Magistrate may record evidence on oath to test the fitness of sureties, 26 A. 371; he can now call upon another officer subordinate to him to report and act upon such report. The decisions in 43 C. 1624; 25 A. 272; 27 A. 293, are no longer law. When sureties are offered it is the duty of the Court to accept them, unless the Court itself is satisfied that they are not proper persons. An inquiry under this section is a judicial inquiry, 42 C. 703 and a Magistrate cannot import his personal knowledge in such matter, 15 Cr. L.J. 378=23 Ind. Cas. 745, but a Magistrate is justified in using and applying his knowledge of his division when acting under this section and he must record his reasons for rejecting sureties offered, 11 Cr. L.J. 198=4 Ind. Cas. 1133; 14 C.W.N. 709=11 Cr. L.J. 243=6 Ind. Cas. 124. The Magistrate has a wide discretion in accepting or rejecting sureties and he must hold an independent inquiry and should not act on a mere police report, 12 A.L.J. 1004=16 Cr. L.J. 754=26 Ind. Cas. 646; 13 Cr. L.J. 760=17 Ind. Cas. 72; 3 C.L.J. 575; 20 A.L.J. 760; 11 Cr. L.J. 457=7 Ind. Cas. 552; 23 Cr. L.J. 453; 44 B. 385; 15 Cr. L.J. 727=26 Ind. Cas. 175. The unfitness referred to herein though it may not include the idea of pecuniary unfitness is more concerned with the idea of moral unfitness, 13 C.W.N. 80=8 Cr. L.J. 388=4 Ind. Cas. 560.

123. (1) If any person ordered to give security under section 106

Imprisonment in
default of security,

or section 118 does not give such security on or before the date on which the period for which such security is to be given commences, he shall, except in the case next hereinafter mentioned, be committed to prison, or if he is already in prison, be detained in prison until such period expires, or until within such period he gives the security to the Court or Magistrate who made the order requiring it.

(2) When such person has been ordered by a Magistrate to give

Proceedings when
to be laid before High
Court or Court of
Session.

security for a period exceeding one year, such Magistrate shall, if such person does not give such security as aforesaid, issue a warrant directing him to be detained in prison pending the orders of the Sessions Judge or, if such Magistrate is a Presidency Magistrate, pending the orders of the High Court; and the proceedings shall be laid, as soon as conveniently may be, before such Court.

(3) Such Court, after examining such proceedings and requiring from the Magistrate any further information or evidence which it thinks necessary, may pass such order on the case as it thinks fit:

Provided that the period (if any) for which any person is imprisoned for failure to give security shall not exceed three years.

(3A) *If security has been required in the course of the same proceedings from two or more persons in respect of any one of whom the proceedings are referred to the Sessions Judge or the High Court under sub-section (2), such reference shall also include the case of any other of such persons who has been ordered to give security, and the provisions of sub-sections (2) and (3) shall, in that event, apply to the case of such other person also, except that the period (if any) for which he may be imprisoned shall not exceed the period for which he was ordered to give security.*

(3B) *A Sessions Judge may in his discretion transfer any proceedings laid before him under sub-section (2) or sub-section (3A) to an Additional Sessions Judge or Assistant Sessions Judge and upon such transfer, such Additional Sessions Judge or Assistant Sessions Judge may exercise the powers of a Sessions Judge under this section in respect of such proceedings.*

(4) If the security is tendered to the officer in charge of the jail, he shall forthwith refer the matter to the Court or Magistrate who made the order, and shall await the orders of such Court or Magistrate.

Kind of imprisonment.	(5) Imprisonment for failure to give security for keeping the peace shall be simple.
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(6) *Imprisonment for failure to give security for good behaviour shall, where the proceedings have been taken under section 108 be simple and, where the proceedings have been taken under* section 109 or section 110, be rigorous or simple as the Court or Magistrate in each case directs.*

Amendment.—Sub-sections (3A) and (3B) have been newly added, by which when security is demanded from two or more persons some or one of whom only is ordered to give security for more than one year, all the persons should be dealt with by the Sessions Judge and not the one or some who are asked to furnish security for more than one year; sub-section (3B) also gives the Sessions Judge power to transfer proceedings to Additional and Assistant Sessions Judges. In sub-section (6) an important amendment was made by Act X of 1926, S. 2, imprisonment for failure to give security for good behaviour under S. 108 *supra* only, shall be simple and not that under S. 109 *supra*. Where proceedings are under S. 109 or S. 110 *supra* imprisonment shall be rigorous or simple as the Court may in each case direct.

Scope of Section.—This section has reference to the class of cases where default is made in furnishing the security required under S. 118 *supra*. If the security demanded is furnished, this section has no application, and no reference to the Sessions Judge is necessary even though the period for which security is demanded might exceed one year, 23 C. 621. sub-section (1) applies to security demanded under all the provisions of Chapter VIII, but sub-section (2) would not apply to cases falling under Ss. 107, 108 and 109, *supra* as the period for

* Amended by Act X of 1926, S. 2,

which security could be demanded under these sections can in no event exceed one year, and reference to the Sessions Court or High Court is necessary only when such a period exceeds one year. The object of detaining a person in prison is to control his conduct for a certain period and this object is attained equally well if the subsequent sentence of imprisonment for a subsequent offence is made to run concurrently with the other imprisonment, 17 Cr. L.J. 523—35 Ind. Cas. 496. The committal to prison, or a detention in prison for failing to furnish security under Chapter VIII is not a sentence of imprisonment and therefore S. 397 *infra* will not authorize a Magistrate to direct a subsequent sentence to take effect after the expiry of a previous detention or committal to prison under the section, 23 Cr. L.J. 285=66 Ind. Cas. 161. The new proviso to S. 397 *infra* permits such a course, and the decision is no authority now.

Sub-section (1).—This sub-section contemplates that the accused shall be brought up for sentence if security is not furnished. The Court should in its order fix a date for furnishing the security without any order for alternative imprisonment and then if by that date the accused has not furnished the security he is to appear and receive such sentence under sub-section (2) and he is not to fix one year as the accused is entitled to be released the moment he furnishes such security, 51 M. 178. When an accused undergoing a sentence of imprisonment is directed to furnish security, the proper procedure to be followed is to adjourn the security proceedings till the expiry of the sentence of imprisonment and communicate to the jail authorities asking them to detain the person in jail under the provisions of this sub-section, 23 Bom. L.R. 1033=27 Cr. L.J. 1163=97 Ind. Cas. 747. It is not proper to call upon a person to furnish security when he is sentenced to a long term of imprisonment or transportation, 10 Cr. L.J. 63 (F.B.)=2 Ind. Cas. 531. Similarly when an accused person has already been sent to jail for failure to furnish security under S. 108 *supra*, for disseminating seditious a subsequent trial and conviction for seditious under S. 124A, I.P.C. for uttering the same seditious matter is against the spirit of S. 403, *infra*, although technically there has been no breach of the letter of S. 403, *infra*, proceedings under S. 108, *supra*, not constituting a trial for an offence. Such subsequent trial and conviction can only create the impression that the accused were tried and punished twice for the same offence and it is most undesirable that the idea should get abroad among the people of the country that they are liable to be punished twice for the same offence, and thus lower their sense of British Justice. It would be disastrous if British Justice were dragged into disrepute in consequence of such conviction and proceedings under S. 124A, I.P.C. should not have been instituted when the accused had already been committed to jail for a term of imprisonment on the same facts, 30 Cr. L.J. 630 (2)=116 Ind. Cas. 477. Security is to be given on or before the date fixed. Once an order has been passed under S. 118, *supra*, a Magistrate has no discretion under this section but is bound to commit the person to prison forthwith. If for any reason the person proceeded against has not had a reasonable opportunity to furnish security on or before the date, the only legal method of giving him time is to invoke the aid of sub-section (2) of S. 120, *supra*. Actual failure to furnish security should be proved and no order can be passed under this section in anticipation of default, Ratanlal 355, 403 and 511. After the records had been submitted to the Sessions Court the Magistrate has no jurisdiction to accept bail and release the accused from jail as the *sessio* of the case was then with the Sessions Court, 28 Cr. L.J. 657=103 Ind. Cas. 113.

Sub-section (2).—The words 'as aforesaid' occurring in this sub-section should not be construed as referring to the date on which the period for which such security is demanded is to be given, is to commence. They merely refer to the security to be given. It may possibly be that the language of the section is defective and merely refers to orders passed under S. 118, *supra*, but having regard to the language of sub-section (3) *infra* it is clear that the Legislature intended cases contemplated by this section to be heard before the superior Court without undue delay after the Magistrate's order has been passed, 10 Cr. L.J. 69 (F.B.) at 76=2 Ind. Cas. 531=5 L.B.R. 34. Proceedings when referred to the Sessions Judge under this sub-section are not before him for mere confirmation of the Magistrate's order. It is before him for further inquiry for the purpose of determining under sub-section (3) whether the accused ought to be detained at all in custody as a

preventive measure, and, if so, for what period, 7 Cr. L J. 412. When a case is referred to the Sessions Judge it becomes his duty to pass such order as he thinks fit under sub-section (3). A mere finding by the Sessions Judge that in the interests of the community at large security for good behaviour should be demanded from the accused is not sufficient; he is bound to find a special ground on which the order is passed having special reference to S. 110, *supra*, 27 C. 656. It was held in 12 C.W.N. 483=7 Cr. L J. 323, that sub-section (3), contemplated a decision by the Judge on the merits of the order demanding security for good behaviour, but it does not authorize him to consider the sufficiency of the security offered. On a reference to the Sessions Judge he is bound to give notice to the accused, 27 C. 655 and to hear his pleader, 23 C. 493; 27 C. 662; 21 A. 107; 16 B. 661; 25 A. 375, 35 B. 271; 11 Cr. L J. 725=8 Ind. Cas. 879, and after hearing him or his pleader and examining the records of the case come to an independent conclusion on the merits as to whether the order demanding security was or was not justified and if so for what period and in what sum, 23 Cr. L.J. 657=103 Ind. Cas. 193. Although notice is not specially provided for by this section yet on general principles it is advisable to do so as it involves the liberty of the subject, 23 C. 453; 4 C.W.N. 797. A Sessions Judge is not competent to delegate to a Magistrate the question of the adequacy of the security furnished which must be determined by himself alone, 12 Cr. L J. 310. A Sessions Judge has power to transfer a case referred to him under this sub-section to an Assistant Sessions Judge for disposal, 59 C. 229. An order passed directing a person to give security for a period of more than one year, and on failure, to be imprisoned for two years is *prima facie* bad, and such an illegality cannot be cured by the District Magistrate reducing the period to one year, and the period of imprisonment in default also to one year, as the provisions of this sub-section are imperative, Weir II, 57; 7 Cr. L.J. 412. A person undergoing imprisonment under this section for failure to furnish security to be of good behaviour is not undergoing a sentence of imprisonment within the meaning of S. 397, *infra*, so that the term of imprisonment for an offence cannot be made to commence on the expiration of the period for which he has been committed to prison 27 M. 525. Such a person is merely committed to prison, and not sentenced, 4 M.H.C.R. Appx. xliiv; but see 30 A. 334 (F.B.). A Magistrate has no power to sentence a person failing to furnish security to solitary confinement, 36 A. 455; where it was held that the words "committed to prison" in sub-section (1) mean a sentence of imprisonment, and do not merely mean 'committed to custody.' The words 'detained in prison' occurring in sub-section (2) have also a similar meaning. But in 31 M. 515 it was held following 27 M. 525 and Weir II, 452 and not following 30 A. 334 (F.B.) that any person committed to prison under this section is not undergoing a sentence of imprisonment; it is not for the commission of any offence that he is committed to prison under this section, and S. 397, *infra*, therefore, does not apply. See also 37 B. 178; 33 C. 1036; 23 Cr. L J. 255=66 Ind. Cas. 191. The new amendment in S. 397, *infra*, namely second proviso, makes the point clear and follows the Allahabad view in 30 A. 334 (F.B.). See also 28 Cr. L J. 652=103 Ind. Cas. 103. A Magistrate has power under S. 120, *supra*, to give time to the accused to furnish security after expiry of the date originally fixed and when he grants time, it was not in his power finally to dispose of the case when the accused absconds; the final order in such a case is to be passed by the Sessions Court under this section and proceedings cannot be said to have terminated with the Magistrate, 24 A.L.J. 327=27 Cr. L.J. 377=92 Ind. Cas. 889.

Sub-section (3)—The words of this sub-section are wide enough to give discretionary power to the Sessions Judge or High Court as the case may be to deal with the case on the merits and pass such orders as the circumstances of the case might require, 35 B. 271. This sub-section empowers Sessions Judges when good behaviour cases are laid before them to require the Magistrate to furnish them with further information or evidence if they think it necessary but they are not empowered to direct a rehearing of the case, 25 Cr. L.J. 1112=81 Ind. Cas. 836. This sub-section contemplates a further inquiry and evidence. Both in the interest of the prosecution and the accused it stands to reason that any further inquiry necessary should be held when the facts are fresh and when any further information or evidence necessary can, if possible, be obtained easily. As time elapses facts become forgotten and evidence unobtainable through various causes such as death and change of residence,

The Sessions Judge should pass orders as soon as possible and the law does not require him to wait until the expiry of the sentence before passing an order 10 Cr. L. J. 63 at 76 (F.B.) = 2 Ind. Cas. 531 = 5 L. J. R. 34. It is a fatal defect in procedure to pass an order under this sub-section without giving notice to the accused and without affording him an opportunity of being heard by the Sessions Judge, 10 Cr. L. J. 69 (F.B.) = 2 Ind. Cas. 531 following 2 Cr. L. J. 735 = 4 L. J. R. 43.

Sub-section (3A).—This is new and enacted with the object of avoiding conflict of opinion between the District Magistrate and the Sessions Judge in any particular case where one accused may appeal to the District Magistrate and the case of another accused jointly inquired into may be referred to the Sessions Judge.

Sub-section (4).—This sub-section deprives Superintendents of Jails of the power they possessed formerly to release persons if the security demanded was tendered to their satisfaction. This power was found to be inconsistent with the provisions of S. 122 *supra*, and therefore taken away. What corresponded to this sub-section in the Code of 1882 came in the end of sub-section (1). In the change newly effected, there is a clear indication that this sub-section authorized a Magistrate to take security even in a case where he has referred the matter to the Sessions Judge if it is offered before the Sessions Judge dealt with the case and the Magistrate cannot be said to be *functus officio*. There is nothing in the Code clearly indicating what should be done if security is offered after a reference to the Sessions Judge and before the reference is disposed of by him and this construction is a reasonable one, 29 Cr. L. J. 36 at 38 = 107 Ind. Cas. 286.

Sub-section (5).—Under this sub-section imprisonment for failure to give security for keeping the peace shall be simple, 26 Cr. L. J. 430 = 85 Ind. Cas. 49.

Sub-section (6).—By Act X of 1926, S. 2, an important amendment was made in this sub-section by omitting good behaviour cases falling under S. 109 *supra* from the category of cases where only simple imprisonment is awarded, and made to come under the category of cases falling under S. 110 *supra* namely simple or rigorous as the Court or Magistrate in each case directs. The result is, that political offenders are now classed along with habitual offenders.

Appeal.—S. 406 *infra* gives a right of appeal in good behaviour cases to the Sessions Court unless the Local Government notifies that in any district such appeal shall not lie to the Sessions Court. If a first class Magistrate demanded security for good behaviour for a period exceeding one year and the accused furnished security, the proceedings are not to be submitted to the Sessions Judge, and he has a right of appeal to the Sessions Judge; but if he fails to furnish the security the records must be submitted to the Sessions Judge, and the order passed by him, whatever its nature be, is the order passed by the Sessions Court, and no appeal lies to the High Court in such a case, as the order is not a conviction in a trial held by a Sessions Judge. In a case where the District Magistrate passes the order under this section an appeal lies to the Sessions Court under S. 406 *infra*. If a Sessions Judge refuses to confirm the order of a District Magistrate under this section, the District Magistrate cannot refer the matter to the High Court under S. 433 *infra* but his proper remedy is to ask the Public Prosecutor to move the High Court to revise the order of the Sessions Judge, 23 C. 249.

If a person who has been under a bond for good behaviour for three years is proceeded against a week after the expiry of the bond and no evidence was produced to show that anything had occurred in the week, no order ought to be passed demanding security. It is not fair to run a man in, as a *Budmask* before he had an opportunity of showing that he is willing to adopt an honest livelihood, 3 A L. J. 29 = 3 Cr. L. J. 95 following 1925 A.W.N. 34.

Power to release persons imprisoned for failing to give security.

124. (1) Whenever the District Magistrate or a Chief Presidency Magistrate is of opinion that any person imprisoned for failing to give security under this chapter may be released

without hazard to the community or to any other person, he may order such person to be discharged.

(2) Whenever any person has been imprisoned for failing to give security under this Chapter, the Chief Presidency or District Magistrate may (unless the order has been made by some Court superior to his own) make an order reducing the amount of the security or the number of sureties or the time for which security has been required.

(3) *An order under sub-section (1) may direct the discharge of such person either without conditions or upon any conditions which such person accepts :*

Provided that any condition imposed shall cease to be operative when the period for which such person was ordered to give security has expired.

(4) *The Local Government may prescribe the conditions upon which a conditional discharge may be made.*

(5) *If any condition upon which any such person has been discharged is, in the opinion of the District Magistrate or Chief Presidency Magistrate by whom the order of discharge was made or of his successor, not fulfilled, he may cancel the same.*

(6) *When a conditional order of discharge has been cancelled under sub-section (5), such person may be arrested by any police officer without warrant, and shall thereupon be produced before the District Magistrate or Chief Presidency Magistrate.*

Unless such person then gives security in accordance with the terms of the original order for the unexpired portion of the term for which he was in the first instance committed or ordered to be detained (such portion being deemed to be a period equal to the period between the date of the breach of the conditions of discharge and the date on which, except for such conditional discharge, he would have been entitled to release), the District Magistrate or Chief Presidency Magistrate may remand such person to prison to undergo such unexpired portion.

A person remanded to prison under this sub-section shall, subject to the provisions of section 122, be released at any time on giving security in accordance with the terms of the original order for the unexpired portion aforesaid to the Court or Magistrate by whom such order was made, or to its or his successor.

Amendment.—Sub-sections (3), (4), (5) and (6) are new.

Scope of the section—The powers of a District Magistrate under this section are distinct from the powers he exercises under S. 406, *infra* as an appellate Court in case he is empowered by the Local Government to hear appeals. The District Magistrate is responsible for the peace of his district, and it rests with him entirely to release a person if, in his

opinion it could be done without hazard to the community, 1853 A.W.N. 183; 1905 A.W.N. 143; 2 Cr. L.J. 335. A Chief Presidency Magistrate also may exercise such a power. If a Subordinate Magistrate is of opinion that a person may be discharged he should make a report to the District Magistrate, Ratanlal 668 and an order under this section by any Magistrate other than those mentioned herein is void, S. 530 (e), *infra*. For purposes of this section all Presidency Magistrates are subordinate to the Chief Presidency Magistrate R. 12 Mad. Cr. Ruls. of Pr.

Sub-section (1).—The words "whether by the order of such Magistrate or that of his predecessor or by some Subordinate Magistrate" have been omitted by the new amendment.

Sub-section (2).—A Chief Presidency Magistrate or District Magistrate has power only to *reduce the amount of the security or the number of sureties or the time for which security has been taken*, but as this sub-section stands he has no power to alter the condition as to the character and class of the sureties required.

Sub-section (3).—This is new. The District Magistrate or Chief Presidency Magistrate has absolute power now to release with or without condition a person imprisoned for failure to give security without the intervention of the Court of Session or the High Court.

Sub-section (4).—This is new. Power is given to the Local Government to prescribe conditions upon which a conditional discharge may be made.

Sub-section (5).—This is also new and it empowers the Magistrate to cancel the discharge made on condition not being fulfilled.

Sub-section (6).—This is also new and it empowers the Magistrate to commit the person to jail to undergo the unexpired term, unless security is furnished as per original order for the unexpired period.

125. The Chief Presidency or District Magistrate may at any time for sufficient reasons to be recorded in writing, cancel any bond for keeping the peace or for good behaviour executed under this Chapter by order of any Court in his district not superior to his Court.

Power of District Magistrate to cancel any bond for keeping the peace or good behaviour.

Scope of the section.—The words of the section are very wide. This section applies only to cases where a bond has actually been executed and if the person has been imprisoned for default of the execution of the bond, S. 121 *supra* would apply to such a case, 35 A. 103; 32 C. 949. The District Magistrate may at any time cancel a bond for reasons which appear to him in the exercise of a sound judicial discretion to be sufficient. If the District Magistrate in the exercise of a judicial discretion is of opinion that a bond in the particular case ought never to have been required, he is entitled to cancel such a bond. The words "at any time" occurring in the section also support this view, 37 M. 125 (F.B.), 34 C. 1 (F.B.); see also 7 Cr. L.J. 349; 2 Cr. L.J. 507; 15 Cr. L.J. 143=22 Ind. Cas. 495. But it was held in 44 A. 614 that the only ground on which a District Magistrate could cancel a bond under this section is that something has supervened since the passing of the order, which satisfies him that there was no longer any necessity for keeping the person under bond, and not merely because he holds a different view of the evidence justifying the passing of the order. This was the view taken by *Sundara Ayyar, J.*, in 37 M. 125. An application under this section is not an appeal and does not give power to the District Magistrate to review an order passed by the lower Court on the ground that it was improperly passed, 24 Cr. L.J. 204=71 Ind. Cas. 668 where 35 A. 103; 39 A. 466; 41 A. 651; 44 A. 614, are referred to; 24 Cr. L.J. 616=73 Ind. Cas. 504. The nature of the jurisdiction vested in the District Magistrate under this section whether it is *original*, *appellate* or *revisional* is not very clear. Whether the jurisdiction is to be considered *original* or *revisional* depends on the circumstances which evoke the exercise of jurisdiction. If the

petitioner alleges circumstances which have taken place since the execution of the bond, and its continuance is no longer necessary, the jurisdiction involved for cancellation is clearly original, but if he alleged that the order was made for insufficient reason and asks for the cancellation of the bond, then it is revisional, 37 M. 125 at 129. It was held in 23 Cr. L.J. 281=66 Ind. Cas. 423, that a District Magistrate was not an appellate or revisional authority when called on to cancel a bond under this section and he has no power to vacate the lower Court's order as *ultra vires* or to quash proceedings, see also 37 C. 72; 34 C. 1 and 32 C. 948; 19 Cr. L.J. 245=41 Ind. Cas. 33. This section does not provide for setting aside the order but only for the cancellation of the bond, 22 Cr. L.J. 394. The omission was perhaps due to a desire for simplicity of language as the section was intended to cover two classes of cases, 37 M. 125 at 130.

At any time—The words mean "however early or however late," 37 M. 125 at 145.

For sufficient reasons cancel.—If we give the words '*for sufficient reasons*' in the above section their natural meaning, then it would seem that the District Magistrate may set aside the order if he thinks that the evidence did not support the conclusion arrived at by a Subordinate Magistrate. That the evidence adduced does not warrant the conclusion is surely a sufficient cause for interference. If anything had happened after the date of the passing of the order which made the continuance of the bond unnecessary, that also would be a sufficient reason," 37 M. 125 at 140; 16 Cr. L.J. 556=29 Ind. Cas. 827; 33 A. 103. The District Magistrate under this section is entitled to interfere on grounds other than those disclosed in the evidence before the Magistrate who passed the order. This section confers a larger power than those of an appellate or revisional Court, 37 M. 125 at 141. This section does not confer upon a District Magistrate either an appellate or revisional jurisdiction but confers only an original jurisdiction 15 Cr. L.J. 721=26 Ind. Cas. 169. Under this section the District Magistrate or Chief Presidency Magistrate has power to cancel a bond if in his opinion the Court ordering the execution of the bond ought never to have so ordered; but a District Magistrate cannot cancel a security bond accepted by a Subordinate Magistrate and order that the person proceeded against should be imprisoned till he executes a *fresh bond* with fit and proper sureties, 29 C. 455, 33 A. 624; 2 Cr. L.J. 507 and 278. Cancellation of the bond will discharge the accused, as well as his surety from all liability, and when there is no likelihood of a breach of the peace or the commission of an offence likely to cause a breach or when a bond has been wrongly taken, the District Magistrate will ordinarily cancel the bond, 1905 A.W.N. 143. Under this section, the District Magistrate is not empowered to remand a case for further inquiry and fresh evidence, as S. 428, *infra*, has no application, 20 Cr. L.J. 221=43 Ind. Cas. 781; 33 C. 8; cancellation of bond by Magistrate not empowered is void under S. 530 (f), *infra*.

In his district—See S. 20 *supra* as to the jurisdiction and local limits of a Presidency Magistrate. His district will be the Presidency town.

126. (1) Any surety for the peaceable conduct or good behaviour of another person may at any time apply to a Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class to cancel any bond executed under this Chapter within the local limits of his jurisdiction.

(2) On such application being made, the Magistrate shall issue his summons or warrant, as he thinks fit, requiring the person for whom such surety is bound to appear or to be brought before him.

Scope of the section—This section deals with cases where a surety intimates to the Court his wish to withdraw and to have his bond cancelled. He may do so at any time without any reasons for his action; no man can be compelled to continue as a surety against

his will and the Magistrate is bound to cancel the bond and issue summons or warrant to the person for whom such surety is bound to appear to be brought before him. A surety may be discharged in one of three ways (1) By death of the principal, (2) By operation of law, (3) By act of parties. Where a person on bail commits suicide the surety is discharged, 15 C.W.N. 550=13 Cr. L.J. 592=15 Ind. Cas. 4003; 37 M. 156.

The surety may apply—When an application is made by a surety under this section, the Magistrate has no option but to cancel the bond. But he must issue summons or warrant to the principal and when he appears or is brought before him, then only he is empowered to cancel the bond. There is no such thing as hearing the application on the merits. The presentation of the application itself under S. 102, *infra*, imposes upon the Magistrate this duty of issuing a warrant for the arrest of the accused. Therefore when surety after once presenting an application fails to appear in person or by pleader, such failure cannot deprive him of his right to treat the bond as cancelled. When an application has been presented and received there is no option left to the Magistrate but to act under S. 102, *infra*, 9 Bom. L.R. 1285. The principal, if he is unable to give fresh surety, will be committed to prison under S. 123 (1), *supra*. In case imprisonment exceeds one year the Magistrate is bound to refer the case to the Sessions Judge, 12 Cr. L.J. 410=11 Ind. Cas. 524. An order passed under this section is really an order under S. 118, *supra*, and as such is appealable under S. 405, *infra*.

126A. *When a person for whose appearance a warrant or summons has been issued under the proviso to sub-section (3), of section 122 or under section 126, sub-section (2), appears or is brought before him, the Magistrate shall cancel the bond executed by such person and shall order such person to give, for the unexpired portion of the term of such bond, fresh security of the same description as the original security. Every such order shall, for the purposes of sections 121, 122, 123 and 124, be deemed to be an order made under section 106 or section 118 as the case may be.*

This section was originally sub-section (3) to S. 126, *supra*. The words in italics are newly added. This section deals with an order passed on an application by a surety for his discharge provides *inter alia* that the order shall for purposes of Ss. 21 to 124 be deemed to be an order under S. 118, *supra*, but it makes no mention of S. 120 *supra*, 27 Cr. L.J. 865=56 Ind. Cas. 113; it prescribes the procedure to be adopted on the appearance of the person called upon to furnish security in Court, the surety having already applied to have his bond cancelled. Orders under this section come within S. 118, *supra*, and are therefore appealable under S. 406, *infra*. Fresh security for the unexpired term of the bond must be of the same description as the original security.

CHAPTER IX.

UNLAWFUL ASSEMBLIES.

An unlawful assembly at Common Law is an assembly of three or more persons (1) for purpose forbidden by law such as that of committing a crime by open force or (2) with intent to carry out a common purpose, lawful or unlawful in such a manner as to endanger the public peace or to give firm and courageous persons in the neighbourhood of such assembly reasonable grounds to apprehend a breach of the peace. In consequence of it. . . Assemblies under arms even for self-defence appear to be unlawful except when they are in defence of a

dwelling house. It includes meetings forbidden by statute as unlawful assembly or unlawful combinations or associations, meetings to intimidate the Executive or Parliament; meetings for the purpose of spreading sedition or listening to seditious speeches; assemblies to obstruct the offences of the law..... It appears to be immaterial whether the common purpose of the assembly is unlawful or lawful if the manner of the meeting endangers the public peace or causes general alarm. *Arch Cr.Pl.Ev. and Pro*, p. 1161-62. S. 141, I.P.C., defines an unlawful assembly thus. "An assembly of five or more persons is designated an unlawful assembly if the common object of the persons composing the assembly is (1) To overawe by criminal force or show of criminal force, the Legislative, or Executive Government of India or the Government of any Presidency or any Lieutenant Governor, or any public servant in the exercise of the lawful power of such public servant; or (2) To resist the execution of any law, or of any legal process, or (3) To commit any mischief or criminal trespass, or other offence; or (4) By means of criminal force or show of criminal force to any person, to take or obtain possession of any property or to deprive any person of the enjoyment, of a right of way, or the use of water or other incorporeal right which he is in possession or enjoyment or to enforce any right or supposed right, or (5) By means of criminal force or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do. *Explanation*—An assembly which was not unlawful when it assembled, may subsequently become an unlawful assembly." Chapter VIII of the I.P.C. deals with offences against public tranquility and punishes especially unlawful assemblies of persons whether they assemble tumultuously or otherwise, on account of the unlawful purpose they have in their minds the execution of which will disturb public peace and excite alarm. For aggravated forms of unlawful assemblies as a menace to public peace, see Ss. 144, 145, 146, 148, 150, 151, 152, 153, I.P.C.

127. (1) Any Magistrate or officer in charge of a police-station may command any unlawful assembly, or any assembly of five or more persons likely to cause a disturbance of the public peace, to disperse; and it shall thereupon be the duty of the members of such assembly to disperse accordingly.

Assembly to disperse on command of Magistrate or police-officer.

(2) This section applies also to the police in the town of Calcutta.

Any officer in charge of a police station—An order to disperse may be passed by an officer superior in rank to an officer in charge of a police-station See S. 531, *infra*.

Unlawful Assembly.—For definition, see S. 141, I.P.C., quoted above. Where the object of three persons was to draw a crowd and their action was such as was calculated to draw a crowd of fifty or sixty persons likely to cause a disturbance of the public peace, it was held that the gathering constituted an unlawful assembly, 7 B. 42.

Any assembly of five or more persons.—The words used are "Any assembly." An assembly which is perfectly innocent and lawful, of five or more persons may be commanded to be dispersed under this section if the assembly is likely to cause a disturbance of the public peace.

Likely to cause a disturbance of the public peace.—Whether a disturbance of the peace is likely to be caused, must of necessity be very much a matter of opinion and the police-officer to whose discretion the law leaves the duty of dispersing assemblies must of course act upon his own opinion one way or the other, and if his opinion is relevant, the grounds on which it is based are relevant also. In a case of this kind the opinion of the police-man who knows the people of the locality is obviously valuable and the Magistrate himself must look to the surrounding circumstances and form his own conclusions whether the acts committed were reasonably likely to lead to a breach of the peace, 7 B. 42 at 50.

128. If, upon being so commanded, any such assembly does not disperse, or if, without being so commanded, it conducts itself in such a manner as to show a determination not to disperse, any Magistrate or officer in charge of a police-station, whether within or without the presidency-towns, may proceed to disperse such assembly by force, and may require the assistance of any male person, not being an officer or soldier in Her Majesty's Army or a volunteer enrolled under the Indian Volunteers Act, 1869, and acting as such, for the purpose of dispersing such assembly, and, if necessary, arresting and confining the persons who form part of it, in order to disperse such assembly or that they may be punished according to law.

If such assembly does not disperse.—The members of an assembly who fail to disperse when commanded to do so, are liable under S. 151, I.P.C. See S. 145, I.P.C. which makes upon any person who joins or continues in an unlawful assembly commanded to disperse and fails to do so liable. Where the object of three persons was to draw a crowd and their action was such as was calculated to draw a crowd of 50 or 60 persons likely to cause a disturbance of the public peace it was held that the gathering constituted an unlawful assembly within the meaning of S. 151, I.P.C., and a refusal to disperse after being lawfully commanded to do so rendered the members liable to a conviction under S. 151, I.P.C., 7 B. 42.

Disperse such assembly by force.—This section refers only to the use of civil force to disperse an unlawful assembly and S. 129 *infra* refers to use of military force.

Officer, soldier or volunteer acting as such.—It is only when an officer, soldier, etc., was acting as such officer, soldier, etc., that is, on actual duty who may not be required to assist a Magistrate or Police-officer in dispersing an unlawful assembly.

The degree of force to be used must be proportionate to the circumstances of each particular case, 21 M. 249.

129. If any such assembly cannot be otherwise dispersed, and if it is necessary for the public security that it should be dispersed, the Magistrate of the highest rank who is present may cause it to be dispersed by military force.

130. (1) When a Magistrate determines to disperse any such assembly by military force, he may require any commissioned or non-commissioned officer in command of any soldiers in her Majesty's Army or of any volunteers enrolled under the Indian Volunteers Act, 1869, to disperse such assembly by military force, and to arrest and confine such persons forming part of it as the Magistrate may direct, or as it may be necessary to arrest and confine in order to disperse the assembly or to have them punished according to law.

(2) Every such officer shall obey such requisition in such manner as he thinks fit, but in so doing he shall use as little force, and do as

little injury to person and property, as may be consistent with dispersing the assembly and arresting and detaining such persons.

A police-officer in charge of patrol beat duty holding the rank below an S.H.O. has no power to disperse an unlawful assembly by force, 50 C. 318.

131. When the public security is manifestly endangered by any such assembly, and when no Magistrate can be communicated with, any commissioned officer of Her Majesty's Army may disperse such assembly by military force, and may arrest and confine any persons forming part of it, in order to disperse such assembly or that they may be punished according to law; but if, while he is acting under this section, it becomes practicable for him to communicate with a Magistrate, he shall do so and shall thenceforward obey the instructions of the Magistrate as to whether he shall or shall not continue such action.

Power of commissioned military officers to disperse assembly.

132. No prosecution against any person for any act purporting to be done under this chapter shall be instituted in any Criminal Court, except with the sanction of the Local Government; and—

(a) no Magistrate or police-officer acting under this chapter in good faith,

(b) no officer acting under section 131 in good faith,

(c) no person doing any act in good faith, in compliance with a requisition under section 128 or section 130, and

(d) no inferior officer, or soldier, or volunteer, doing any act in obedience to any order which he was bound to obey, shall be deemed to have thereby committed an offence :

Provided that no such prosecution shall be instituted in any Criminal Court against any Officer or Soldier of His Majesty's Army except with the sanction of the Governor-General in Council.

No prosecution shall be instituted except with the sanction, etc.—The words 'Local Government' for 'the Governor-General in Council' and the Proviso were added by the Devolution Act XXXVIII of 1920. The sanction required by this section for a prosecution against any person for any act purporting to be done under Ch. IX is that of the Local Government or of the Governor-General in Council, and want of such sanction cannot be cured by S. 537 *infra*, 21 M. 80, where 29 M. 139 is followed and 22 C. 176 not followed. No sanction is necessary to prosecute a police-officer in charge of patrol duty who is below the rank of an S.H.O. as such an officer has no power to disperse an unlawful assembly by force, 50 C. 318.

Any act purporting to be done under this chapter.—A Police-officer below the rank of an S.H.O. has no power to act under this chapter. The protection enures only to acts purporting to be done under this Chapter and not otherwise, 50 C. 318.

Good faith.—Nothing is said to be done in good faith which is done without due care and attention S. 62 I.P.C. General Clauses Act X of 1897, S. 3 (20) defines good faith as

follows : ' A thing shall be deemed to be done in good faith where it is in fact done honestly, whether it is done negligently or not ' but having regard to S. 4 (2), *supra*, the definition of the Penal Code is to be adopted for construing the words of the Code. The words 'in good faith' occurring in cl. (a) to (c) is omitted in cl. (d), so that disobedience to order is sufficient justification in the case of persons mentioned in cl. (d), so long as the order is one they are bound to obey. Cl. (d) is not applicable to police-officers. A police officer is not protected simply because he obeyed the orders of his superior officer. The degree of force depends on the nature of such assembly. Force must always be moderated and proportioned to the circumstances of the case. The taking of a life may be justified only by the necessity of protecting person or property against violence or crime or by the necessity of dispersing a crowd which is dangerous unless dispersed. When a police-officer without believing that it was necessary for public security to disperse an assembly by firing on them fired in the air without warning and killed one of the crowd, it was held that he was not acting in good faith and his act was not protected simply because he obeyed the orders of his superior, 21 M. 239. When the defence of the police-officers was, they were acting in pursuance of the provisions of Ss. 127 and 123 *supra* and therefore sanction was necessary for the prosecution, in a trial by Jury, the Judge should direct the jury that they should consider the provisions of Ss. 127 and 123, *supra*, and determine whether the police-officers were so acting, 25 C.W.N. 623—33 C.L.J. 340.

Proviso.—This proviso was added by Act XXXVIII of 1920 (Devolution Act), Sch. I.

CHAPTER X.

PUBLIC NUISANCES.

Public or common nuisances are such inconvenient or troublesome offences as annoy the whole community in general and not merely some particular person ; and therefore are indictable only and not actionable as it would be unreasonable to multiply suits by giving to everyman a separate right of action for what damns him in common only with the rest of his fellow subjects 4 *Blackstone Com.* p. 167. Everyman is guilty of a misdemeanour at common law known as common nuisance who (1) does an act not warranted by law, or (2) omits to discharge a legal duty, if the effect of the act or omission is to endanger the life, health property, morals or comforts, of the public or to obstruct the public in the exercise or the enjoyment of the rights common to all His Majesty's subjects. It is immaterial whether the annoyance arises from noise, stench, unwholesomeness or interference with the public comfort or convenience. If the legal duty does not exist at common law and a particular penalty is imposed by the statute creating the duty, the remedy by indictment for common nuisance would seem to be excluded. The object with which the act or omission is made is immaterial if the probable result is to affect injuriously, in any of the ways above stated the public or any appreciable part of it and if the effect is such, the nuisance cannot be legalized by long continuance. It is only in this respect and in the quantum of annoyance that the public nuisance differ from a private nuisance.....Public nuisances which are indictable may thus be classified (1) Interference with comfort, enjoyment or health, (2) acts dangerous to public safety, (3) acts injurious to public morals or decency, (4) unlawful treatment of dead bodies, (5) interference with public rights of passage by land or water. *Archbold Cr. Pl. Pr and Ev*, p. 1216-1217. Chapter XIV, I.P.C., deals with public nuisances, offences affecting the public health, safety, convenience, decency and morals. S. 268, I.P.C., defines public nuisance thus. A person is guilty of public nuisance who does any act or is guilty of an illegal omission, or which causes any common injury, danger, or annoyance to the public or to the people in general who dwell or occupy property in the vicinity or which must necessarily cause injury, obstruction, danger or annoyance to persons who may have occasion to use any public right. A common nuisance is not excused on the ground that it causes some convenience or advantage." See also S. 269, I.P.C., dealing with negligent act likely to spread infection of disease dangerous to life. S. 270 I.P.C. malignant act likely to spread infection of disease dangerous to life S. 271 I.P.C.

disobedience to quarantine rule. S. 272 Adulteration of food or drink intended for sale. S. 273 Sale of noxious food or drink. S. 274 Adulteration of drug and sale of such drugs etc. S. 277 Fouling water of a public spring etc. S. 278 Making the atmosphere noxious to health. S. 279 Rash driving, etc., in a public way. S. 280 Rash navigation etc. S. 284 Negligent conduct with respect to poisonous substances. Ss. 235 to 237 Negligent conduct with fire or combustible matter or explosive substance, machinery, etc. S. 233 Negligent conduct in pulling down or repairing buildings. S. 239 Negligent conduct with respect to animals. These are all public nuisances punishable under the I.P.C. and Ss. 292 to 294A, I.P.C., deal with offences against public morals and decency.

133. (1) Whenever a District Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class considers, on receiving a police-report or other information and on taking such evidence (if any) as he thinks fit,

Conditional order
for removal of nuisance.

that any unlawful obstruction or nuisance should be removed from any way, river or channel which is or may be lawfully used by the public, or from any public place, or

that *the conduct of any trade or occupation, or the keeping of any goods or merchandise, is injurious to the health or physical comfort of the community, and that in consequence such trade or occupation should be prohibited or regulated* or such goods or merchandise should be removed or *the keeping thereof regulated*, or

that the construction of any building, or the disposal of any substance, as likely to occasion conflagration or explosion, should be prevented or stopped, or

that any building, *tent or structure, or any tree* is in such a condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by, and that in consequence *the removal, repair or support of such building, tent or structure, or the removal or support of such tree*, is necessary, or

that any tank, well or excavation adjacent to any such way or public place should be fenced in such manner as to prevent danger arising to the public, or

that any dangerous animal should be destroyed, confined or otherwise disposed of,

such Magistrate may make a conditional order requiring the person causing such obstruction or nuisance, or carrying on such trade or occupation, or keeping any such goods or merchandise, or owning, possessing or controlling such building, *tent, structure*, substance, tank, well or excavation, or *owning or possessing such animal or tree*, within a time to be fixed in the order,

to remove such obstruction or nuisance ; or

to desist from carrying on, or to remove or regulate in such manner as may be directed, such trade or occupation ; or

to remove such goods or merchandise, or to regulate the keeping thereof in such manner as may be directed ; or

to prevent or stop the erection of, or to remove, repair or support, such building, tent or structure ; or

to remove or support such tree ; or

to alter the disposal of such substance ; or

to fence such tank, well or excavation, as the case may be ; or

to destroy, confine or dispose of such dangerous animal in the manner provided in the said order : or, if he objects so to do,

to appear before himself or some other Magistrate of the first or second class, at a time and place to be fixed by the order, and move to have the order set aside or modified in the manner hereinafter provided.

(2) No order duly made by a Magistrate under this section shall be called in question in any Civil Court.

Explanation.—A ' public place ' includes also property belonging to the State, camping grounds and grounds left unoccupied for sanitary or recreative purposes.

Amendment.—The section has been redrafted and many a doubt which existed before has been cleared ; the term building is made to include " tent, structure or tree " and the words " that any dangerous animal should be destroyed or disposed of " have been added and power to order destruction, confinement or disposal of animals is also given ; power is also given to prohibit or regulate trade or keeping of goods, etc.

Scope and object of the Section.—The powers given under this section are of an exceptional nature. The provisions of the chapter should be worked so as not to become a nuisance to the community at large and although every man is bound so to use his own property in such a way as not to cause legal damage or harm to his neighbour yet no one has a right to interfere with a free and full enjoyment by another of his property except on clear and absolute proof that such use to producing such legal damage or harm and therefore a lawful and necessary trade such as tanning should be interfered with unless it is proved that it is injurious to the health or physical comfort, 1 Lah. 163 following 1888 P.R. (Cr.) 17. This section is primarily intended to be exercised in cases where there is no question that the right claimed was one vested in the public, 45 A. 656 at 666 ; 49 C. 682. This section contemplates only an inquiry as to the existence or non-existence of the obstruction complained of, and not an inquiry into a disputed question of title, and where a *bona fide* claim or private right is raised the Magistrate has no power to make an order under this section but should leave the matter for the determination of the Civil Court, 18 C.W.N. 1148=19 C.L.J. 631 ; 18 C.W.N. 1086 ; 28 A. 98 ; 11 C. 8. Where the person proceeded against sets up title to the property, the proper course is to proceed under S 137 *infra* 49 A. 453. A long user by a person of what is claimed to be a part of the public way may be taken as a *bona fide* assertion of claim ousting the jurisdiction of the Magistrate to pass a summary order under this section *vice versa* a long user by the public of a place as part of the public road or way raises a presumption of relinquishment by the owner of the right over it and the Court has to maintain the possession as at present found, 29 Cr. L.J. 432=108 Ind. Cas. 559. Whether there is a

bona fide dispute as to the public nature of the subject-matter, the question should be left to a Civil Court for adjudication, but whether there is a *bona fide* question is for the Magistrate to decide, 24 Cr. L.J. 690=73 Ind. Cas. 802. Whenever there is in fact a *bona fide* claim of right in a case in which a person is required to remove a nuisance the Magistrate's jurisdiction is ousted and he has no power to make an order under this section, 1 C.L.J. 434. See also 25 Cr. L.J. 1030=81 Ind. Cas. 934. This section only relates to an existing state of affairs and to the possibility of future results, 1 Lah. 153 ; 20 Cr. L.J. 462; 1901 A.W.N. 26; 21 W.R. (Cr.) 19. A general order or proclamation prohibiting a nuisance cannot be issued under this section as under S 114 (3), *infra*. Before this section can be applied there must be a finding that the obstruction in question is situated in a way which may be lawfully used by the public or on any public place, 12 A.L.J. 1024=13 Cr. L.J. 724=26 Ind. Cas. 172. A permissive way may be obstructed at pleasure by the owner or tenant of the land over which it runs, 13 C. 273 at 278. This section is limited to injuries arising or likely to arise to members of unascertained mass of the public. When a person against whom a notice is issued under this section appears and objects to the order, the inquiry must proceed as in a summons case, 20 A.L.J. 692. The persons who require protection are *persons living or carrying on business in the neighbourhood or passing by*. It would be straining the meaning of the words to hold that the section applies to persons living actually in the alleged dangerous building or in the servants' quarters in the compound belonging to it. This section does not therefore empower a Magistrate to order an owner of a house standing apart from the public in its own compound, to repair, 20 A. 501. The words 'when empowered by the Local Government in this behalf' are now omitted by the new amendment. All First Class Magistrates in the place of those specially empowered, have been now authorized to take action when necessary. This section is not intended to be employed to avoid the necessity of filing a civil suit in regard to a construction which had been in existence for several years, 24 A.L.J. 112=27 Cr. L.J. 27=91 Ind. Cas. 59. An order under this section and under the subsequent sections of the Chapter is an order against a particular individual and when that individual dies, the order must be considered to be spent and no order can be passed against his successor in-interest without fresh proceedings, 26 A.L.J. 405=29 Cr. L.J. 443 (2)=108 Ind. Cas. 565.

District Magistrate, Sub-divisional Magistrate or Magistrate of the first class.—Only these Magistrates, and not a Presidency Magistrate, are entitled to act under this chapter. A Presidency Magistrate can only deal with nuisances under the Local Acts. A Sub-divisional Magistrate after passing a conditional order under this section may refer this matter to a subordinate Magistrate for disposal. There is nothing in the Code to prevent such a course, 6 Pat. 428 at 430 where 42 C. 159; 17 C. 562; 25 C. 278 are referred to but in 50 C.L.J. 251, it was held that the Magistrate cannot refer the matter to a third class Magistrate as this section says that proceedings should be in the hands of a District Magistrate, etc., and a third class Magistrate cannot inquire and report.

Any unlawful obstruction or nuisance should be removed from any way, etc., which in his opinion—Obstruction to private paths and drains can only be dealt with by Civil Courts, 2 W.R. (Cr.) 33; 5 W.R. (Cr.) 58. The words '*in his opinion*' have been *newly added*. This is to empower Magistrates to issue a conditional order under this section when in his opinion the way, river or channel which is the subject of unlawful obstruction or nuisance may be lawfully used by the public. The amendment is designed to meet the difficulty which arises when the defence set up that the way, river, etc., is private property of the objector, and that no public right exists. *St of Objs. and Reas.* This section deals with an obstruction to a way, river or channel which is or may be lawfully used by the public, and the obstruction must be to a public use, 22 B. 993. The duty of determining whether the site of the obstruction is a public place or way is cast by the section on the Magistrate in the first instance and under no circumstances can it be left to the jury and unless the Magistrate finds that the place or way is public he has no jurisdiction to proceed with the investigation, 4 Lah. 224. The erection of a dam across a public river is an unlawful obstruction which can be ordered to be removed under this section, 21 Cr. L.J. 55=54 Ind. Cas. 407. The word channel is not defined in the Code but it is quite wide

enough to include a water course in the centre of a catchment area for rainwater which takes the water falling in that area to a public urani, 22 L.W. 470-1925 M.W.N. 663-27 Cr. L.J. 103-51 Ind. Cas. 537. Under this section power is given only for the removal of an obstruction and there is no provision for the reconstruction of a bund which has been once removed, 26 Cr. L.J. 517-55 Ind. Cas. 537. Eviding a cattle trough on Government waste land touching a public road was held to be an unlawful obstruction. The motive with which a public highway is obstructed is absolutely irrelevant and it does not matter when as a matter of fact the structure causes practical inconvenience or not, because the land in which it is built though not at the time necessary for continuous use of the public, may be required for such use when there is increased traffic or for any other similar reason, 23 A. 159; 14 C.W.N. 544; when the encroachment complained of is admittedly on a public way, however *bona fide* the claim may be, the Magistrate's jurisdiction is not ousted, 6 C.W.N. 836; 32 C. 530. A mere construction of a latrine in one's own land cannot be considered to be a nuisance within the meaning of this section. An order directing the removal of a latrine built on one's own property is without jurisdiction although the Magistrate can direct the owner not to use the latrine in such a way as to cause nuisance to his neighbours, 26 A.L.J. 86-29 Cr. L.J. 233-107 Ind. Cas. 242, following 25 C. 425. A common nuisance cannot be excused on the ground that it affords some convenience or advantage to the person guilty of it, 34 A. 345. See also 28 Cr. L.J. 203-99 Ind. Cas. 539 as to the erection of a bund amounting to a public nuisance justifying the passing of an order under this section when once such a bund has been found to be an encroachment the conditional order cannot be discharged on the ground that the encroachment causes no inconvenience, 6 Pat. 423.

Lawfully used by the public.—Before an order can be made ordering the removal of an obstruction to a way or public place, there must be a finding that the obstruction in question is on a way which may be lawfully used by the public or in a public place, 12 A L.J. 1024-15 Cr. L.J. 724-26 Ind. Cas. 172; 10 Cr. L.J. 210-3 Ind. Cas. 7. There is no warrant for the view that Railway land is necessarily a public place, with regard to which action under this section can be taken. There must be a finding that the land encroached upon is in a way which is, or may lawfully be used by the public, 24 Cr. L.J. 555-74 Ind. Cas. 1047. In 36 A 209 it was held that when a person whose field was on a lower level, raised the level of his field to such an extent as to cause damage to the neighbour's land, no action could be taken under this section against him, as the field or even if a channel, was not such as had been or could be lawfully used by the public. This ruling is based upon the fact that the field over which the water used to flow was not a public field and hence this section could not be applied to it. The Court was apparently prepared to concede that the field over which the water flowed could be described in a wide sense as a channel. 22 L.W. 470-1925 M.W.N. 663-27 Cr. L.J. 105-51 Ind. Cas. 537. See 10 C L J. 484.

The Conduct of any trade or occupation injurious to health etc.—"It was held that the section dealt with only trades or occupations which are in themselves injurious, but by the new amendment the conduct of any trade, etc., the provision as to various trades or occupations have been amplified in order to provide for cases in which it is the manner in which the trade or occupation is conducted which may be injurious to the health or physical comfort of the community."—*St. of Obs. and Reas.* See 1 Lah. 163 following 1883 P.P. (Cr.) 47. Where there is no evidence that the manufacture of bricks was in itself injurious to the health of the resident of a college near by or that the persons proceeded against were so working that the health of any one was being impaired, an order passed under this section was set aside and the High Court remarked thus "The powers given under S. 133 of the Code are of an exceptional character. The rights involved are important and the case essentially one in which if the residents of the college considered themselves aggrieved they should have taken action in the Civil Court to abate the nuisance alleged and this can still be done. The fact that the college was built many years ago in the present position in order to have an open country round and pure air is beside the point and is no ground for ignoring the legal rights of others. It is open to the college authorities to acquire the surrounding country in which the brick kilns had existed for many years." An order against some

persons inoculating their children upon an outbreak of small-pox is not covered by this section as those persons cannot be said to be carrying on a *trade* or engaged in an occupation 15 Cr. L. J. 253=23 Ind. Cas. 205. Though a *burning ghāt* may not be a nuisance under this clause, if it is in such an offensive state as to be a source of injury or annoyance to the people of the vicinity, a Magistrate will have jurisdiction to act under this section, 25 C. 423; 19 M. 464; 49 A. 453 where 20 A. L. J. 657 and 692 and 6 A. L. J. 685 are *followed*, noise injurious to the physical comfort of the community is a nuisance within this section, 32 C. L. J. 42=21 Cr. L. J. 669=57 Ind. Cas. 829. This section authorizes action being taken if any trade in question is injurious to the physical comfort of the community. An order prohibiting the discharge into a river of an effluent from a factory which might be injurious to the health of the community which has rights to use the water of the river can validly be made under this section, 28 Cr. L. J. 317=100 Ind. Cas. 541. But at the same time it is necessary to take that all the circumstances into account to see that interference with public comfort is considerable, and a considerable section of the public is not affected injuriously, general equitable principles not being lost sight of, 12 Cr. L. J. 146=9 Ind. Cas. 891.

Health or physical comfort.—That is, as distinguished from religious or sentimental gratification such as arising from carrying *taboos* along a certain public road. See 2 B. 457.

May make a conditional order.—A Magistrate who commences proceedings under this section is bound to follow the procedure laid down in this chapter. He cannot proceed with the inquiry without issuing a conditional order and when the alleged public right is denied and there is reliable evidence in support of such denial he is bound to stay proceedings until the matter is decided by a competent Civil Court without directing any particular party to go to a competent Civil Court, 29 Cr. L. J. 530=109 Ind. Cas. 354. The conditional order under this section must be such that the person against whom it is directed can learn from its terms what it is they are to do for the purpose of complying with it. When it is too vague and indefinite, the final order made under S. 137, *infra* was set aside by the High Court holding that it was unnecessary to send back the case for retrial, as under S. 137, *infra* it could decide only on the reasonableness or propriety of the conditional order and was not competent to go behind it, 11 C. L. J. 114=11 Cr. L. J. 213=5 Ind. Cas. 7.2.

Requiring the person—The word "person" according to S. 11 I.P.O. includes a company or association or a body of persons, incorporated or not. A Magistrate cannot proceed to pass an order for the removal of a nuisance under this section without calling on the party to show cause why the order should not be passed against him and without hearing his objections if any, even if they are filed after the time fixed originally but before he takes up the case.

Persons living or carrying on business in the neighbourhood.—By these words are meant not the persons who in the exercise of their private rights may use a building supposed to be in a dangerous condition, but unascertained members of the public whose ordinary avocations may take them to the neighbourhood of such building, 20 A. 501.

Building, tent or structure likely to fall, etc.—The term "building" is made now to include tent or other structures. To justify an order, there must be proof that the building is in a dangerous state at present. Dangerous trees also are included now.

Any dangerous animal should be destroyed, etc.—This is newly introduced and provision is here made for the destruction or disposal of dangerous animals.

Remove such obstruction or nuisance.—The order under this section should be confined to a direction to remove the nuisance complained of. It must be left to the person to choose them most effective way of removing it. If a tank is a nuisance or it may be removed by filling it up or by excavating it to greater depth. He should be allowed the opportunity of using his discretion as to the mode in which he would remove the nuisance, 10 W. R. (Cr). 51. A final order directing a person to remove such portion of a platform as might be obstructing a public highway being vague and indefinite, such an order was held bad, 23 A. L. J. 43.

Remove or regulate such trade, etc.—It is of course possible to suggest that power to order 'removal' of a trade must be held to include power to remove anything connected with that trade or restore the *status quo* before that trade commenced. But that is not the natural and straightforward meaning of the expression 'removal of a trade' and the Court has no right to strain the natural and straightforward meaning merely because an order that might be passed by so doing would possibly be very desirable. The powers given under the section suggest three different ways (1) the Magistrate may simply order the party to stop carrying on the trade, etc. (2) May order it to be removed to a short distance holding the trade to be injurious. (3) May allow the trade to be carried on under certain conditions holding it to be injurious. It shall be manifestly straining the language to hold that removal of trade includes ordering the party to restore *status quo*, 27 A.L.J. 177.

Tank, well or excavation should be fenced in.—Under this section the Magistrate cannot order the *filling of* an excavation; he could order only that the excavation be *fenced in*, 22 B. 715; 27 A.L.J. 177. Where a tank is used as a reservoir for water, the Magistrate may order it to be *fenced in* to prevent accidents, but where the tank is proved to be injurious to the health and comfort of the community, he may treat it as a public nuisance and order it to be *filled up*; to fence in, such an excavation and to stop there, would be to make a dead letter of this section, and to take away from the community the relief which the law gives them, 10 W. R. (Gr.) 27.

Within a time to be fixed in the order.—Every conditional order must fix a time within which the person is required to remove the obstruction, etc., when the time fixed in the order is allowed to expire without obeying the order or appearing to show cause against it, the liability to punishment attaches irrespective of S. 140, *infra*, 31 M. 280.

To appear at the time and place to be fixed by the order.—The order must appoint a time within which and a place where, the person to whom it is directed to appear and move to have the conditional order set aside or modified, 9 C. 637. It must be addressed to a particular person or persons. It cannot be addressed to the public at large as in the case of orders under S. 144 (3), *infra*. The Magistrate is bound to hear the objections and to take evidence tendered under S. 137, *infra*, 20 A.L.J. 692 and 657; 8 C.L.R. 431; 11 B. 375. He is also bound to compel the attendance of witnesses when required by a party, 6 C.W.N. 548. Where from the conditional order the person against whom it is made could not learn what he is to do for the purpose of complying with it, it being vague and indefinite such an order is bad and the High Court while setting aside the order declined to send back the case for re-hearing as it thought that no useful purpose could possibly be served by such a course, 11 C.L.J. 114=11 Cr. L.J. 213=5 Ind. Cas. 722.

No order duly made shall be called in question in any Civil Court.—It is not competent to a Civil Court to set aside an order *duly made* under this section on the ground that it was made without jurisdiction as the subject matter in dispute was private land and not a thoroughfare or public place. But the Civil Court irrespective of the order made under this section may try the question whether the land in question is private property or not as between parties to such suit and those who claim under them, 6 C. 291; 2 B. 457; 3 B.L.R. 295; 4 B.L.R. 24 (F.B.). To such a suit it is unnecessary to make the Secretary of State a party, 13 C. 460 (F.B.) But in 17 B. 293 it was held that a party aggrieved by an order under this section may sue for a declaration of title against Government who is interested in denying plaintiff's title to the land; see 6 B. 670, where it was held that the party dissatisfied with the Magistrate's order cannot sue the Magistrate, but must sue the Secretary of State, see also 15 Cr. L.J. 259=23 Ind. Cas. 467. This clause provides that no order duly made shall be called in question in any Civil Court and therefore it is necessary that the provisions of this section should be sparingly used and if the party against whom an order is contemplated raises the question that the land is his private land he should stay hands and refer the party to a Civil Court, 18 C.W.N. 1086.

Revision.—In 48 C. 534 it was held that it was not the practice of the High Court to entertain an application in revision against an order made by a Magistrate unless the party

aggrieved has first moved the Sessions Judge under Ss. 435 and 438, *infra*, see also 50 C. 423. The High Court cannot set aside an order under this section except on an error of law or an excess of jurisdiction. The Magistrate's proceedings being judicial proceedings, it is open to the High Court to revise the order on a point of law, 9 B.H.C.R. 160; 7 B.L.R. 449; 9 B.L.R. 417.

The High Court will not interfere in revision when a Magistrate dropped proceedings, 1 C.L.R. 486; 8 C. 883. A Magistrate clearly has jurisdiction to exercise his discretion by declining to decide when the public right is strongly disputed and sending the party to a Civil Court, 45 A. 656 at 666. Orders under this chapter are orders in a Criminal trial. No Letters Patent Appeal lies therefrom. The fact that the person proceeded against is a competent witness on his behalf does not make it the less a Criminal trial, 39 M. 537.

Further Inquiry.—When a Magistrate dropped proceedings under this section the District Magistrate or Sessions Judge has no power to order further inquiry under S. 436, *infra*, 24 C. 395. The proper course is to refer the matter to the High Court under S. 438 *infra*, when the order is illegal or improper, 25 C. 425; 26 Cr.L.J. 125 (1)=83 Ind. Cas. 995 (1)

Costs.—There is no provision in this chapter for the payment of costs by any party to a proceeding under this section, 26 Cr. L.J. 517=85 Ind. Cas. 357.

134. (1) The order shall, if practicable, be served on the person against whom it is made in manner herein provided for service of a summons.

(2) If such order cannot be so served, it shall be notified by proclamation published in such manner as the Local Government may by rule direct, and a copy thereof shall be stuck up at such place or places as may be fittest for conveying the information to such person.

Scope of the section.—The terms of this section are directory and an omission to follow strictly such direction though it is an irregularity does not invalidate the order where it is shown that the order passed has been actually known to the person affected by it. Such omission does not prevent the case coming within S. 188, I.P.C., 16 C. 9, 12 M. 475; 5 W.R. (Cr.) 4.

Order shall if practicable be served on the person.—The order herein referred to is the conditional order under S. 112, *supra*, and such conditional order is to be served on the person individually and an opportunity given to him to show cause against such order. It is only when service is not practicable, that resort is to be had to notification by proclamation, 8 A. 99. In order to ascertain the manner in which the order may be served it is necessary to refer to the provisions of Ss. 69 to 71, *supra*. It is plain that the procedure provided by S. 71, *supra*, cannot be made use of unless service in the manner provided by Ss. 67 and 70, *supra*, cannot be effected by due diligence. A conditional order under this section is not legally served when it is not proved that the order was served in the manner provided for service of summons. First it should be proved that service could not be effected personally under S. 69, *supra*, and then it could not be effected in the manner provided by S. 70, *supra*, and it is only after that, service by affixture should be resorted to under S. 71, *supra*, 43 C.L.J. 113.

In manner herein provided for service of summons.—See Ss. 69 to 73 as to manner of service. Service on an agent is sufficient, 30 A. 354. Omission to follow strictly the direction as to service of order on the person proceeded against is only an irregularity which can be cured under S. 537, *infra*.

Sub-section (2).—Disobedience of the order duly promulgated by a Magistrate is an offence under S. 188, I.P.C., 54 C. 152.

135. The person against whom such order is made shall—

Person to whom
order is addressed to
obey.

(a) perform, within the time *and in the manner*
specified in the order the act directed thereby; or

(b) appear in accordance with such order and either show cause
against the same, or apply to the Magistrate by
whom it was made to appoint a jury to try whether
the same is reasonable and proper.

or show cause or
claim jury.

Scope of the section—This section gives the person against whom a conditional order is made (1) to perform the act directed within the specified time, (2) to appear to show cause against the same, (3) to apply to the Magistrate to appoint a jury to try whether the same is reasonable and proper, 43 M. 316 at 318. If he appears to show cause, the procedure laid down in S. 137, *infra*, is to be followed. He can hear the case on cause shown and may record evidence as in summons cases and may either drop proceedings or make the original order absolute. But if he claims a jury, the Magistrate is to proceed under S. 138, *infra*. Both Ss. 137 and 138 are imperative in their terms and the Magistrate has no discretion in the matter. The party cannot both show cause against the order and at the same time claim a jury, 13 C.W.N. 367=10 Cr. L.J. 454=4 Ind. Cas. 72; 1500 A.W.N. 204.

And in the manner specified—The words 'and in the manner' are new. If the person appears the Magistrate is bound subject to S. 139A *infra*, to take evidence as required by S. 137, *infra*, 1 Bom. L.R. 783; see also 25 Cr. L.J. 266=76 Ind. Cas. 826.

Apply for the appointment of a jury to try.—Reference to a jury is entirely optional with the person against whom an order is made, but if he applies for a jury he is bound by their verdict, 14 C. 60. When an application is made for the appointment of a jury the Magistrate cannot decide the matter by a local inquiry, 2 C.L.R. 518, Weir II, 63. When the jury return their verdict, the plea of obstruction under a *bona fide* claim of right cannot be raised, 22 A. 267; 1900 A.W.N. 30. Similarly when the party appears to show cause and does not object that it is not a public way, he cannot afterwards raise such an objection as to the Magistrate's jurisdiction in rejecting the plea as not *bona fide*, 15 C 564. An application for the appointment of a jury must be made to the Magistrate who passed the order under S. 133, *supra*, and it would seem that he alone is entitled to do with the case, 9 M 201; 25 C 273; 43 M. 316. There is nothing in the Code to prevent a Magistrate making a conditional order and subsequently referring the matter to a subordinate Magistrate for disposal. It is only when the person appears and demands a jury that the matter should be disposed of by the Magistrate who made the original order, 6 Pat 428 at 430. The jury is to be appointed to consider whether the measures directed by the Magistrate are *reasonable and proper*, 30 A. 354, and the Magistrate has no jurisdiction to refer the case to a jury unless he finds that the way alleged to be obstructed is one which is or may be lawfully used by the public; it was held in 31 C. 679 that the Magistrate is 'not entitled to refer to the jury and ask them to decide whether there was a public right of way, see Weir II, 64 and 14 C.W.N. 544. The new S. 139A makes this clear.

136. If such person does not perform such act or appear and
show cause or apply for the appointment of a jury

Consequence of his
failing to do so.

as required by section 135, he shall be liable to the
penalty prescribed in that behalf in section 188 of
the Indian Penal Code, and the order shall be made absolute.

Scope of the section—The provisions of this section are stringent, because the intention is to create facilities for conditional orders which Magistrates are authorized to pass under this Chapter in order to prevent danger to the public, becoming final without

needless delay and thereby promptly to ensure public safety, 12 M. 473 at 478; before proceeding criminally for a breach of the order it must be shown that the order clearly and unequivocally prohibits the thing said to have been done. If the order is ambiguous and capable of two interpretations, the one most favourable to the accused must be adopted, 16 C. 9 at 13.

Appear and show cause.—The Magistrate is bound to take evidence and make some inquiry under S. 135, *infra*, 1 Bom. L.R. 783.

In that behalf.—The words "*in that behalf*" mean for his failure to comply with the requirements of S. 135 *supra*, 12 M. 475.

Order shall be made absolute.—When once an order has been made absolute it is not competent to the party affected by it to go behind and question its validity in any way, 13 A. 577; 12 M. 475; 31 M. 260. These decisions were distinguished in 20 A. 571. A Court has inherent power to set aside an *ex parte* order, 19 Cr. L.J. 214=43 Ind. Cas. 790 non-service of notice would not give the Magistrate power to cancel the order absolute made by him and on failure to obey the order passed under this section, the procedure prescribed under S. 140, *infra*, should be adopted, 31 C.W.N. 530=44 C.L.J. 211=28 Cr. L.J. 30=22 Ind. Cas. 62.

137. (1) If he appears and shows cause against the order, the Magistrate shall take evidence in the matter as in a summons-case.

(2) If the Magistrate is satisfied that the order is not reasonable and proper, no further proceedings shall be taken in the case.

(3) If the Magistrate is not so satisfied, the order shall be made absolute.

Scope of the section.—Where a conditional order under S. 133 *supra* is passed and the opposite party appeared by pleader before the Magistrate to show cause and denied the existence of any public right in respect of a water course in dispute the party denying the existence of the right is to adduce evidence in support of his case relevant to an inquiry under S. 139 A, *infra* and the party who moved the Court cannot be expected or required under this section to produce his evidence before the conclusion of that inquiry and any order made without affording the party who moved the Court an opportunity to adduce his evidence under this section after the conclusion of the inquiry under S. 139A *infra*, cannot be sustained. The inquiry under this section will commence only after the conclusion of the inquiry contemplated by S. 139A, *infra*, 30 Cr. L.J. 622 (1)=116 Ind. Cas. 334.

Shall take evidence as in summons-cases.—The provisions of this section are clearly mandatory and no waiver on the part of the petitioners can confer on the Magistrate authority to act in a manner not prescribed by the Legislature, *viz.*, to pass an order without recording evidence, but merely basing it on information gathered at a local inquiry to which the parties consented, 10 C.L.J. 432=11 Cr. L.J. 1=4 Ind. Cas. 436. A Magistrate is not justified in assuming the role of an arbitrator between the parties to the proceedings before him. When the parties wished him to blink at the law, he should not have readily agreed to do so. Consent of the parties or waiver did not vest him with jurisdiction, 21 C.W.N. 825=25 C.L.J. 34f=18 Cr. L.J. 738=40 Ind. Cas. 733. The Magistrate is not justified in consenting to act as an arbitrator and deciding the matter in dispute on mere local inspection, 49 A. 270; nor can the Magistrate decide the matter merely on the report of a Tahsildar to whom he had referred the matter for inquiry. He must take evidence in the matter as in a summons-case, 27 Cr. L.J. 1254=93 Ind. Cas. 102. An order absolute made without recording evidence but on mere local inspection is

illegal, 49 A. 475. A Conditional order cannot be made absolute without the party moving the Court being required to adduce evidence in support of his claims even where the opposite party called upon to show cause, appeared and denied the right claimed but failed to adduce evidence in support of the denial, 28 Cr. L.J. 855=104 Ind. Cas. 635; 28 Cr. L.J. 60=99 Ind. Cas. 52; where a Magistrate on receipt of a petition alleging an obstruction on a public highway asked certain Panchas to make a local investigation and on their reporting that a newly built shop encroached on the public highway directed the removal of the building relying on the report received by him, it was held that the Magistrate was bound to follow the procedure laid down in this chapter and determine on the evidence adduced whether there was any unlawful obstruction of a highway or public place and could not act outside such evidence relying solely on the report of the Panchas, 24 A.L.J. 162=28 Cr. L.J. 510=101 Ind. Cas. 824 following 31 A. 453. This certainly cannot mean that the person showing cause is to start the proceedings and produce evidence to meet a case which he has never heard. He is not supposed to know the substance of the Police report made to the Magistrate or other information on which the Magistrate acted; he is entitled to hear the evidence, taken as in summons-cases and cross-examine, and then he may produce his own evidence if so advised. When this has been done, but not before, the Magistrate can make the conditional order absolute if he finds sufficient reason for doing so," 31 A. 453 at 456, following 24 C. 325; 11 A.L.J. 531=15 Cr. L.J. 23=22 Ind. Cas. 167. It is clearly intended by the Legislature that the Court should by itself go into the evidence before making a preliminary order final and should give a judicial decision in the matter, 20 A.L.J. 657=27 Cr. L.J. 864=95 Ind. Cas. 944. After the conditional order has been made, it is incumbent on the Magistrate to take evidence as in a summons case if the final order is to be made by him, 47 B. 89 at 91; 42 C. 702; 22 Cr. L.J. 232; 28 Cr. L.J. 859=104 Ind. Cas. 635; 28 Cr. L.J. 60=99 Ind. Cas. 92. Where a person against whom a conditional order under S. 133, *supra* has been made appears and shows cause, the Magistrate is bound to take evidence as in a summons-case and he cannot make the order absolute under this section merely on the ground that no evidence was produced before him in support of the written statement filed denying any encroachment on the public way. The procedure prescribed, in B 214, *infra*, is, when the accused appears, the Magistrate is first to ask him to show cause, and if he does so, then the Magistrate is to hear the complainant's evidence first and then the evidence for the accused. The Magistrate should therefore in a case under this chapter hear the evidence in support of his order before calling upon the person on whom the conditional order is served for his defence, and such omission certainly prejudices the person proceeded against and the order under this section making absolute the conditional order is illegal, 47 A. 341. Where in a case of alleged obstruction to a public way the Magistrate made a conditional order but dropped proceedings when the person called upon to show cause raised the question of the Magistrate's jurisdiction to proceed with the inquiry as the matter had been previously inquired into, held it was the duty of the Magistrate to follow the procedure laid down in sub-section (1) of the section, to take evidence and then consider whether the objection raised was a complete answer or whether the case should be referred to a Civil Court for determination, and there was no room for applying the doctrine of *res judicata*, 19 C.W.N. 332; 44 C. 61. The person proceeded against is not an accused person and he is a competent witness on his behalf, 9 C.W.N. 983. The Magistrate cannot act on his own opinion and also cannot act solely on local inspection, 11 B. 375; Weir II, 62; 17 M.L.T. 142=16 Cr. L.J. 207=27 Ind. Cas. 767. When the person who was served with a notice under S. 133 *supra* appeared on the day fixed for hearing but failed to appear and produce evidence on the adjourned hearing, this will not justify the Magistrate in making it absolute without recording formal evidence, 2 Bom. L.R. 818 followed in 28 Cr. L.J. 1036=106 Ind. Cas. 220. The person who is called upon to show cause has an undoubted right to call upon the Court to compel the attendance of his witnesses, 6 C.W.N. 548. A verbal order to remove an obstruction has not the effect of an order under this section and is not lawful and disobedience of such an order is not punishable under the I.P.C., 16 Cr.L.J. 24=20 Ind. Cas. 328. When the party appears to show cause, the Magistrate cannot send the case to another Magistrate even if the parties consent, and pass final order acting on the report sent, 47 B. 89; 21 C.W.N. 826; 20 A.L.J. 657=27 Cr. L.J. 864=95 Ind. Cas. 944. Where

the person against whom proceedings are initiated under S. 133 *supra* appears and sets up his title to the property in question, the proper course for the Magistrate is to proceed under this section, 49 A. 453.

Sub-section (2)—This sub-section is in accordance with the decision in 1 C.L.R. 436. If in a case relating to an obstruction to an alleged public thoroughfare the Magistrate finds that the way is not a public thoroughfare his jurisdiction to proceed ceases and he cannot direct the removal of obstruction under this section, 15 W.R. (Cr.) 67. Where the public nature of the way is disputed it is incumbent on the Magistrate after taking evidence to determine whether the claim is *bona fide* and if he finds it to be so, he is bound to stop further proceedings and refer the parties to establish their right in a Civil Court, 24 Cr. L.J. 856=74 Ind. Cas. 1047.

Sub-section (3).—An order made absolute on materials not provided to. by the section and in a manner contrary to the provisions of the section on consent of parties cannot possibly cure the illegality, 47 B. 89 at 92; 10 C.L.J. 432=11 Cr. L.J. 1=4 Ind. Cas. 436; 49 A. 475; 21 C.W.N. 926=23 C.L.J. 342=18 Cr. L.J. 733=40 Ind. Cas. 738. When a *bona fide* claim of private right is set up, the Magistrate ought not to make his conditional order absolute under this section but the proper course for him is to pass an order under S. 139A *infra* staying proceedings until the existence of such right has been determined by a competent Civil Court, 28 A.L.J. 285 following 32 C. 158 (F.B.); 21 A.L.J. 529 and referring to 19 A.L.J. 355; 12 A.L.J. 243 and 22 B. 188. When a conditional order has been found to be invalid as being too vague and indefinite and set aside by the High Court, the case cannot be sent back to the Magistrate for re-consideration having regard to the terms of this section and no useful purpose will be served by so doing for the vice really rests not on the final order under this sub-section but on the conditional order 11 C.L.J. 114 at 115.

Procedure where he
claims jury.

138. (1) On receiving an application under section 135 to appoint a jury, the Magistrate shall

(a) forthwith appoint a jury consisting of an uneven number of persons not less than five, of whom the foreman and one-half of the remaining members shall be nominated by such Magistrate, and the other members by the applicant;

(b) summon such foreman and members to attend at such place and time as the Magistrate thinks fit; and

(c) fix a time within which they are to return their verdict.

(2) The time so fixed may, for good cause shown, be extended by the Magistrate.

The Magistrate shall forthwith appoint a jury.—The word "forthwith" must be construed in a reasonable way and it means that the Magistrate shall appoint a jury as soon as reasonably can, 4 Lah. 224. This section leaves no discretion to the Magistrate in the matter of appointing a jury when the petitioner applies for the same, Weir. II, 63. For form of the order constituting a jury see Sch V, form No. 17, *infra*. The Magistrate to whom the application for the appointment of a jury is made cannot delegate his powers. The Magistrate referred to in this section is the Magistrate who made the conditional order under S. 133, *supra*. This is clear from the language of cl. (b) of S. 135, *supra*.

Constitution of Jury.—The foreman and one-half of the remaining members shall be nominated by the Magistrate. When only the foreman was appointed by the Magistrate and the rest of the members by the parties, it was held there was no legally constituted jury, 16 W.R. (Cr.) 23. The Magistrate is to exercise an independent discretion in selecting

the members of the jury and the persons selected should not be persons interested in upholding his conditional order, 21 W.R. (Cr.) 43; 23 Cr.L.J. 1036=106 Ind. Cas. 220; 23 C. 499; 26 C. 659. The Magistrate is bound to make his own nomination of the foreman and one half of the members of the jury, the other half being left to be nominated by the applicant. It is not open to the Magistrate to ask the applicant to nominate the jurors and the appointment of such nominees amounts to an illegality, 31 Bom. L.R. 79=30 Cr. L.J. 785=117 Ind. Cas. 333, *following* 23 C. 449 and 26 C. 669 and *distinguishing* 37 A. 26. Where a Magistrate appointed the complainant and his two witnesses as jurors, the High Court set aside the proceeding as there was no legally constituted jury, 22 W.R. (Cr.) 47. If one of the jurors declines to act, the Magistrate should appoint another jury and commence the inquiry afresh, 11 C. 84. When on the failure of a jury to report, the petitioner applied for a fresh jury but the Magistrate rejecting the application proceeded under S. 141, *infra* and made his order absolute, it was held that the Magistrate acted illegally and did not exercise a proper discretion in refusing to appoint a fresh jury, 12 C.W.N. 1047. See also 44 A. 575

Fix a time within which to return the verdict—A Magistrate cannot receive and enforce the award of the jury delivered long after the day fixed for the purpose. Such an award being invalid it was the duty of the Magistrate to take up the case himself, inquire into it and decide it. 7 B.L.R. (Appx.) 57=16 W.R. (Cr.) 23.

Time fixed may, for good cause shown, be extended—This provision was introduced to set at rest the conflict of rulings on the point. The time originally fixed may, for good cause shown, be extended by the Magistrate. He cannot delegate that power to the foreman of the jury, 23 A. 159 at 161.

139. (1) If the jury or a majority of the jurors find that the order of the Magistrate is reasonable and proper as originally made, or subject to a modification which the Magistrate accepts, the Magistrate shall make the order absolute, subject to such modification (if any).

Procedure where jury finds Magistrate's order to be reasonable

(2) In other cases no further proceedings shall be taken under this Chapter.

A majority of jurors.—A juror should not blindly follow the opinion of his fellow-jurors. Where out of five jurors only two inspected the place and the third never visited it but based his opinion solely on what the other two told him, *held* that the finding of the so-called majority is not that of a legal majority, 25 W.R. (Cr.) 4. The majority contemplated is a majority arrived at after full deliberation among the jurors appointed. Where a minority of the jurors do not act the Magistrate cannot, proceed upon a report submitted by the majority, but he is competent to act under S. 141, *infra* and pass such orders as he may think fit, 13 C. 275. Where under the provisions of S. 138, *supra* five jurors were appointed and on account of illness of one of the jurors who failed to attend only four of them dealt with the case and made a report and relying on such report, the Magistrate made the conditional order absolute, it was held that although the jury as a body can act by a majority that act must be by a majority out of the five who investigated the case and therefore the report submitted by four is not a legal one and the order cannot therefore be sustained, 11 Cr. L.J. 432=6 Ind. Cas. 777; a finding arrived at by a majority of the jurors cannot be rejected on the ground of inconsistency by the Magistrate when they found the order of the Magistrate to be reasonable and proper, 10 Cr. L.J. 210=3 Ind. Cas. 7. Where three out of the five jurors appointed under the last section refused to return any verdict at all, it was held that the Magistrate was not justified in stopping the proceedings entirely but should have appointed a fresh jury, 44 A. 575. See also 23 Cr. L.J. 276=66 Ind. Cas. 420. Where the majority of the jurors find the order of the Magistrate to be

reasonable and proper the Magistrate cannot decline to make the order absolute on the ground that it involved an inconsistency, 10 Cr. L.J. 210=3 Inl. Cas. 7.

Find the order reasonable.—There is nothing in this chapter laying down any hard and fast rules to guide the procedure of the jury. It is commonsense and justice that they should hear the parties and receive the evidence which they may produce and if the jury require any evidence it should be produced before them, 18 A. 158; 25 C. 669; 6 C.W.N. 886; but see 30 A. 364, which takes a different view. The jury in deciding whether the conditional order passed under this section is reasonable or not shall consider any objection raised as to the non-existence of a public right, 5 C. 875; 31 C. 979; 26 C. 669; 3 C.W.N. 345 and 10 C.W.N. 843. But the power is now taken away by enacting S. 139A under which the Magistrate is to find as a preliminary point the existence of a public right and the question will not go before the jury if the person fails to deny the right or fails to adduce evidence before the Magistrate after denying the existence of such a right.

The Magistrate shall make order absolute.—The words "the Magistrate" in this section refer to the Magistrate to whom application has to be made under S. 133 (b) to empanel a jury and who under S. 133 does so, 43 M. 316 at 319.

139A. (1) *Where an order is made under section 138 for the purpose of preventing obstruction, nuisance or danger to the public in the use of any way, river, channel or place, the Magistrate shall, on the appearance before him of the person against whom the order was made, question him as to whether he denies the existence of any public right in respect of the way, river, channel or place, and, if he does so, the Magistrate shall, before proceeding under section 137 or section 138, inquire into the matter.*

Procedure where
existence of public
right is denied.

(2) *If in such inquiry the Magistrate finds that there is any reliable evidence in support of such denial, he shall stay the proceedings until the matter of the existence of such right has been decided by a competent Civil Court; and, if he finds that there is no such evidence, he shall proceed as laid down in section 137 or section 138, as the case may require.*

(3) *A person who has, on being questioned by the Magistrate under sub-section (1), failed to deny the existence of a public right of the nature therein referred to, or who, having made such denial, has failed to adduce reliable evidence in support thereof, shall not in the subsequent proceedings be permitted to make any such denial, nor shall any question in respect of the existence of any public right be inquired into by any jury appointed under section 138.*

This section is new and is in accordance with the decision in, 13 C. 564 which held that mere assertion of a claim of title made without reasonable ground or honest belief in it or honest intention to support it will not oust the Criminal Court of its jurisdiction under Ss. 133 to 137, *supra*. It is a matter of common knowledge that prior to the amendment in 1923 the Courts had engrafted on the Code a law which may generally be stated as having the effect of casting on the Magistrate the duty of determining whether the claim was *bona fide* and if he found it to be so to refer the parties to the Civil Court. This graft on the Code

was no doubt dictated by a feeling that it was undesirable where there was some reliable evidence of title in the opposite party to allow Criminal Court to order destruction of property. The Legislature desired to clarify the law on this point by enacting this section. It will be noted that the Legislature however has very carefully avoided any reference whatever to any consideration of the *bona fides* of the denial of the opposite party, except so far as there may be definite reliable evidence of that *bona fides*. The Court has not been directed on the opposite party showing cause, to consider directly the question of *bona fides* at all, but to consider whether there is reliable evidence in support of his denial. The merit of this is obvious, a party may make an absolute denial but he may have no reliable evidence to support his denial. He may have an honest belief in his denial. *Bona fides* was therefore a bad test to apply and so the Legislature has substituted a much better one. The Magistrate when the applicant shows cause to inquire into the matter and determine as to the existence of any reliable evidence. This inquiry is clearly something quite distinct from the inquiry under S. 137 *supra* and is to find out whether there is *prima facie* reliable evidence in support of the denial, 27 A.L.J. 335 at 335-37-38 Cr. L.J. 670=116 Ind. Cas. 783. This section was enacted to give effect also to the Full Bench decision in 42 G. 158, which related to the obstruction of a public way, and it was held there that if the Magistrate finds that the claim set up was *bona fide*, i.e., the right set up is a private and not a public one the Magistrate should stay his hands and refer the parties to a Civil Court, 26 A.L.J. 1285 at 1285, see also 24 A.L.J. 529 and 30 Cr. L.J. 360=114 Ind. Cas. 782. The matter is also elaborately dealt with in, 49 C. 682 (F B) where it was held that the mere raising of a *bona fide* claim of title will not oust the Magistrate's jurisdiction. See also 8 C.W.N. 143; 45 A. 656 where 28 A. 98 is not followed; see also 29 Cr. L.J. 254=107 Ind. Cas. 483. Under this section on the appearance of the party cited the Magistrate is bound to question him whether he denies the existence of the right in respect of the way, river or channel or place and if he does so the Magistrate before proceeding under S. 137 or S. 138, *supra* should inquire into the matter. The Magistrate could not refuse to inquire into the matter because the objection was not taken until a late stage of the case, 23 Cr. L.J. 1168=88 Ind. Cas. 528. When an order is made under S. 133 *supra* for preventing obstruction to the public in the use of a way, the Magistrate shall under this section question the person called upon to show cause as to whether he denies the existence of any public right in respect of the way and if he does so deny, the Magistrate shall before proceeding under S. 137 or S. 138 *supra* inquire into the matter and if in such inquiry he finds that there is any reliable evidence in support of such denial he shall stay proceedings until the matter of the existence of such right is decided by a competent Civil Court and if he finds no such evidence he shall proceed according to S. 137 or S. 138, *supra*, 10 Lah. 151; see also 29 Cr. L.J. 661=110 Ind. Cas. 213. The law before the amendment was that as soon as a party appeared before the Magistrate, his duty was to determine whether any public right existed. A long user by a person of what is claimed to be part of a public way may be taken as a *bona fide* assertion of a claim ousting the Magistrate's jurisdiction to pass a summary order. *Vice versa* a long user by the public of a private place as a part of the public road or way raises a presumption of relinquishment by the owner of his right over it. The Criminal Court's duty is to maintain the possession as at present found and undoubtedly the land the use of which is in dispute is part of the public road the right of the private person can only be revived by the decision of a competent Civil Court on his favour, 29 Cr. L.J. 422=108 Ind. Cas. 559. If the party denied the existence of the public right, the Magistrate is to determine whether the denial is *bona fide* or a mere pretence. Only when he finds it a mere pretence he can make the order absolute. If the denial is found to be *bona fide*, the Magistrate's jurisdiction is ousted. Thus the section requires (1) parties shall appear and deny the existence of public right (2) reliable evidence to be produced (3) such evidence shall be legal evidence to support the denial. If these conditions are satisfied the Magistrate's jurisdiction ceases and he has no jurisdiction to weigh the evidence and determine on which side the balance turns. This section has only given statutory effect to the view taken before the amendment. The section requires only evidence and not proof; and the only condition is that on the evidence before him the Magistrate has no reason to think it to be false. The intent of the section is that the Magistrate should neither encroach on the right of the Civil Court which can alone determine

the right nor fail to exercise his own jurisdiction. The criterion is that the Magistrate should find evidence supporting the denial which he can presume to be reliable; that is necessary and sufficient to oust his jurisdiction, 4 Pat. 783 followed in 29 Cr. L.J. 254=107 Ind. Cas. 485. Reliable evidence is evidence of reliable persons; what is meant by the expression is not to weigh the evidence produced by both sides and then come to a conclusion which side evidence he believes or prefers but the Magistrate should take the evidence as it stands and see whether on the face of it, if there was no evidence to the contrary, he would come to the conclusion that the evidence was false and was therefore unreliable, 29 Cr. L.J. 254 at 255 =107 Ind. Cas. 485. See also 23 Cr. L.J. 1080=81 Ind. Cas. 904. It is not the duty of the Magistrate to come to a definite finding whether the evidence adduced is in his opinion sufficient to support the case set up by the person called upon to show cause. All he has to see is whether there is reliable evidence in support of the denial of any public right in respect of the subject of dispute. If there is, the Magistrate's jurisdiction is ousted, 10 Lah. 151. The Magistrate is to inquire into the question of public right if such right is denied by the person summoned and the person is entitled to adduce evidence to establish the right claimed by him. Where in a dispute relating to the closing of an old drain and the opening of a new one it was denied that the drain was a public one, the Magistrate instead of proceeding under this section, at once took evidence under S. 133 *supra* it was held that the procedure adopted was illegal, 23 A.L.J. 187=26 Cr. L.J. 873=86 Ind. Cas. 809, when on receipt of a notice under S. 133 *supra*, requiring the removal of a building, the party denied encroachment on a public way, the Magistrate should not immediately proceed to take evidence under S. 137 *supra* without proceeding under this section and passing an order under S. 140 *infra*, 24 A.L.J. 361=27 Cr. L.J. 473=93 Ind. Cas. 697 where 28 A. 98 and 1900 A.W.N. 204, are referred to. If the Magistrate finds there is reliable evidence of the right set up, he is bound to stay proceedings till it is settled by a competent Civil Court. Where a party causing the obstruction has produced reliable evidence in support of his denial of the existence of any public right in respect of the way, the case falls within this section and the Magistrate is bound to stay proceedings until the alleged right is decided by a Civil Court, 28 Cr. L.J. 247=100 Ind. Cas. 119; once proceedings are stayed under sub-section (2) they remain stayed until there is a decision by a competent Civil Court and there is nothing in the section which entitles the Magistrate to say which party is to file that suit in the Civil Court. By passing an order of stay under sub-section (2), the Magistrate ousts his own jurisdiction to decide any thing above the question of title including the onus of proof, 28 Cr. L.J. 363=100 Ind. Cas. 971. If the Magistrate finds that there is no reliable evidence he shall proceed under S. 137 or S. 138. The Court is to consider whether there is any *reliable evidence* and some force must be given to the word *reliable*. If there is some reliable evidence, the court is to exercise its discretion by staying proceedings till the matter is determined by the Civil Court. There is no direction in the section as to which party is to be directed to go to the Civil Court. The Court is not directed to quash proceedings when there is reliable evidence of the claim set up but only to stay proceedings, 27 A.L.J. 333 at 387. If the person fails to deny the existence of public right or fails to adduce evidence in support of his case, he shall be precluded from re-agitating the same question by claiming a jury under S. 133 to decide such right. It is the duty of the Magistrate before referring the matter to the jury to decide himself whether the way is a public one or not and it is only after deciding this question that any matter can be referred to the jury. If a private claim is asserted the Magistrate must himself inquire into such claim and if he finds the claim to be a *bona fide* question of title he must discontinue the proceedings, 4 Lah. 224. The proper procedure to be followed where in proceedings under S. 133 *supra* it is found that there is no reliable evidence to prove that the place in dispute is not a public place, is not to dismiss the application and refer the parties to the Civil Court but to stay proceeding pending before the Magistrate under sub-section (2) until the matter of the existence of the alleged right is decided by a competent Civil Court, 29 Cr. L.J. 244=107 Ind. Cas. 333. Where the public right is denied it is the duty of the Magistrate to inquire into the matter and come to a conclusion under this section and on the result of the inquiry will depend whether he is to stay proceedings or proceed under S. 137, *supra*, 30 G.W.N. 648=27 Cr. L.J. 878=86 Ind. Cas. 126. The

inquiry must be made by the Magistrate himself, upon the result of the inquiry depends the subsequent procedure—either a stay of proceedings, or a further step under S. 137 or 138, *supra*. The test is whether there is or is not reliable evidence in support of the denial of the existence of the alleged public right. The value of the evidence is a matter better determined by the Magistrate if he has heard it himself. The Magistrate cannot depute a third class Magistrate to inquire and report and acting on such report decide whether to proceed further or not, 50 C.L.J. 291.

140. (1) When an order has been made absolute under section 136, section 137 or section 139, the Magistrate shall give notice of the same to the person against whom the order was made, and shall further require him to perform the act directed by the order within a time to be fixed in the notice, and inform him that, in case of disobedience, he will be liable to the penalty provided by section 188 of the Indian Penal Code.

Procedure on order
being made absolute

(2) If such act is not performed within the time fixed, the Magistrate may cause it to be performed, and may recover the costs of performing it, either by the sale of any building, goods or other property removed by his order, or by the distress and sale of any other moveable property of such person within or without the local limits of such Magistrate's jurisdiction. If such other property is without such limits, the order shall authorize its attachment and sale when endorsed by the Magistrate within the local limits of whose jurisdiction the property to be attached is found.

Consequences of dis-
obedience to order.

(3) No suit shall lie in respect of anything done in good faith under this section.

Sub-section (1)—Inexcusable delay in carrying out a lawful order, no doubt, renders a person liable for his neglect, but when he has during the course of the proceedings, endeavoured to correct his remissness, and very slight injury or inconvenience has resulted, it is certainly a grave error of judgment to sentence him to imprisonment, 10 C.L.R. 193 at 196. Under this section if a person fails to perform the act after the order is made absolute and notice served on him, he is liable under S. 188, I.P.C. But in an earlier stage also he can be made liable under S. 188 if he fails to perform the act or appear and show cause, or apply for appointment of jury under S. 136 *supra*. Thus there are two distinct liabilities, one under S. 136 *supra* and one under this section after the order has been made absolute.

A succeeding Magistrate has no power to go behind the order of his predecessor or to question its validity, 27 C.W.N. 459; nor can an accused when proceeded against for disobedience of the order go behind the order and show cause that the order ought not to have been made, 12 M. 475. As soon as the person against whom an order is made to remove a nuisance dies, the order ceases to have further effect and the Magistrate will not be entitled to act under this section and have the obstruction removed, 26 A.L.J. 405=29 Cr. L.J. 445 (2)=108 Ind. Cas. 563.

Sub section (2).—The procedure to be followed when the act is not performed by the person directed by the Magistrate to do it, is clearly laid down in this sub-section, 31 C.W.N. 530=44 C.L.J. 211=23 Cr. L.J. 30=99 Ind.Cas. 62. If a party fails to perform the act directed

Not to repeat or continue a public nuisance.—For definition of "public nuisance" see S. 268, I.P.O., defined at p. 187. If a Magistrate makes an order under this section, prohibiting persons entitled to use a place dedicated for the communal purpose of cremation, when they use the same in a manner either unusual or calculated to aggravate the inconvenience necessarily incidental to such act, it is not warranted by this section, 19 M. 464.

Revision.—S. 435 (3) *infra* which had enacted that proceedings under this section are not proceedings within the meaning of that section is now repealed by the amendment of the Code in 1923 and therefore orders under this section are now open to revision under Ss. 435 and 439, *infra*, by the High Court.

CHAPTER XI.

TEMPORARY ORDERS IN URGENT CASES OF NUISANCE OR APPREHENDED DANGER.

144. (1) In cases where, in the opinion of a District Magistrate or a Chief Presidency Magistrate, Sub-divisional Magistrate, or of any other Magistrate (*not being a Magistrate of the third class*) specially empowered by the Local Government or the Chief Presidency Magistrate or the District Magistrate to act under this section, *there is sufficient ground for proceeding under this section and immediate prevention or speedy remedy is desirable,*

Power to issue order absolute at once in urgent cases of nuisance or apprehended danger.

such Magistrate may, by a written order stating the material facts of the case and served in manner provided by section 134, direct any person to abstain from a certain act or to take certain order with certain property in his possession or under his management, if such Magistrate considers that such direction is likely to prevent, or tends to prevent, obstruction, annoyance or injury, or risk of obstruction, annoyance or injury, to any person lawfully employed, or danger to human life, health or safety, or a disturbance of the public tranquillity or a riot, or an affray.

(2) An order under this section may, in cases of emergency or in cases where the circumstances do not admit of the serving in due time of a notice upon the person against whom the order is directed, be passed *ex parte*.

(3) An order under this section may be directed to a particular individual, or to the public generally when frequenting or visiting a particular place.

(4) Any Magistrate may, *either on his own motion or on the application of any person aggrieved*, rescind or alter any order made under this section by himself or any Magistrate subordinate to him, or by his predecessor in office.

(5) *Where such an application is received, the Magistrate shall afford to the applicant an early opportunity of appearing before him either in person or by pleader and showing cause against the order; and,*

if the Magistrate rejects the application wholly or in part, he shall record in writing his reasons for so doing.

(7) No order under this section shall remain in force for more than two months from the making thereof ; unless, in cases of danger to human life, health or safety, or a likelihood of a riot or an affray, the Local Government, by notification in the official Gazette, otherwise directs.

Amendment.—In sub section (1) the words "not being a Magistrate of the third class" are added depriving third-class Magistrate of the power to act under this section, and the words "there is sufficient ground for proceeding under this section" have been newly added in the same sub-section. In sub-section (4) the words "either on his own motion or on the application of any person aggrieved," are added, thus empowering the Magistrate to act *suo motu*. Sub-section (5) is new and makes it imperative to give the party an opportunity of appearing in person or by pleader to show cause against the order, and the Magistrate is bound to record reasons when rejecting the application.

Scope and object of the section.—This section appears in the Chapter which is headed "*Temporary orders in urgent cases of nuisances*" and reading the whole chapter it is clear that it relates to interference or dealing of some kind with the land itself or with something erected or standing on it ; and the section is directed to the prevention or direction by prompt order of some definite act on the part of an individual, so that injury or nuisance may not be caused, 19 C. 127 at 130. This section is enacted for preserving the public peace. Private rights must give way to the necessity of preserving public peace. The hands of the executive should not be tied by the Courts when they have been deliberately left free by the Legislature, 30 Cr. L.J. 510=115 Ind. Cas. 683. Both the heading of the Chapter and the language of the section show that the orders passed under this section are only of a temporary character, 27 C. 918 ; a Magistrate cannot issue an order the effect of which is a perpetual injunction, 8 C. 580 ; 24 M. 43. This section is ordinarily to be used in cases of urgency and should not be allowed to take the place of any other provision of the law which might appropriately apply, 38 C. 876. Its scope is very limited and the powers under it should be exercised sparingly and only in urgent cases, 50 A 415 at 416. It is of general application and is to be resorted to as a temporary measure, 2 Pat. 94. In a matter that can be dealt with both under this section and S. 193, *supra*, the Magistrate is bound to proceed under S. 193 unless he thinks that *immediate prevention or speedy remedy is desirable*, Weir II, 58 ; 1 C.L.J. 216. The gravamen of the provisions of this section consists in providing a speedy remedy in cases of emergency and a Magistrate is justified in passing an *ex parte* order immediately on receiving a police report, if he is satisfied that immediate action is necessary, and the aggrieved party can move the Court for its rescission or alteration, 25 Cr. L.J. 433. This section is of general application and contains nothing which ousts the Magistrates jurisdiction in case of *bona fide* disputes as to possession of land, 2 Pat. 94 at 101, and the Magistrate in such a case is bound to start proceedings under S. 145, *supra*, 7 Pat. 269. But a Magistrate may take action under this section in a case of dispute with regard to possession of immovable property when he finds that there is no *bona fide* dispute as to actual possession and one party is merely trying to get into possession held by the other. In such a case it will be manifestly oppressive to subject an unoffending citizen in possession by starting proceedings under S. 145 *infra*, 30 Cr. L.J. 510=115 Ind. Cas. 683. The power of suspending lawful rights is an extraordinary power which should be resorted to sparingly when other powers are insufficient. The authority of a Magistrate should be used in defence of rights rather than their suspension, in the repression of illegal, rather than in interference of lawful rights, 6 M. 203 (F.B.) ; 5 C. 132. Every person is ordinarily entitled to exercise all rights of ownership on his property. The Criminal Court gets jurisdiction to interfere with the lawful exercise of a person's

right of ownership when such exercise in its ulterior consequences being directed primarily against the lawful right of another person's right of ownership is likely to cause a breach of the peace, 24 Cr. L.J. 164=71 Ind. Cas. 516. This section is ordinarily to be used in cases of urgency and should not be allowed to take the place of any other provision of law which might more appropriately apply, 38 C. 876. An order under this section cannot be passed in a matter dealt with under S. 133, *supra*, 8 W.R. (Cr.) 37. The terms of this section must be strictly complied with and a Magistrate cannot by means of an order under this section forbid *future obstructions* to a public high-way, 21 W.R. (Cr.) 10. A mere statement that an order is made under this section, if as a matter of fact the order is one not warranted by this section, does not make the order passed a valid order under this section, and consequently it is liable to be revised by the High Court, 19 C. 127 at 131. Although an owner of property has an absolute right to use his property as he pleases, yet if the mode of enjoyment of the property innocent and lawful as it might be, resulted or tended to result in a series of acts committed by the owner or his men which were likely to lead to a breach of the peace the Magistrate has ample powers to restrain the owner of the property temporarily from so using his property, say from holding a new market on his own land, 55 C. 1077 following 10 B.L.R. 434 (F.B.)=18 W. R. (Cr.) 47 and *dissenting* from, 11 C.W.N. 79 and 223. This section is not intended to restrict the liberty of an individual if there is no apprehension of a breach of the peace on account of any act to be done by him. The object of this section is to enable a Magistrate in case of emergency to make an order for the purpose of preventing an imminent breach of the peace. But it is not intended to relieve him of the duty of making a proper inquiry into the circumstances which make it likely that such breach of the peace will occur. If it is found that a person is doing an act which he is legally entitled to do, but his neighbour chooses to take offence thereat and to create a disturbance in consequence, it is the clear duty of the Magistrate not to deprive the person exercising the legal right, but to restrain the other party from illegally interfering with the exercise of the legal right, [1924] Pat. 262=25 Cr. L.J. 1173=82 Ind. Cas. 42 following 5 C. 132. A Magistrate ought not to proceed under this section where the dispute between the parties is such that proceedings should have been drawn up under S. 145 *infra* in the first instance, as the dispute between the parties was not likely to be satisfactorily settled by a temporary order made under this section, 28 Cr. L.J. 1039=106 Ind. Cas. 223. Similarly if a party has an undoubted right to take a procession along a public road, it is obvious that they cannot be prevented from doing so because some one else propose to interfere with the exercise of that lawful right. The proper course is to bind down the other party under S. 107, *supra*, 12 C.W.N. 703=7 Cr. L.J. 504; 18 Cr. L.J. 512=39 Ind. Cas. 480. It is the obvious duty of the Executive to uphold the civil rights declared by its own Civil Courts. Any omission to do so is a confession of failure in duty. No doubt the interests of the public peace are paramount but where the Magistrate is aware that there will be probably a disturbance of a party's civil rights at recurring seasons every year, it is his duty to exhaust every measure at his disposal to uphold declared civil rights before he abandons the attempt and he should resort to this section only if there is no time or opportunity for any other course. The Magistrate by taking thought in time, it is part of his duty to take thought in time, could have those who threaten to interfere with a party's civil rights bound over to keep the peace or might have got down sufficient force to meet the crisis and then call in aid this section to tide him over it, 52 M.L.J. 298=25 L.W. 375=28 Cr. L.J. 325=100 Ind. Cas. 709. Orders under this section are certainly not intended to be used as a means of depriving the citizens of lawful rights which have been declared in their favour by a competent Court. Any interruption to the exercise of that right, say to carry on a procession, so long as it is conducted in accordance with the decree of the Civil Court is undoubtedly an infraction of the law and for the Government to state that they are not prepared to prevent the infraction of the law and to restrain the law-breakers from interfering with lawful rights is practically to abdicate all authority. If the party who has obtained the decree of the Civil Court establishing their right to carry on the procession apply to carry on the procession and give reasonable notice to the authorities what they propose to do it would be incumbent on the authorities to take such action as will protect their rights, 52 M.L.J. 651=28 Cr.L.J. 509=101 Ind. Cas. 893. See the recent Full Bench decision in 51 M. 1006, where it

was held that it cannot be laid down that it is the duty of the authorities to enforce the decree of the Civil Court in favour one party, namely the right of the Hindus of a particular locality to carry on a procession attended with music before a mosque in all circumstances and at all costs. Where there is a conflict between public interest and private right, the former must prevail. This section is a temporary measure which the Magistrate in his discretion may adopt for the immediate prevention amongst others of a disturbance of the public tranquillity or riot, or affray, 2 Pat. 54 at 105; 33 M. 489; 26 Cr. L.J. 1229=88 Ind. Cas. 845. A Magistrate has no power to direct a party to dig a channel in his own land, 15 Cr. L.J. 291=23 Ind. Cas. 499. An order under this section should not be passed to prejudice a party and exclude him from the possession of property whether exclusive or joint. No Courts by its proceedings can allow an advantage to one of the parties, [1922] Pat 241. This section cannot apply to a case where the object of the order appears to have been merely to prevent pecuniary loss to the opposite party. The proper remedy for the aggrieved party lies in the Civil Court and not under this section. 13 C.W.N. 183=11 Cr. L.J. 11=4 Ind. Cas. 577 where S.C.W.N. 373 and 9 C. 103 are followed. This section was never intended to vest a Magistrate with powers to decide disputes of a civil nature between private individuals and to usurp the functions of a Civil Court which alone have been vested by the Legislature with jurisdiction to decide disputes of a civil nature between private individuals and it is not permissible for Magistrates under cover of an order under this section to dispossess a particular individual from certain property and to direct a delivery of possession of that property by an order under this section, when the object of the order is not to prevent obstruction, annoyance or injury, etc., to any person lawfully employed, 50 A. 414. Under this section no preliminary notice as under S. 145, *infra*, is necessary, 52 M. 69 at 72.

Any Magistrate specially empowered—Third class Magistrates are now deprived of their power to pass orders under this section. The law in sanctioning the power under this section, is careful to provide that it shall be committed only to Magistrates whose discretion is presumably guaranteed by their responsible position or by selection, 6 M. 203 (F.B.) If any Magistrate not being empowered by law in this behalf issues an order under this section, his proceedings are void, S. 530 (i), *infra*.

Immediate prevention or speedy remedy is desirable.—This section is not intended to restrict the liberty of an individual if there is no apprehension of a breach of the peace on account of any act to be done by him. The object of the section is to enable a Magistrate in cases of emergency to make orders for preventing a breach of the peace and not to relieve him of his duty to make proper inquiry into circumstances showing a breach of the peace is likely. If a man when doing a lawful act in a lawful manner is obstructed by his neighbours who create a disturbance, it is the Magistrate's duty not to deprive the person lawfully exercising his right but to restrain his neighbours who illegally interfere with the exercise of a lawful right, 1924 Pat. 262=25 Cr. L.J. 1178=82 Ind. Cas. 42; 12 C.W.N. 703=7 Cr. L.J. 804; 18 Cr. L.J. 512=39 Ind. Cas. 499. Before a Magistrate takes action under this section he must be of opinion that immediate prevention or speedy remedy is desirable and when he has made up his mind that it is so, he may pass a written order stating the material facts in the order, so that the parties may know exactly whether they are bound to obey the order or to show cause against it by contesting its legality. When this is not done, the order is bad in law, 32 C. 933; 27 C. 918; 38 C. 876; 23 C.W.N. 145; 38 M. 459; 22 Bom. L.R. 157; but in 30 M. 543, it was held that the omission to state the grounds on which the Magistrate was satisfied was only an irregularity not vitiating the proceedings of the Magistrate. An order under this section can be passed in case of emergency, and when there is no emergency the order is one made without jurisdiction, 5 C. 7; 11 M. L.J. 122; 27 C. 918; 6 C.W.N. 455; 19 C.W.N. 213; 13 Cr. L.J. 511=15 Ind. Cas. 655. Whether the matter is likely to be decided shortly by the Civil Court and there is no apprehension of an immediate breach of the peace there is no necessity to take action under this section, 15 Cr. L.J. 291=23 Ind. Cas. 499. If no immediate prevention or speedy remedy is desirable, the Magistrate ought to proceed under S. 131, *supra*. The authority of the Magistrate

under this section to suspend the rights recognized by law when such exercise may conflict with the rights of the public or tend to endanger public peace, is limited by the special ends it was designed to secure and is not destructive of the suspended rights, 6 M. 203 (F.B.). Where grave danger of breach of the peace is apprehended and the Magistrate cannot prevent it with the force at his command he has jurisdiction to pass a temporary order under this section. The fact that carrying on a procession is a luxury and not a necessity is no ground for passing a temporary injunction under this section, 15 Cr. L.J. 30=22 Ind. Cas. 174. If the Magistrate apprehends a breach of the peace he is entitled temporarily to restrain the exercise by any private individual of his lawful rights to prevent a breach of the peace. But when the order is made only to prevent loss to another party then the order is one passed without jurisdiction. See 50 A. 414; 51 M. 1006.

Written order stating material facts of the case.—The order ought to contain a clear statement of the facts upon which the order is based, to enable the party to know distinctly the grounds upon which the Magistrate has acted and to decide for himself whether he is to obey the order or resist it by standing a prosecution under B. 188 I.P.O. or to show cause against the order, 1 B.L.R. (Ap Cr.) 20=10 W.R. (Cr.) 53; 2 C.W.N. 747. See Form No. 21 of Sch. V as to form of order.

To abstain from a certain act.—The word 'certain' placed between the word 'act' and afterwards repeated twice in the expression 'to take certain order with certain property in his possession' leaves no reasonable doubt that the Legislature intended to give full and ample powers to the Magistrate, the chief officer entrusted with the duty of preserving the peace of the district to restrain any person from doing any act or to command him to hold any property in his possession subject to any condition, whenever such Magistrate shall consider that such a course of procedure is likely to prevent or even tends to prevent a riot or an affray. A particular act or a particular mode of enjoyment of property might be perfectly innocent or lawful in itself. But the act may be done or the property enjoyed in that particular mode under circumstances calculated to lead to a serious breach of the peace attended even with loss of human life and it would be by no means proper or desirable to hold that even in such cases the chief peace officer of the district has no power to issue an order such as that contemplated by this section, 10 B.L.R. 434 (F.B.)=18 W.R. (Cr.) 47 followed in 55 C. 1077 at 1082-83 where it was held that in cases where a party has an absolute right to use his property, innocent and lawful as it might be, such a use resulted or tends to result in a series of acts committed by his servants likely to lead to a breach of the peace, an order under this section restraining him temporarily from so using his property, say holding a new market on the property was amply justified. The words 'any person from abstaining from certain act' have been liberally construed in Madras and not in the restricted sense as in Calcutta. See 26 M.L.J. 132=1914 M.W.N. 165=15 Cr.L.J. 143=22 Ind. Cas. 721 following 24 M. 45 and 262. When a person was directed "not to interfere with the management of a certain Kori," it was held that it was a direction "to abstain from a certain act" within the meaning of these words as used in this section, 24 M. 45 at 46; 3 M. 354 "Certain act" means "a definite act". An order passed under this section prohibiting a person from collecting rents from the ryots in two villages no particular ryots being mentioned, it was held that such an order could not be properly made under this section, 16 C. 80; 9 C.W.N. 392. An order prohibiting a *meluramdar* from exercising certain rights as *meluramdar* is valid under this section. If such an order includes rights properly belonging to tenants, it would not be operative to prevent tenants from exercising acts properly belonging to them, unless the order is specific and definite and is addressed to them, 23 M.L.J. 132=(1914) M.W.N. 169=15 Cr. L.J. 145=22 Ind. Cas. 721. The order of a Magistrate directing that two rival sects of Mahomedans could each enter a mosque only at stated times was held to be one in substance, and effect, an order directing certain persons to abstain from certain acts within this section, 24 M. 282 at 263. In a dispute regarding prayers in a mosque there being an apprehension of a breach of the peace, the Magistrate drew up proceedings under this section and eventually passed an order that no member of either party would be allowed to read prayers in the mosque, it was held that the order was

misconceived as it was not warranted by the provisions of the Code and the proper course was to ascertain which party was in the wrong, and to bind down that party to prevent a breach of the peace, 24 Cr. L. J. 154=71 Ind. Cas. 506.

In 2 M. 143 at 141 142 it was held that an order passed by the Magistrate directing that all music should cease when any procession is passing a certain place of worship was held to be ultra vires. "At times the rights of the several sects to the undisturbed exercise" "of their religious observances may come into conflict without any criminal intention" "In such cases, mutual toleration is, and must be, the only and the proper rule. It has" "then to be determined how far the conflicting rights interfere with and necessarily" "modify each other. It is, on the one hand, a right recognized by law that an assembly" "lawfully engaged in the performance of religious worship or religious ceremonies shall" "not be disturbed. It is, on the other hand, a right recognized by law that persons may," "for a lawful purpose whether civil or religious, use a common high-way by parading it" "attended by music, so that they do not obstruct the use of it by other persons. If" "persons passing in procession attended by music pass a place in which others are assembled" "and engaged in public worship which the music would tend to disturb, it is the duty of" "the persons composing the procession to refrain from such disturbance, but assemblies" "for purpose of worship are held scarcely in any place at all hours and generally at" "appointed hours, and therefore it is unnecessary that there should be a rule that persons" "should not at any time pass along a high road in the neighbourhood of a recognized" "place of worship if attended by music. If, indeed, the procession be of a religious" "character, the prohibition of it may be as real an interference with the free exercise of" "religion as in allowing it to proceed past an assembly engaged in worship attended with" "such circumstances as to disturb that worship, and if no religious procession is to be" "allowed to pass a recognized place of worship, whether persons are or are not at the" "time there assembled and engaged in religious worship, the members of a numerous sect" "might close every high-way to the procession of a sect to which they are opposed by" "erecting in the neighbourhood of each high-way a place of worship. The law in the" "restrictions it imposes on processions of whatever character, does not go beyond" "the necessity, and a Magistrate has no general authority to declare the law on" "the subject and anticipate a breach of it by a prohibitory order. For the" "preservation of the public peace he has a special authority—an authority limited" "to certain occasions. His first duty is to secure to every person the enjoyment" "of his right under the law and by measures of precaution to deter those who seek" "to invade the rights of others; but if he apprehends that the lawful exercise of a" "right may lead to a civil tumult, and he doubts whether he has available a sufficient" "force to repress such tumult or to render it innocuous regard for the public welfare is" "allowed to override temporarily the private right and the Magistrate is authorized to" "interdict its exercise. The duration of this authority in the Magistrate is co-extensive" "with the emergency that justified the exercise of the authority." The principles laid down in the above decision were approved in 6 M. 203, where the duties of Magistrates in cases where the public peace is likely to be disturbed by one sect attempting to disturb another using the public streets are fully discussed. The same High Court in its proceedings, dated 13th May, 1895, observed as follows.—"Primarily he (the Magistrate) must consult the public safety and the responsibility thrown on him is great, seeing that the Legislature has prohibited all interference with his order by a superior Court. At the same time it is incumbent on the Magistrate to interfere as little as possible with private rights and a custom which might be recognized as not unlawful under a Government that possessed a State religion might be unreasonable now that Government professes impartiality to all creeds. The Magistrate should endeavour to abstain from the appearance of showing favour to one sect at the expense of another, though, where a sufficient emergency arises private rights must necessarily yield to public security." These remarks were made under the old 1873 code where proceedings under this section were treated as executive and not judicial proceedings, see also 25 G.W.N. 904=24 Cr. L.J. 153=71 Ind. Cas. 506 where the order of the Magistrate was set aside as illegal when he prohibited the worshippers in a

mosque from reading prayers therein and there was a dispute between the worshippers and *Pesh Imam* appointed by the *Mutawalli*. See also 51 M. 1006 (F.B.), Where a breach of the peace is anticipated, action is to be taken against the law breakers and not against peaceful citizens whom it is expected the law breakers will molest, 28 Cr. L.J. 345=100 Ind. Cas. 825 following 26 C.W.N. 904=24 Cr. L.J. 153=71 Ind. Cas. 506. As to right to conduct religious processions in public streets see 26 M. 376 at 382; 30 M. 185 (P.C.); 38 M. 489; 6 M. 203; 47 A. 151 (P.C.) *Weir* II 74; 38 M.L.T. 307.

To take certain order with certain property in his possession.—These words are undoubtedly very wide and equally vague, but it must be assumed that the Legislature in using these words in the section did not intend to give a Magistrate such extraordinary powers as would enable him to order, under this section, a building that has fallen down on private grounds to be rebuilt by the owner of the yard, 17 A. 485. An order on the hereditary priests of a public temple visited periodically by a large concourse of pilgrims to widen and heighten the doorway with a view to prevent danger arising from overcrowding and to improve the ventilation was held to be a legal order, 6 B.H.C.R. (Cr. Ca.) 36; see 2 C.W.N. 70 where it was held that the order passed by a Magistrate on certain prostitutes and the Zemindars under whom they held the land to remove their houses to the other side of a railway line within twenty-four hours on the ground that the visitors of the prostitutes had to cross the railway line and thereby their lives were endangered was not covered by the words *direct any person to abstain from certain act or to take certain order with certain property in his possession*. A Magistrate has no power under this section to pass an irrevocable order such as an order to cut down trees, 32 C. 154. The Magistrate has no power to direct a party to dig a channel under this section, 15 Cr. L.J. 291=23 Ind. Cas. 459. A general order prohibiting a person from holding a *hat* within an extensive area is illegal, 26 C.W.N. 663=35 C.L.J. 397. All that he has power to do is to compel the owner of property to take a certain order with it and cannot include an irrevocable order such as cutting down trees, 13 W.R. (Cr.) 72. A Magistrate has no power to make an order prohibiting the holding of a market for a definite period, 11 C.W.N. 223; or to take possession of property in dispute into custody for two months, 12 C.W.N. 1044, followed in 3 L.W. 498. The heading of the chapter seems to show that "property" is only immovable property; therefore a Magistrate cannot make an order under this section as to the custody of a sum of money even though there is a dispute concerning it. 12 W.R. (Cr.) 38.

Danger to human life.—Where a Magistrate directed certain prostitutes and the Zemindars under whom they were tenants to remove the houses occupied by the former from a particular site within 24 hours and to take up their quarters on the opposite side of a Railway line on the ground that the visitors to the prostitutes had to cross the Railway line and by so doing their lives would be in danger, and for the disobedience of the order passed directed their prosecution under S. 188, I.P.C., it was held that the order was not one contemplated by this section and was *ultra vires*, 2 C.W.N. 70. But a Magistrate is empowered to prevent overcrowding and to improve the ventilation to direct the hereditary priest of a certain temple to widen and heighten the doorway of the temple, 6 B.H.C.R. (Cr. Ca.) 36. This section is ordinarily to be used in cases of urgency and should not be allowed to take the place of any other provision of law which might be more appropriately be applied, 38 C. 876.

Order may in cases of emergency be passed ex parte.—In special and urgent cases alone an order may be passed *ex parte*, 6 M. 203; 2 C.W.N. 747; 38 M. 489; (1910) M.W.N. 354=8 M.L.T. 180=11 Cr. L.J. 449=7 Ind. Cas. 343; 27 C. 785. Ordinarily the party against whom an order is made should have an opportunity to show cause against it, 10 W.R. (Cr.) 53; 5 B.L.R. 131. Where a party called upon to show cause appeared ten minutes after the order made *ex parte* was made absolute and applied to be heard but the Magistrate declined to do so, it was held that the Magistrate ought to have under the circumstances heard the applicant, 2 C.W.N. 572; see also 26 C.W.N. 663=35 C.L.J. 397=24 Cr.L.J. 153=71 Ind. Cas. 506. The order must on the face of it show the emergency which renders the necessity of passing an *ex parte* order, and, if not, the order is liable to be set aside in revision,

2 C.W.N. 747; 22 M.L.T. 323. Proceedings under this section are judicial proceedings within S. (41) (m), *supra*, 19 M. 18; Cr.R.C. No. 273 of 1929 (M.H.C.). The object of the section is to enable the Magistrate in cases of emergency to make an immediate order for preventing an imminent breach of the peace, but it was never intended to relieve him of the duty of making proper inquiry into the circumstances which make it likely that such a breach of the peace will occur. It is incumbent on him to limit the operation of the order to such reasonable time as may be necessary to enable him to hold a sufficient inquiry and if necessary to deal with the case under this section, B.C. 132. It is not proper for a Magistrate after passing an *ex parte* order under this section, when its propriety or legality is challenged, to postpone the hearing of the matter from time to time until about the termination of the force of the order. Such matters are to be disposed off quickly in order to avoid unnecessary encroaching on the civil rights and liberties of the subject, 24 Cr. L.J. 164=71 Ind. Cas. 816.

Order may be directed to the public generally when frequenting or visiting a place.—In this section an exception is made to the general rule that the order should be directed to a particular individual. In emergent cases it may be directed to the public generally when frequenting or visiting a particular place, *e.g.*, a temple, bathing ghat, or a fair or market, but it should not be confined to a portion of the community or a class of the public 8 A. 99; 14 B 160; 19 C. 127. An order may be directed to an individual but when it is impossible on account of numerous individuals to serve notices on each of them, a general order to the whole number of such individuals designated as the "public" may be issued and such an order will have the same effect as a separate service of order on each individual provided that it has been so promulgated and has come within the knowledge of each individual. This section is intended to extend rather than to limit the scope of the order so as to include therein every casual or frequent visitor from outside the limits of the particular locality within which the order is to have application. A general order by a Magistrate that no person shall sacrifice or cause to be sacrificed any cow within a certain specified area and period is a legal order, 16 Cr. L.J. 190=27 Ind. Cas. 670. A Magistrate has no power to issue a prohibitory order on the public, except as qualified by the last lines of sub-section (3). The order can only be issued to the public generally when resorting to a public place. An order directing the public in general to abstain from attending the 'Hat' is bad since it is not until the public attend the 'Hat' that the order can be binding on them. They cannot be forbidden by the order to do an act when the order cannot be addressed to them until after they have done that act, 26 Cr. L.J. 874=86 Ind. Cas. 810. This section authorizes him only to direct an order to the public generally when frequenting a particular place, 16 Bom. L.R. 684=16 Cr. L.J. 98=27 Ind. Cas. 146. For form of the order, see Sch. V, Form No. 91.

Magistrate may rescind or alter any order.—The power to rescind or alter is neither revisional nor appellate but is a special jurisdiction vested in the Magistrate by statute, 24 Cr. L.J. 331=72 Ind. Cas. 171. The jurisdiction is confined to rescind or alter any order made. A Magistrate has no jurisdiction to prevent a party before him from doing an act which he is permitted to do, 42 M.L.J. 352, followed in 16 L.W. 452=1922 M. W.N. 612=23 Cr. L.J. 689=69 Ind. Cas. 369. When a Magistrate after taking evidence finds his first order was wrong and passed without jurisdiction, he will be acting properly in recalling his first order, 13 W.R. (Cr.) 72. When an order has been set aside by the Magistrate who passed it, he had no power to revive it without starting fresh proceedings, 8 C. 580. An order by a joint Magistrate while acting as District Magistrate may be rescinded or altered after his reversion by the then District Magistrate, and the latter cannot transfer the application for rescission or alteration to the former, 16 Cr. L.J. 74=26 Ind. Cas. 666. For purposes of sub section (4) a Presidency Magistrate is subordinate to the Chief Presidency Magistrate, Rule 12, *Mad. Cr. Rules of Pr.* Under sub-section (4) a Magistrate has jurisdiction only to rescind or alter any order made under the section by himself or any Magistrate subordinate to him. A Magistrate has no jurisdiction on appeal from an order under this section to prohibit the counter-petitioners before him from doing an act which they were permitted to do by the order appealed against, 42 M.L.J. 352; 16 L.W. 452. It has been decided in 3 Pat. L.J. 237=19 Cr. L.J. 880=47 Ind. Cas. 76 that a District Magistrate

under sub-section (4) has no power to substitute an order of his own for that made by the lower Court. His power is confined to rescind or alter. See also 29 Cr. L.J. 478=103 Ind. Cas. 126. The powers given by this section are not confined to cases where there has been a change of circumstances since the original order was passed. The Magistrate has power to rescind an order previously made because the circumstances no longer require it to remain in force. He should equally have power to rescind it if he is satisfied that it ought not to have been made. There is nothing in the wording of the section to limit the powers. No valid reasons exist to limit the words of the section. It is clearly desirable that a Magistrate should not interfere with an order once made, unless very good reasons are disclosed for doing so. It may equally be desirable that these reasons should be clearly defined in the section itself. But that is a matter for the Legislature and as the section at present stands the powers given are in no way limited to cases in which the circumstances have altered. To read into the section, words limiting its operation would be to usurp the functions of the Legislature which it is not within the competence of the High Court or any other Court, 2 Pat. 93 (F.B.); 26 Cr. L. J. 874=86 Ind. Cas. 810.

No order shall remain in force for more than two months.—It would be inconsistent with the intention of the Legislature that a Magistrate can pass under this section an order meant to have more than a temporary operation and although such order may, no doubt, what seems to the Magistrate sufficient cause to restrain a man in the otherwise lawful exercise of his rights, such restraint ought clearly not to be indefinite in its terms or to have an effect beyond the urgency which it was intended to provide for 5 C. 7 at 19. An order purporting to be under this section ceases to be effective after the expiry of two months from the date of the order. Any observation made in such an order as regards the possession of the parties is simply an incidental observation and cannot have the force of an order under S. 145, *infra*, determining the question of actual possession and which could be determined subsequently in proceedings under S. 145, 26 Cr. L.J. 1229=88 Ind. Cas. 845. A Magistrate cannot by passing successive orders under the section extend the operation of the order indirectly beyond two months, 11 C.W.N. 79; 13 C.W.N. 195=11 Cr. L.J. 12=4 Ind. Cas. 590; 38 M. 499. Non-specification of the duration of time does not make the order invalid. Under sub-section (5) it will be presumed in the absence of anything to the contrary in the order itself, that its duration is limited to the full period of two months, 34 C. 897. Confirmation of the *ex parte* order could not extend the operation of the first order to a further period of two months from the date of its confirmation, 13 C.W.N. 193. This section applies to temporary orders in urgent cases of nuisance or apprehended danger, and it is distinctly provided that except when specially extended by notification of Government, no such order shall remain in force for more than two months. When the records did not show any indication of urgency, and the order itself did not set forth material facts of the case as required by law and the order was in effect a second extension of two months prohibiting the procession, which is in contravention of sub-section (5) of this section, it was held to be *ultra vires*, it was also pointed out that it was open to the Magistrates to address Government for issue of a certificate under sub-section (5) of this section, 27 M.L.J. 628=(1913) M.W.N. 1003=14 Cr. L.J. 658=21 Ind. Cas. 893; 20 C.W.N. 758; 16 L.W. 452=(1922) M.W.N. 612=23 Cr. L.J. 689=69 Ind. Cas. 369; 38 M. 499. The Magistrate cannot under the shelter of this section, which relates to the passing of provisional order to tide over temporary emergencies in cases where immediate prevention or speedy remedy is desirable, issue a permanent injunction restraining parties from doing anything. Successive orders are invalid and cannot be supported as fresh orders. Such orders are an abuse of the process of the Court specially where the Civil Court has passed a temporary injunction against one party. It is the duty of Criminal Courts to respect the opinion of Civil Courts, and for preserving peace to take action against those infringing the rights of others and protect those in the enjoyment of lawful rights, 16 L.W. 452=1922 M.W.N. 612=23 Cr. L.J. 689=69 Ind. Cas. 369. The arm of law is long enough to prevent such evasion of the express provision of the Code by arbitrary and successive renewals of the orders passed under this section, and the High Court has power to prevent such evasion, 38 M. 499; 16 L.W. 452=(1922) M.W.N. 612=23 Cr. L.J. 689=69 Ind. Cas. 369.

see also 11 Cr. L.J. 12=4 Ind. Cas. 590. Repeated recourse should not be had to the provisions of this section in the same dispute. If it is considered probable that danger to the public may remain even after the expiry of two months from the date of the order, the proper course is to take steps to obtain an order from Government or to take action under the security sections of the Code, 16 Cr. L.J. 592=30 Ind. Cas. 144. An order cannot be made under this section prohibiting a person from taking part in the management of a temple until the *de facto* manager was duly evicted in due course of law, as such an order contravenes sub-section (5) of this section, 24 M. 45; nor can a Magistrate issue a perpetual injunction under this section, 8 C. 589; 5 C. 7; 26 C. 189; 18 M. 41; 26 A. 144; 24 M. 45; 25 A. 537. An order which, on the date on which it is sought to be revised by the High Court, had ceased to be in force by efflux of the time under the last clause of this section should not be interfered in revision, 16 Cr. L.J. 272=29 Ind. Cas. 160; Cr. R. C. No. 273 of 1929 (M.H.C.) but where the order is illegal on the face of it and affects the rights of a party, the High Court will interfere, 42 M.L.J. 352; 16 L.W. 452=(1922) M.W.N. 612; 24 M. 45; but see 47 M.L.J. 439=(1924) M.W.N. 675=25 Cr. L.J. 394, where the High Court refused to follow, 42 M.L.J. 352, and followed the earlier decision in 29 Ind. Cas. 160, holding that the order which has expired by efflux of time should not be revised, see also, 16 Cr. L.J. 272.

Unless the Local Government by notification otherwise directs.—The Local Government's power is not limited to any particular kind of procession and the period can be extended so long as the danger apprehended continues and no reasons are to be stated by Government, 45 A. 526. If the Local Government considers that there was danger to human life, health or safety, or likelihood of a riot or affray, in allowing a procession to pass down a public street, it was perfectly competent under sub-section (6) to extend the period of the order passed by the Magistrate and was not limited to any particular kind of procession. The Local Government was also competent to extend the order so long as the danger apprehended continues to exist and it is not necessary for the Local Government to state its reasons or even to state the fact of likelihood of a riot or affray or other danger, 45 A. 526 at 527. The power herein given to the Local Government to extend the operation of the order beyond two months in very exceptional cases may perhaps suggest the view that the order may be taken to be an executive one. If it submitted that view is farfetched and may not be accepted in the face of the various rulings of the High Court and by reason of the amendment in 1923 of S. 435, *infra*.

Revision.—The High Court has now power to revise orders under this section, sub-section (3) of S. 435, *infra*, which declared that orders under this section are not proceedings within the meaning of S. 435, *infra*, is now omitted and it is no longer necessary to invoke the aid of the Government of India Act, 47 M. 56, is no longer law. In 52 M. 69 Ramesam, J., disapproved of the view expressed here that 47 M. 56 is no longer law and following 47 M. 56 held that no revision lay to the High Court against orders passed under this section on the ground a Magistrate acting under this section is not a Court and Ss. 495 and 499 *infra* enable the High Court to call for and examine proceedings of inferior Criminal Courts and revise the same but if a Magistrate abuses his powers under this section by passing successive orders at the expiry of two months, in such a case the High Court may invoke the aid of S. 107 of the Government of India Act and set aside the order. This view was followed by Rellly, J., in the case in 53 M.L.J. 621 (Foot-note)=30 Cr. L.J. 629=116 Ind. Cas. 137. It is submitted that the view taken in the above decisions in 52 M. 69, and in 55 M.L.J. 621 (foot-note) is not correct. In 19 M. 18 a Bench of the Madras High Court held that proceedings under this section are judicial proceedings. A comparison of the provision of the Code of 1861, 1872 and 1882 shows that the proceedings are judicial and it was the practice of the High Court for the past 30 years, to revise proceedings under this section in spite of the express prohibition in S. 435 (3) *infra* under the Charter Act and Government of India Act. This bar which had existed before, has now been removed by the Legislature in 1923 omitting sub-section (3) in S. 435, *infra* and making proceedings under this section subject to the revisional jurisdiction of the High Court like any other proceedings under the Code. The view expressed in 52 M. 69 that the omission of S. 435 (3) was probably to remove any redundancy and such removal had made the matter clear against entertaining revisions against order under this section, it is

submitted, is not correct. Again the Full Bench of five Judges in 51 M. 1005 have only held that the High Court will not interfere in revision with orders under this section as the preservation of the public peace is a function of Government and in the performance of that function it may be necessary for them to override temporarily private rights established by the decree of the Civil Court and the High Court cannot advise Government as to what measures should be taken to protect a particular section who had obtained a decree establishing their right or to preserve public peace in any locality. The question as to the correctness of the decision in 52 M. 69 was referred to a Bench for decision in Cr.R.O. No. 273 of 1929 and their Lordships (The Chief Justice and Cornish, J.) have held after an elaborate review of the provisions in the various Codes from 1861 and the decided cases that the proceedings under this section are *judicial* and the removal of sub-section (3) of S. 435 *infra* in 1923 was a clear indication that these orders are subject to the revisional jurisdiction of the High Court and the view expressed in 52 M. 69 and 55 M.L.J. 62. (Foot-note) was dissented from. The learned Judges however declined to interfere in revision as the order had ceased to have effect by efflux of time. When a Magistrate has jurisdiction to pass an order under this section in case of need whether that order was or was not the best that could have been passed or not is not a question which should be considered in revision, 5 M.L.T. 217=11 Cr. L.J. 164=4 Ind. Cas. 1123. The High Court has power under S. 439 read with S. 435 to set aside an order under this section directing the removal of property into Court and to restore *status quo*, 12 C.W.N. 1014. S. 561A *infra* empowers the High Court to set aside an illegal order passed by a Magistrate for delivery of property under this section and to direct that the property be re-delivered to the person who was originally in possession, 28 Cr. L.J. 991=105 Ind. Cas. 815 following 1916 M.W.N. 88=3 L.W. 408=17 Cr. L.J. 190=33 Ind. Cas. 830; 23 C.W.N. 145=28 C.L.J. 83=19 Cr. L.J. 951=47 Ind. Cas. 803. When the case is not one which can properly be dealt with under this section, it is subject to revision as any other *judicial proceedings*, 1 C.L.R. 58; 23 C. 862, where the order of the Magistrate is sought to be justified under an authority derived from law, but is in fact without jurisdiction not being sanctioned by it, it cannot but be assumed that the Magistrate has acted within his general jurisdiction and as such his order, is revisable by the High Court and is liable to be set aside at the instance of the party whose liberty is affected by it, 41 C. 500 at 404 405. Where the order is on the face of it purports to be an order under this section, there is no good of the Magistrate saying that his order is an executive order over which the High Court has no control and as an order under the section it is certainly *ultra vires*, it is liable to be set aside in revision, 21 Cr. L.J. 657=57 Ind. Cas. 817 following 41 C. 400. The High Court may exercise its powers of revision when there is a gross miscarriage of justice in regard to an order under this section, 26 M.L.J. 208, or to prevent the abuse of the powers of the Court, (1914) M.W.N. 169. Where the order has expired by efflux of time it would be mere waste of time to adjudicate upon matters which have no practical effect and the High Court would not therefore interfere on the merits of the order or annul it in revision, 47 M.L.J. 439, where 16 Cr. L.J. 272=28 Ind. Cas. 160, is followed and 42 M.L.J. 332 not followed, See also Cr.R.O. No. 273 of 1929 (M.H.C.) but see 26 Cr. L.J. 260=84 Ind. Cas. 324, where an order which had already expired, when the application for revision was made to the High Court, was set aside by the Patna High Court on the ground that it was clearly illegal as no preliminary order was passed and served on the party as required by law. Even the decision in 52 M. 69 held that when the order passed is an abuse of the power conferred by the Code the power under S. 107 Government of India Act may be invoked to have the order revised by the High Court.

Reference.—Orders under this section are now proceedings within S. 435 *infra* and can be dealt with under S. 433, *infra*. When the District Magistrate is of opinion that proceedings under this section is illegal or improper, the proper course for him is to make a reference to the High Court under S. 433, *infra*, 33 C.W.N. 723.

Civil suit to set aside Magisterial orders under this section.—A Full Bench of the Calcutta High Court consisting of twelve Judges in 5 C. 7 held that where a

Magistrate passed an order clearly beyond his powers which in effect was in the nature of a perpetual injunction, the aggrieved party had a cause of action for a Civil suit against the opposite party and he is entitled to a decree declaring his right as against his opponent but the question whether the Civil Court can set aside an order passed with jurisdiction was left undecided. Magisterial orders prohibiting people from going in procession in public streets under this section are, without special damage furnish a good cause of action for a Civil suit by a member of the public for a declaration and injunction with regard to their right to go in possession against the defendants who procured the order of the Magistrate, 20 M.L.J. 119 following 32 M. 473 at 434; 2 M. 140 at 141; 30 M. 15; 26 M. 377; 18 B. 693; 2 B. 437.

CHAPTER XII.

DISPUTES AS TO IMMOVEABLE PROPERTY.

145. (1) Whenever a District Magistrate, Sub-divisional Magistrate or Magistrate of the first class is satisfied from

Procedure where
dispute concerning
land, etc., is likely to
cause breach of peace

a police-report or other information that a dispute likely to cause a breach of the peace exists concerning any land or water or the boundaries thereof,

within the local limits of his jurisdiction, he shall make an order in writing, stating the grounds of his being so satisfied, and requiring the parties concerned in such dispute to attend his Court in person or by pleader, within a time to be fixed by such Magistrate, and to put in written statements of their respective claims as respects the fact of actual possession of the subject of dispute.

(2) For the purposes of this section the expression "land or water" includes buildings, markets, fisheries, crops or other produce of land, and the rents or profits of any such property.

(3) A copy of the order shall be served in manner provided by this Code for the service of a summons upon such person or persons as the Magistrate may direct, and at least one copy shall be published by being affixed to some conspicuous place at or near the subject of dispute.

(4) The Magistrate shall then, without reference to the merits of the claims of any of such parties to a right to possess the subject of dispute, peruse the statements so put in, hear the parties, receive *all such evidence as may be* produced by them respectively, consider the effect of such evidence, take such further evidence (if any) as he thinks necessary, and, if possible, decide whether any and which of the parties was at the date of the order before mentioned in such possession of the said subject :

Provided that, if it appears to the Magistrate that any party has within two months next before the date of such order been forcibly and wrongfully dispossessed, he may treat the party so dispossessed as if he had been in possession at such date.

Provided also, that, if the Magistrate considers the case one of

emergency, he may at any time attach the subject of dispute, pending his decision under this section.

(5) Nothing in this section shall preclude any party so required to attend, or any other person interested, from showing that no such dispute as aforesaid exists or has existed; and in such case the Magistrate shall cancel his said order, and all further proceedings thereon shall be stayed, but, subject to such cancellation, the order of the Magistrate under sub-section (1) shall be final.

(6) If the Magistrate decides that one of the parties was or should *under the first proviso to sub-section (4) be treated as being in such possession of the said subject*, he shall issue an order declaring such party to be entitled to possession thereof until evicted therefrom in due course of law, and forbidding all disturbance of such possession until such eviction, and, *when he proceeds under the first proviso to sub-section (4), may restore to possession the party forcibly and wrongfully dispossessed,*

Party in possession to retain possession until legally evicted.

(7) *When any party to any such proceeding dies, the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding, and shall thereupon continue the inquiry, and if any question arises as to who the legal representative of a deceased party for the purpose of such proceeding is, all persons claiming to be representatives of the deceased party shall be made parties thereto.*

(8) *If the Magistrate is of opinion that any crop or other produce of the property, the subject of dispute in a proceeding under this section pending before him, is subject to speedy and natural decay, he may make an order for the proper custody or sale of such property, and, upon the completion of the inquiry, shall make such order for the disposal of such property, or the sale-proceeds thereof, as he thinks fit.*

(9) *The Magistrate, may, if he thinks fit, at any stage of the proceedings under this section, on the application of either party, issue a summons to any witness directing him to attend or to produce any document or thing.*

(10) *Nothing in this section shall be deemed to be in derogation of the powers of the Magistrate to proceed under section 107.*

Amendment.—Sub-section (7), (8), (9) and 10 are new. So also the last portion of sub-section (6), sub-section (7) is elaborated considerably, and power is now given to add even rival claimants claiming as legal representatives of a deceased party. In sub-section (4) for the words "receive the evidence" the words "receive all such evidence as may be" have been substituted; and the new sub-section (9) gives power to the Magistrate on the application of

either party to issue summons to witnesses to give evidence or to produce any document of thing. Power is also given by sub-section (6) to restore to possession the party forcibly and wrongfully dispossessed. Sub-section (10) expressly reserves the power to proceed under S. 107 *supra*.

Distinction between Chapter XI and Chapter XII.—Chapter XI is headed—temporary orders in urgent cases of nuisances and reading the whole chapter it is clear that it relates to interference or dealing of some kind with the property itself, the possession of which is undisputed or something erected or standing upon the property, 21 Cr. L.J. 646=57 Ind. Cas. 662. Chapter XI has nothing to do with the question of possession of the parties. It relates only to a temporary order in emergent cases of apprehended danger and is directed to the prevention or direction by a prompt order of some definite act on the part of an individual so that injury or nuisance may not be caused. Chapter XII on the other hand is headed 'Disputes as to immoveable property' and deals with the possession of the property in dispute. The dispute is concerning land or water likely to cause a breach of the peace, 21 Cr. L.J. 625=57 Ind. Cas. 449. Chapter XII can be applied to prevent interference by one party with the collection of rents and profits of the land by another and matters of similar kind and thus prevent a breach of the peace by forbidding all disturbance, 19 C. 127 at 130. What the legislature intended by enacting chapter XII is to provide an effective means of preventing a breach of the peace between rival claimants until their claims to property have been adjudicated by a competent Civil Court. Prompt preventive action and not lethargy is what is wanted in cases of this kind. But the Magistrate must himself be satisfied and he must form his own judgment and not proceed automatically upon a mere opinion of the police or the direction of some other officer, 23 Cr. L.J. 929 at 931=103 Ind. Cas. 449.

Scope and object of the section.—The object of the provisions of this section is to prevent a breach of the peace, 32 C.W.N. 275=47 C.L.J. 233; 56 C. 290 (F.B.); 30 C. 112; 21 C. 29; 28 C. 436; 30 C. 153 (F.B.); 6 C.W.N. 101; 3 L.W. 165=18 Cr. L.J. 23=38 Ind. Cas. 835 18 Cr. L.J. 692=49 Ind. Cas. 692; 18 Cr. L.J. 461=39 Ind. Cas. 301; 27 M.L.J. 169 at 171=15 Cr. L.J. 572=23 Ind. Cas. 324; 25 B. 179; 30 A. 41 and to bring to an end by a summary process disputes relating to land which are in their nature, likely, if not suppressed, to end in breaches of the peace: the object of the section is limited, strictly to the prevention of violent self help even by a true owner, 18 Cr. L.J. 858=41 Ind. Cas. 826; 56 C. 290 (F.B.). The object is not to provide the parties with an opportunity of bringing their civil dispute before the Criminal Court or of manoeuvring for possession for the purpose of a subsisting a civil litigation though that is often the effect of such proceedings but to arm the Magistrate concerned with an additional weapon for maintaining the peace within the area for which he is responsible, 55 M.L.J. 693=28 L.W. 664 the mere fact that the dispute is of a religious nature, is not sufficient to justify a Magistrate taking action but there must be positive proof that a breach of the peace is likely to occur if proceedings are not taken. 23 Cr. L.J. 23=73 Ind. Cas. 990, 26 Cr. L.J. 870=85 Ind. Cas. 806. The object of the section is thus there to prevent breaches of the peace pending a settlement of the rights of parties in the Civil Court. The Magistrate's jurisdiction is ancillary in a way to that of the Civil Courts, in fact it is quasi civil. In making use of his powers under the section the Magistrate should be guided by this cardinal principle for example he cannot acting on the mere words of the section pass an order in respect of any property where the question of the right to it has been decided by competent Civil Court long before the initiation of proceedings, 1902 P.L.R. (Cr. J.) 135 at p 573 following, 26 C. 623. The section is not the only weapon with which a Magistrate is entrusted for preserving the peace in disputes relating to land. He has power specially adopted in cases of urgency under S. 144 *supra* and also under S. 107 *supra*. Whatever force is given to 'shall' in sub-section (1) it need not in any way embarrass the Magistrate in exercising his discretion which is to be exercised on the particular facts of each case considered as a whole and by an officer with knowledge of local condition, 56 C. 290 (F.B.) at 303-4. Proceedings under this section are taken not in the interest of private parties but for the preservation of public peace and in cases the Magistrate is satisfied that the likelihood of the breach of the peace either did not

exist or has ceased to exist, it is his proper duty to drop proceedings without notice and to withdraw from interfering with the rights of the parties in the property in dispute, 49 M. 232. What the Legislature intended by this section was to bring the dispute to a prompt termination and to compel the parties concerned in it to set their differences at rest without delay and once for all by having recourse to the Civil Courts, 30 C. 155 (F.B.) at 169.

Legislation regarding disputes concerning land likely to cause a breach of the peace and for the adjustment of these disputes and by such adjustments preventing them from culminating in a breach of the peace began with Regulation XLIX of 1793 and continued practically on the same lines down to the current Act *viz.*, V of 1898. The tribunal by which the adjustment was to be made was changed by Regulation XV of 1824 but the method laid down by Regulation XLIX of 1793 has continued without a break in all subsequent legislations. That method was to bring before the Court the disputing parties, to ascertain, if possible which of them is in actual possession irrespective of title and to say to all other disputants that the person found in actual possession was to be left in undisturbed possession until evicted in due course of law. The prescribed method was to be resorted to, if the dispute related to land and was of such a character that there was a likelihood of a breach of the peace resulting therefrom. The object to be attained was the prevention of the dispute culminating in a breach of the peace. The object and method have remained the same all through, 56 C. 290 (F.B.) at 330. The maintenance of the public peace was the object before the mind of the Legislature, and where that supreme object is in view there can be no question but that the convenience and even the rights of individuals must at times be sacrificed for its attainment. It would be improper to lean too much in attempting to construe the section, upon analogies derived from suits and other civil proceedings, the result of which are very different from the proceedings under this section, and in which the rights of individuals *inter se* are alone in question. It is assumed as a possible consequence of proceedings under this section that the owner of the property may temporarily be deprived of possession of what is rightfully his and subjected to other inconveniences. But this and such like considerations, it was presumably necessary to subordinate to the imperative necessity of preserving the peace, 30 C. 155 (F.B.) at 195. The procedure prescribed by this section is intended solely for the purpose of preventing a breach of the peace where a dispute exists concerning any land, or water, or the boundaries thereof; which dispute, if no proceedings were taken, would be likely to cause a breach of the peace. The institution of such proceedings is a matter in the discretion of the Magistrate. By the addition of the new sub section (10) the Magistrate may now proceed under S. 107 or under this section; see 39 C. 150 (F.B.) which laid down that where there is a dispute concerning land a Magistrate is not precluded from proceeding under S. 107, *supra*. The existence of a dispute likely to cause a breach of the peace is a condition precedent absolutely necessary to give the Magistrate jurisdiction to enter upon such an inquiry as to possession.....Any inquiry as to possession that is made under the provisions of the section is made not for the purpose of strengthening the position of the one party or of the other in the dispute between them, but because such an inquiry is necessary for the making of an order declaring the party in possession to be entitled to retain possession until evicted from the property in due course of law, and forbidding all disturbance of such possession until such eviction, 30 C. 112 at 115. The Magistrate, in order to assume jurisdiction under this section has to satisfy himself as to the likelihood of a breach of the peace and he has to exercise his own judgment upon the materials placed before him and to arrive at a conclusion as to whether on the materials placed before him there was a likelihood of a breach of the peace, and should not be satisfied in acting merely upon an expression of opinion by the police, (1923) Pat. 83=26 Cr. L.J. 133=83 Ind. Cas. 693; 33 C. 33; 26 Cr. L.J. 944=88 Ind. Cas. 1008. The jurisdiction of a Magistrate to proceed under this section is derived from the fact that he is satisfied that there is a likelihood of a breach of the peace and the moment it is found that there is no likelihood of a breach of the peace his jurisdiction to proceed under this section ceases and any order of attachment which had been made previously automatically comes to an end and he cannot continue the attachment, 29 Cr. L.J. 456=108 Ind. Cas. 904; see also 56 C. 290 (F.B.) The law does not require a Magistrate to record in his final order under this section an express finding that a breach of the peace is imminent. A finding as to the existence of a dispute likely to cause a breach of the peace

is a matter to be considered in relation to the preliminary order under sub-section (1) and where the preliminary order states that the Magistrate is satisfied on the materials before him that a dispute likely to cause a breach of the peace, with regard to the property in dispute, exists there is a sufficient compliance with law and his final order cannot be questioned on the ground that it did not contain a finding as to the likelihood of a breach of the peace, 26 Cr. L.J. 1581=90 Ind. Cas 541. What the Magistrate has to decide first is whether there is a dispute likely to lead to a breach of the peace and then he is to decide after taking evidence which party is in actual possession of the subject of dispute, 30 Cr. L.J. 381=115 Ind. Cas 810. A party to a proceeding under this section is not in the position of a plaintiff in a civil suit who has set the Court in motion and has a right to require a decision upon the question raised by him. If a Magistrate either refuses to make an order under sub-section (1) or having made such an order subsequently cancels the same on the ground that a dispute likely to cause a breach of the peace does not exist, no private person has any *status* to contest the propriety of his refusal to make an inquiry into the question of possession, 30 C. 112 at 117 followed in 49 M. 232. An order under this section is only a mere police-order made to prevent a breach of the peace; it does not confer any title on the person declared by the order to be in possession. He is only entitled to retain such possession until he is evicted by a person who can prove a better title or who can prove a better right to possession, 29 C. 187 (P.C.). An order under this section does not signify that the successful party is thereby entitled as of right to the property, in defiance of whatever legal title there may be existing in favour of the rightful owner; the order only entitles the successful party to possession pending the decree of a Civil Court, 18 L.W. 649. There is nothing in this section to prevent a Magistrate joining together various claims to possession and dealing with them in one proceeding, 26 Cr. L.J. 424=85 Ind. Cas. 40; 18 L.W. 649. It is not the actual parties but all parties who may have notice of the proceedings that are bound by the order, since the object of the section is to prevent a breach of the peace, 11 Bom. L.R. 377=10 Cr. L.J. 64=2 Ind. Cas. 513 followed in 33 C.W.N. 1002 at 1004. When a Hindu father who was the manager of the joint family was a party to a proceeding under this section as such manager, all the other members of the family are bound by the order passed by the Magistrate even though they were not parties to this proceeding 56 M.L.J. (Sh. N.) 14. This section did not before the amendment expressly authorize the successful party to be placed in possession by the Court but now, by the amendment, power is given to restore the successful party to possession. The functions of a Magistrate acting under this section are of quasi-executive character having for their object and justification the prevention of a breach of public peace. For that purpose the Magistrate could only decide the fact of possession, 6 Bom. L.R. 246. Under this section a special jurisdiction is vested in Subordinate Criminal Courts under special circumstances and for a special purpose. Where either the special circumstances do not exist or when the order does not attain the purpose for which the jurisdiction is created, then the special jurisdiction vested falls to the ground. The circumstances under which the jurisdiction springs up are those which give rise to an apprehension of a breach of the peace and if there is no such apprehension there is no jurisdiction to make the order. The purpose the Legislature had in view is a prevention of a breach of the peace, 28 C. 446; 24 C.W.N. 621=31 C.L.J. 369. This section is intended to provide a speedy remedy for prevention of the breaches of the peace arising out of disputes concerning immoveable property. The Code contemplates a determination of the question of possession without reference to the merits of the claims of the disputing parties to a right to possess. The question of possession has to be determined with reference to a specified point of time, viz., the date of the initial order or in the case of forcible dispossession a date within two months next preceding such order. The legislature could hardly have contemplated an elaborate protracted inquiry the result of which might be in many instances to defeat the very object in view, 32 C. 1093. This section is concerned solely with the fact of actual physical possession, whether lawful or unlawful, whether in contemplation of law enjoyed by the possessor in his own right or on behalf of others, 3 L.W. 164=4 Cr. L. Rev. 482=29 Ind. Cas 541; 29 Cr. L.J. 902 at 903=111 Ind. Cas. 662. So in proceedings under this section any question as to whether possession is on behalf of others or in one's own behalf is quite irrelevant;

questions as to rights of parties raised by their written statements under this section are quite irrelevant as such proceedings are initiated in the interests of the public order and tranquillity, and it is his preliminary order that settles the actual issues between the parties and founds his jurisdiction, 3 L.W. 164=16 Cr. L.J. 525=29 Ind. Cas. 541; 26 Ind. Cas. 155. In cases under this section the tribunal inquiring into the case is not under the necessity which a Court trying a civil case or ordinary criminal case, is under, of coming to a conclusion at all, 14 C. 361 at 364. Proceedings under this section are generally taken as a preliminary skirmish before the actual battle in a Civil Court one side or other generally gets some advantage out of the proceedings, 27 Bom. L.R. 1353=27 Cr. L.J. 661 at 665=24 Ind. Cas. 709. Proceedings under this section are summary proceedings of a quasi civil nature the object being to prevent a breach of the peace and no right of title is decided and no one's life or liberty is in question and S. 360, *supra*, cannot apply, 26 Cr. L.J. 915=86 Ind. Cas. 979, 28 Cr. L.J. 437=101 Ind. Cas. 469. Before the amendment, a Magistrate had no power under the section to oust one party and to place another in possession of the disputed property as he has power to do under S. 522, *infra*, when there is a conviction for an offence, 13 A.L.J. 932 but the new addition to sub-section (6), empowers the Magistrate to restore to possession the party forcibly and wrongfully dispossessed. The Magistrate has power in proceedings under this section to give one of the parties a right of way over a plot of land in the possession of the other party; because he has power to declare the possession of one party to the plot the greater will include the less, viz, to declare a right of way, 48 B. 512. When once a Magistrate has issued a preliminary order under this section, he has no jurisdiction to cancel the same without holding an inquiry as required by sub-section (4) or (5). Failure to do so is illegal and the order dismissing the petition was set aside as not warranted by law, 7 Cr. L. Rev. 193. When a party has been declared to be in possession as the result of proceedings under this section, no fresh proceedings can be started against him, unless it is shown that that order had been vacated in due course of law or possession had been surrendered amicably and if the Magistrate without finding these, starts fresh proceedings, he acts without jurisdiction, 21 Cr. L.J. 753=58 Ind. Cas. 337. Similarly once proceedings have been dropped by the Magistrate, they cannot be revived unless upon further materials, 20 C. 867; 6 C.W.N. 923. So also a Magistrate cannot strike off proceedings once started without passing an order under this section or under S. 146, *infra*, 20 Cr. L.J. 464; 11 W.R. (Cr.) 9. The provisions of sub-section (1) are mandatory and failure to observe them vitiates the entire proceedings, 23 A.L.J. 155=28 Ind. Cas. 231=99 Ind. Cas. 1031.

District Magistrate sub-divisional Magistrate or a Magistrate of the first class.—Only these Magistrates are empowered to act under this section. *Presidency Magistrates* too were sought to be included in the amending Bill, but the amendment fell through. In S. 6, *supra*, *Presidency Magistrates* and *Magistrates of the first class* are specially mentioned as two different Courts so that the expression "*Magistrate of the first class*" cannot include a *Presidency Magistrate*. In the *Presidency towns* the *Commissioner of Police* is an *ex-officio* *Magistrate of the first class* who can exercise powers under this chapter. See S. 7 of *Madras Act III of 1886*. In the towns of *Calcutta* and *Bombay*, *Commissioners of Police*, though not ordinarily *Magistrates* may be invested with powers necessary for the preservation of peace and prevention of crime. Under S. 18, *supra*, a sub-divisional *Magistrate* may be a *Magistrate of the first or second class* in charge of a sub-division. So a *Magistrate of the second class* in charge of a sub-division can exercise powers under this section although a *Magistrate of a Second Class* without a sub-division charge, cannot exercise powers under this section. A *Bench of Magistrates* are ordinarily empowered to try cases or class of cases referred to them within certain limits and they will not be empowered to inquire into miscellaneous proceedings under this chapter which are not trials for offences. But a *Bench* may be invested with any of the powers conferred or conferrable by and under this Code on a *Magistrate*. See S. 15 *supra*. Therefore proceedings under this section are cognizable by a *Bench of Magistrates* if specially empowered, e.g., *Benches of Magistrates* in the Hill stations of *Nilgiris* and *Kodakanal* are so empowered. See *Fort St. George Gazette*, 1875, p. 1204 and 1902, p. 299.

Is satisfied from a police report or other information.—The Magistrate has a wide discretion whether proceedings are to be instituted or not. It is for him to decide upon all the materials before him whether he should initiate proceedings or not, 43 C.L.J. 428; 50 C.L.J. 237. He is in no way bound to act on all that is stated in the Police report before him, 27 C. 892, 30 C. 112. Whether proceedings should or should not be taken is entirely a matter within the Magistrate's discretion. It appears to be settled law that a District Magistrate has no authority in law to direct a Subordinate Magistrate to institute proceedings under this section, 50 C.L.J. 237. The police report alone does not give jurisdiction. The Magistrate need not rely upon the entire police report and need not accept the truth of the whole report, 49 C.L.J. 428. A police report and the evidence contained therein are inadmissible in evidence for any purpose except for the initiation of proceedings under this section. It cannot be used for arriving at a finding as to *factum* of possession, 21 Cr.L.J. 735=53 Ind. Cas. 159 nor by itself evidence that a dispute which is likely to cause a breach of the peace exists, 7 B.L.R. 329. No rule can be laid down so as to specify the sufficiency of the materials upon which the Magistrate is entitled to act. But the Magistrate must form his own judgment and not proceed upon a mere expression of opinion by the police, 33 C. 33 followed in (1923) Pat. 83=26 Cr. L.J. 133=83 Ind. Cas. 693 and 28 Cr. L.J. 929 at 931=105 Ind. Cas. 449. A mere petition by an officer in the employ of one of the interested parties is not however such information upon which a Magistrate can act without receiving further evidence, 29 M. 561. A statement by a Magistrate that he has been directed by the Judge to hold an investigation is not sufficient to satisfy the requirements of this section, 9 W.R. (Cr.) 64. Though no initiation of proceedings can be ordered by a superior tribunal, yet it may draw the attention of the Magistrate to the nature of the dispute before it so that the Magistrate may exercise his own discretion in the matter, 20 C. 529; 24 C. 391; 33 C.W.N. 723; 50 C.L.J. 289, 10 Cr.L.J. 231. A mere expression of opinion by a police officer without sufficient materials, in his report that there is a likelihood of a breach of the peace, or a police report which states in the vaguest terms that a breach of the peace may occur, should not be acted upon, 11 C.W.N. 835 and 193. A Magistrate should specify the nature of the information received by him and state the material facts which by the exercise of a judicial discretion he derived therefrom and which in his judgment constitute grounds for believing that a dispute concerning certain land exists which is likely to cause a breach of the peace, if he does not take necessary steps to prevent it. Unless he is in a position in this way to present clear and rational grounds, capable of being estimated according to their merits on the mere statement of them, he has no legal foundation on which to base his investigation *inter partes*, relative to possession. He is not in any way limited as to the materials he might make use of to base his finding. No complaint is necessary, nor is he confined to evidence recorded on oath, 19 W.R. (Cr.) 10; 33 C. 33 (F.B.). The nature of the information is not defined and the Magistrate has a wide discretion as to the sufficiency of the information and so long as it is reasonable it cannot be interfered with; a mere statement on oath of one of the parties is not sufficient, 10 C. 78. Information as used in this section has no technical sense as in S. 190 (1) (c) *infra*. The meaning to be attached to this word should be as liberal as possible. It does not refer to any particular way in which a Magistrate's attention should be drawn. It is wide enough to cover the knowledge of the Magistrate derived from reading the petitions filed by the parties in another proceeding which satisfied him that a breach of the peace was imminent, 21 Cr. L.J. 625=57 Ind. Cas. 449. So also a written report of an *amin* is not itself sufficient, 20 W.R. (Cr.) 87. A petition which refers to the commission of various offences which involve no breach of the peace is not sufficient, 4 C.W.N. 57. A mere telegram has been held to be no information within this section, 22 B. 949 at 956. It is now well settled that sufficiency of information on which the Magistrate acts is entirely a matter for him and the law does not require it to be furnished to him in any particular form, 1 Pat. L.J. 335 (F.B.). The preliminary order should contain the fact of the Magistrate being satisfied as to the breach of the peace concerning a dispute as to immoveable property and the grounds thereof, 24 B. 527; 28 C. 416. The omission to set forth in the preliminary order the grounds of the Magistrate being satisfied to the likelihood of a breach of the peace do not affect the jurisdiction of the

Magistrate, and is not fatal to the final order, 36 M. 273 at 283-285; 33 C. 332 (F.B.); 30 M. 549; 33 C. 63 (F.B.); 18 Cr. L.J. 156=37 Ind. Cas. 924; 17 M.L.J. 449; 16 M.L.J. 148; Weir II, 93; 3 Cr. L.J. 437 Proceedings initiated without sufficient materials before the Magistrate from which he could satisfy himself that there is a likelihood of the breach of the peace are void and cannot be cured by S. 537, *infra*, 20 C. 513; 11 C.W.N. 835 and any evidence that a Magistrate may take in the course of the inquiry cannot give him jurisdiction which he did not otherwise possess when he started proceedings.

Dispute likely to cause a breach of peace exists concerning land.—"Dispute" under this section means a reasonable dispute, a *bona fide* dispute, a dispute between parties which have each some resemblance of a right or supposed right, 6 C. 835 at 841 but see the observations of Rankin, C.J., to the contrary in 56 C. 290 (F.B.) at 306. "I dissent altogether from the doctrine that the words dispute likely to cause a breach of the peace" refer only to *bona fide* dispute or only to reasonable dispute. The first sub-section is concerned with the maintenance of the public peace and with the reality of disputes, the danger of disputes. It matters little to a broken head whether it be broken in good faith or in bad and the Magistrate can have no preference, when he finds from a police report that he must take action, he can hardly be in a position to enter into such question. The section requires him to call for written statements and to inquire only as to the fact of actual possession. The nature of the claim to title may affect the question of fact as to possession but he is expressly debarred from inquiring into the merits of the claims. The provision is not made with the object of inquiring into the *bona fides* and the reasonableness of claims. It is not generally true in India or elsewhere that unreasonable or *malafide* disputes are less dangerous than others or more readily accommodated. A Court of law might as well commit itself to the proposition that family disputes are always the mildest. The section is based upon the notion that whether a man has the best or the worst claim in the world he must not take the law into his own hand and so disturb the public peace." Dispute is used here in its ordinary sense of disagreement, struggle, scramble or quarrel for possession of land etc likely to cause a breach of the peace 66 C. 290 (F.B.) at 319. A mere verbal altercation between two parties claiming a right is not sufficient, 5 C. 194. The word 'dispute' is not defined but it has been clearly and sufficiently explained in the section itself as a dispute likely to cause a breach of the peace. To add any other explanation to the term is not construing the act but legislating. To say that the dispute must be *bona fide* or reasonable is to restrict the jurisdiction of the Magistrate given to him by statute, 56 C. 290 at 317. Breach of peace apprehended need not be between rival claimants but may be on account of the dispute from anybody, 18 Cr. L.J. 156=37 Ind. Cas. 521. The Magistrate must record a distinct finding that the dispute is such as is likely to cause a breach of the peace, Weir II 117. Ratanlal 38 See also 28 C. 416; 24 B. 527; 4 M.H.C.R. Appx. 49; 1907 A.W.N. 49. The finding is to be recorded in the preliminary order and the final order cannot be questioned, that it did not contain a finding as to the likelihood of a breach of the peace, 23 Cr. L.J. 1331=93 Ind. Cas. 541; 23 Cr.L.J. 847=104 Ind. Cas. 453. If there is no present danger of a breach of the peace, the fact that such dispute is likely to cause breach of the peace in the future will not justify a Magistrate making an order under the section, 7 C.L.R. 352; 8 C.W.N. 590; 26 A. 190; 13 C.W.N. 271=11 Cr.L.J. 723=8 Ind. Cas. 892. The word "likely" in this section does not mean that a breach of the peace complained of is "imminent or likely to happen immediately," but simply signifies that there should be a probability or likelihood of a breach of the peace, 8 Cr. L.J. 173 where 33 C. 33 and 332 and various other rulings are referred to. The words, 'a dispute likely to cause a breach of the peace' have to be given a reasonable and natural meaning. It is to be seen whether the section requires that there should be a dispute in existence which is likely to cause a breach of the peace at any time or whether dispute should be such that it is likely to cause a breach of the peace at the time the proceedings are drawn up. From very early times since this provision of law came under judicial interpretation it has been held that the dispute must be such as is likely to cause a breach of the peace at the time. In some cases it is stated that this likelihood should be 'imminent' or 'immediate' In 33 C. 33 at 43 it was held that the introduction of the word 'imminent' into the section giving it a strange significance

that the words used here can bear is not justifiable but in 33 C. 352 (F.B.) the word imminent was used and it has been used in various other cases but what was meant was always that the breach of the peace was likely at the time when the proceedings were drawn up. It does not seem reasonable that the word 'dispute' should be read apart from the qualifying words 'likely to cause a breach of the peace'. The Criminal law is concerned only with a breach of the peace not at any future time for its interference but at the present time as was held in 7 C.L.R. 332 and 7 C. 395. The words 'dispute likely to cause a breach of the peace exists' must be understood to mean that the dispute must exist and that it should be of such a character as is likely to cause a breach of the peace unless proceedings are taken under this section to avert the breach of the peace which would otherwise take place on account of the existence of the dispute between the parties, 49 C.L.J. 394. See also 56 C. 230 (F.B.). Two essential pre-requisites to give the Magistrate jurisdiction are—(1) a dispute likely to cause a breach of the peace, 49 C.L.J. 394, (2) that such dispute should concern land or water, etc. The Magistrate's jurisdiction solely depends upon his finding that there is a likelihood of a breach of the peace and it is a condition precedent to his taking action, 24 C. 55 (F.B.); 23 C. 557; 20 C. 320; 30 C. 112; 15 C. W. N. 271; 6 C.W.N. 340; 5 C.W.N. 900; 4 C.W.N. 57; 6 C. 835, 4 C. 650; 24 B. 527; 11 A.L.J. 305; 2 A.L.J. 272; 30 A. 41; 6 M.L.J. 193; Weir II, 117; 14 Cr. L.J. 493=20 Ind. Cas. 751; 28 Cr. L.J. 929 at 931=105 Ind. Cas. 419. After deciding that a breach of the peace is likely and issuing a preliminary order, the Magistrate has no jurisdiction to hold that there is no likelihood of a breach of the peace without holding an inquiry, 18 Cr. L.J. 789. The section does not primarily contemplate cases in which there have already been overt acts of violence. All the disputants may be persons of peaceable disposition, but if the dispute is in its nature of such a kind that it is likely, having regard to the known conditions of society to lead to breach of the peace, that is enough to warrant the Magistrate initiating proceedings under this section, 30 C. 155 (F.B.) at 200, 30 A. 41; 21 C. 29; when the apprehension of the breach of the peace is not clear but is only colourable, proceedings instituted are without jurisdiction, 6 C. 835; 10 C. 78; 4 C.W.N. 57; 6 C.W.N. 340; 4 C.L.J. 418; 11 A.L.J. 696. Proceedings under this section are initiated only by complying with the provisions of sub-section (1), which are imperative in their nature, (1914) M.W.N. 793 following 32 C. 652 and distinguishing 33 M. 273; 24 Ind. Cas. 160, 49 A. 325; 23 Cr. L.J. 623=102 Ind. Cas. 911. The term "land" in this section has a very wide significance. It includes crops or other produce of land and even the rents and profits of the land. The mere fact that the crops which are subject of dispute have been removed from the land is not sufficient to oust the jurisdiction of the Magistrate under this section, Weir II, 103. A dispute as regards mines and minerals and the right to work therein falls within the scope of this section, [1922] Pat 122; 4 Pat L.J. 154; 2 Pat. L.J. 637; a dispute as to right to collect rent is a dispute within this section, 16 Cr. L.J. 234; 17 M.L.T. 225; 11 C. 413; 16 C. 513; 12 M. 88. Disputes regarding fisheries are within the section, 11 C. 413; 13 C. 179; 35 C. 117; see also disputes regarding temples Weir II, 110; 17 Cr. L.J. 235 and right to perform *Puja* Weir II, 112; 24 B. 527. Disputes which are not within the purview of this section (1). Possession of one of the parties admitted by the other and possession of items not covered by the preliminary order, 7 C.W.N. 538 (2) possession of moveables, 4 L.B.R. 75, 23 Cr. L.J. 687=103 Ind. Cas. 419 and livestock, etc., 1912 M.W.N. 540, 1 Pat. L.J. 336 such as elephant, cattle (3) Joint possession of property, 27 M.L.J. 169 at 172; 40 C. 982 at 986 and other cases under heading *joint possession* at p. 244 (4); possession of public property, 17 C.W.N. 205; or use of public highway.

Within the local limits of his jurisdiction.—The section does not authorize a Magistrate to decide possession when the subject of dispute is beyond his jurisdiction, 17 W.R. (Cr.) 33; where proceeding were validly instituted and the District Magistrate transferred the case to some other Magistrate for disposal, it is not essential that the Magistrate to whom the case was transferred should have local jurisdiction; all that is necessary is that he must be empowered to inquire into the matter but where a District Magistrate merely received the petition to initiate proceedings and transferred it to a sub-divisional Magistrate who passed the preliminary order under this sub-section when the

lands the subject of dispute between the parties were not within the local limits of his jurisdiction, it was held that the order passed was without jurisdiction, 52 M. 231. Where there was no valid initiation of proceedings they cannot be validated by transfer to a Court of competent jurisdiction. When the land in dispute is situated partly in one district and partly in another the Magistrate of one district could properly act on a police-report of an officer of the other district in respect of land within his jurisdiction and pass a preliminary order, 29 C. 585, followed in 1 Cr. L.J. 329.

Shall make an order in writing.—See 39 C. 150 (F.B.) which laid down that when there is a dispute concerning land a Magistrate is not precluded from proceeding under S. 107, *supra*. It was held in various decisions that the expression "shall" occurring in this section leaves no discretion to the Magistrate if he finds that certain circumstances exist, and when these circumstances exist, viz., a dispute likely to cause a breach of the peace concerning land or water, etc., he is bound to proceed under this section and he is precluded from proceeding under S. 107, *supra*, see 35 C. 117; 12 C.W.N. 606=7 Cr. L.J. 403; 23 A. 406; 7 C.W.N. 746; 32 C. 566; 26 M. 471; 25 B. 179 but in construing the word "shall" the weighty observation of Rankin, C.J., is to be noted: "S. 145 is not the only weapon with which a Magistrate is entrusted for the maintenance of the peace in connection with dispute over land. He has a power specially adopted to cases of urgency under S. 144 and he has a power under S. 107 which in some cases will suffice. It is clear enough that whatever force is given to the word 'shall' in the first sub-section of S. 145 it need in not any way embarrass any Magistrate in exercising his discretion. If he is of opinion that an order under S. 107, will meet the case and proposes to make one he has only to make it to justify himself in holding that the dispute no longer is likely to cause a breach of the peace, he can do this either without taking action under this section or at any stage of the proceeding under that section. If he thinks that the case calls for action under S. 144 he can take such action and if he thinks this sufficient to prevent the likelihood of a breach of the peace he can postpone all action under this section. Whether in the midst of S. 145 proceedings he can on making an order under S. 144 drop such proceedings is a difficult question which it is unnecessary to decide. In exercising his discretion the Magistrate will regard as supreme the necessity of maintaining peace. The attempt to classify cases as appropriate to one section or another can be carried only a little way and it is not to be wondered as if decided cases contain little general advice of practical utility. The discretion is to be exercised on the particular facts of each case considered as a whole and by an officer with knowledge of the local conditions." Thus the use of the word 'shall' is mandatory but it is always open to the Magistrate to take other preventive action and thus put an end to the apprehension of a breach of the peace. There are numerous authorities to show that in matters of procedure, mandatory words like 'shall' may be construed as directory; but these authorities have no application to a case where an enactment which creates special jurisdiction provides certain things shall be done before jurisdiction is exercised, 24 M. 364 at 369; See also 7 B. & C. 12; 10 Cr. L.J. 231 at 233; 56 C. 290 (F.B.) at 303-304 where 32 C.W.N. 275=47 C.L.J. 233 is followed. To say that where the claim of one party is *malafide* or is unreasonable the Magistrate cannot act under S. 145 and should act under S. 107 is both bad advice and bad law 56 C. 290 at 306. Unless and until the Court is in a position to say that the party sought to be bound down is clearly in the wrong S. 107, *supra*, should not be resorted to 26 Cr. L.J. 1562=90 Ind. Cas. 442; see also [1922] Pat. 231=23 Cr. L.J. 549, 68 Ind. Cas. 149, where it was laid down that where one party is clearly in the wrong and threatens to disturb the right of another who is in actual possession of the land, this section has no application. In the light of the new sub-section (10) these decisions are no longer law on this point. A Magistrate's order under this section is no bar to his passing an order under S. 107, *supra*, on the same facts where he is satisfied that notwithstanding the order, one of the parties is likely to take the law into his own hands, 36 M. 315. See for a converse case, 39 C. 469. The new amendment gives ample discretion to the Magistrate to proceed either under this section or section 107, *supra*. The words of this section clearly indicate that the Magistrate is to make an order in writing stating the grounds of his being satisfied that a dispute likely

to cause a breach of the peace exists. The reason for this provision is obviously that the parties should know before attending the Court what case they have to meet and sufficiently prepare themselves to put forward their claims respecting the fact of actual possession of the subject of dispute. The powers conferred by this section on Criminal Courts are somewhat of an exceptional character because they enable the Magistrates mentioned herein to partially deal with a matter over which Civil Courts have jurisdiction and therefore the requirements of the section should be strictly followed. A formal order is absolutely necessary to give the Magistrate jurisdiction and any final order passed without first recording a preliminary order is not in accordance with law and will be set aside, 28 Cr. L.J. 685=103 Ind. Cas. 413; 30 C. 443; 32 C. 552; 2 A.L.J. 272; 7 C.W.N. 174; 4 Lah. 66; 26 Cr. L.J. 1177=83 Ind. Cas. 601; 13 Cr. L.J. 296=14 Ind. Cas. 760; 16 Cr. L.J. 628=30 Ind. Cas. 452; 18 Cr. L.J. 633=39 Ind. Cas. 1001; 18 Cr. L.J. 461=39 Ind. Cas. 301; 30 M. 548. But the order need not be self-contained if the police-report on which the order is based is referred to in the order in express terms, 33 C. 352 (F.B.); 36 M. 275; it is sufficient if the order should specify clearly the subject-matter in dispute with reference to which the order is made, 27 A. 296; 30 C. 443; but non specification of the boundaries of the disputed lands will not vitiate the Magistrate's proceedings, 32 A. 132; 5 C.W.N. 563. The preliminary order is to be made by the Magistrates having local jurisdiction over the land etc., the subject of dispute and a District Magistrate by mere transfer of a petition received by him for initiating proceedings cannot confer such jurisdiction but if the District Magistrate makes the preliminary order and then transfers the case to a Subordinate Magistrate for inquiry the latter Magistrate has jurisdiction to dispose of the case in accordance with law 52 M. 241.

Stating the grounds of his being satisfied.—The Magistrate's order must contain a statement of the facts from which he is satisfied of the likelihood of breach of the peace and also should specify clearly the sufficiency of the materials upon which he takes action, 33 C. 33; 24 B. 527; see (1924) Pat. 83 where it was held that a Magistrate would not be justified in acting merely upon the expression of an opinion by the police but must exercise his own judgment upon the materials placed before him. The preliminary order need not be self-contained and where it makes in express terms a reference to a police report or other information on which action is taken, the proceedings are not defective, but validly instituted, 33 C. 352 (F.B.); 36 C. 370; 30 M. 548; 36 M. 275; 24 B. 527; 32 A. 132. If the preliminary order does not clearly state the grounds on which the Magistrate is satisfied as to the likelihood of a breach of the peace his order is materially defective and made without jurisdiction, 4 M L T. 213. There have been in the past conflicting decisions as to whether the omission of the Magistrate to record grounds on which he considers the inquiry should be instituted, results in his subsequent proceedings being void as without jurisdiction. It is only right and proper to avoid hasty action that a Magistrate should be required to state the grounds of his belief as to the necessity for an inquiry. It would *prima facie* appear to be absurd where an inquiry proves that there is a dispute which may lead to bloodshed and where a Magistrate has taken effective steps to prevent temporarily a breach of the peace, that his order should be capable of being set aside thereby reviving the conditions he is specifically ordered to remedy, merely because he omitted to put in writing the grounds which had caused him so to act. The former view of jurisdiction was based on the mistaken interpretation of, 25 M 61 (P.C.). The Privy Council has in 5 Ran. 53 (P.C.) has decided that disobedience of a mandatory and directory order does not, as a general rule, render the proceedings null and void unless it could be proved that injustice had been done to a party as the result of that omission, 5 Ran. 129 at 131. Even when the Magistrate acts on a local inquiry made by himself he must state the grounds of his being satisfied that there is a likelihood of a breach of the peace, 9 C.W.N. 621, 18 Cr. L.J. 156=37 Ind. Cas. 524 but when the Magistrate held a local inquiry in the presence of both parties and satisfied himself that there was a likelihood of a breach of the peace, the omission to state the source of information at the inquiry itself does not vitiate his proceedings, 7 C.W.N. 599; where parties are aware of a dispute likely to cause a breach of the peace the Magistrate is not ousted of his jurisdiction simply because in the notice issued it is not stated that a dispute exists likely to cause a breach of the peace, 16 Cr. L.J. 224=27 Ind. Cas. 848; 33 C.L.J.

69. The object of drawing up a proceeding under sub-section (1) is to inform the parties of the grounds or source of his information which satisfied the Magistrate that a dispute existed, 32 C. 771. The object of setting forth in the order the grounds of his being satisfied is to enable the parties to know what case they have to meet. Where both the parties move the Magistrate to take action and the Magistrate issues a preliminary order without setting forth his reasons in full the parties are prejudiced in many ways, 32 A. 132; see also 15 Cr. L.J. 279=23 Ind. Cas. 437.

Requiring parties concerned in such dispute to attend his Court.—The expression, "parties concerned in such disputes" indicates all persons claiming to be in possession at the date of the preliminary order and not all parties interested in, or claiming a right to the property in dispute; all parties interested in, or claiming right are not entitled to be, and should not be made parties to the proceeding. To require a Magistrate to do so, would be to impose upon him in some cases, an almost impossible task and would undoubtedly have the effect of unduly prolonging and greatly embarrassing the proceedings, and defeating them of their summary character, 30 C. 155 (F.B.) at 196, 28 C. 446; 21 C. 29; 27 C. 892; 6 C.W.N. 101. The words parties concerned in such dispute have been understood as including persons who are interested in or claim a right to the subject of dispute (21 C. 21, 18 M. 51). The course of legal decisions as regards the right of managers to represent their principals in such proceedings shows a curious development. In 21 C. 915 the managers were held to have no interest or possession and this decision was followed in 25 C. 423 and in 31 C. 48 the possession of a manager on behalf of an absentee proprietor was recognised. In 32 C. 287 the fact of a manager being made a party instead of his employer was held to be a mere irregularity even if the master, the Zemindar lived within the Court's jurisdiction. The position of a servant is rather different. He cannot be treated as in actual possession either in his own right or on behalf of another. The possession in such a case must be with his master who entrusted him with the custody of the property in dispute. See 6 C.L.R. 193. If he were dismissed from service the order passed under this section could not be treated as binding on his successor or his master; nor is he a party to be evicted in due course of law by a Civil Court. The section therefore is not intended to apply to servants in the absence of their masters, otherwise it will be possible for an employer to make the order ineffective by changing servants, 18 Cr. L.J. 44=5 L.W. 118=36 Ind. Cas. 876. It is the duty of the Magistrate in the first instance to find out which parties are concerned in the dispute, 5 C.W.N. 900, and a person concerned in the dispute need not actually be present near the land, 20 C.W.N. 978=17 Cr. L.J. 449=36 Ind. Cas. 129. Landlords who set up false tenants as cultivators to oust the real tenants in possession are necessary parties. Undivided brothers of the original party are necessary parties, 3 C.W.N. 329. A reversioner is not a necessary party as he can have no possible right to present possession, 24 A. 439; 27 C. 892. Parties can be added, up to the time of the beginning of the inquiry and if a Magistrate refuses to allow a party to intervene, not on the ground that he has no interest in the subject of dispute, he is acting without jurisdiction. 30 C. 155 (F.B.); 20 C. 867. A third party can come in the course of the proceedings for the purpose of showing that no dispute likely to cause a breach of the peace really existed or exists. It is not clear that the Legislature contemplated that such third party should be made a party to the proceeding, 5 C.W.N. 900 at 903. The language of sub-section (5) also makes this position clear that a third party interested in the dispute is entitled to show that no such dispute as aforesaid exists or has existed. The object of the law is to obtain a settlement of the dispute and if a party is absent, strict proof of service on him is required and it will be better in most cases to order fresh service to secure an effective settlement of the dispute. If a party after due service of notice fails to appear, a warrant cannot be issued to enforce his attendance, 5 C.W.N. 71; 8 C.W.N. 642; 34 C. 840; 12 C.W.N. 771; 30 C. 918. This section contemplates one proceeding against all parties known to be concerned in the dispute so as to conclude the matter definitely and finally, 27 C. 892. The parties whom the Magistrate has to deal with are not merely the actual parties to, but all persons who may be concerned in the dispute, the object being to prevent a breach of the peace. Therefore it is not the actual parties

alone before the Court but all parties who had notice of the proceedings that are bound by the order, 11 Bom. L.R. 377=10 Cr. L.J. 64=2 Ind. Cas. 517. In a dispute between old and new tenants of an estate the receiver who was not in actual possession but who only granted leases to some of the new tenants is not a necessary party, 9 M.L.T. 602; 12 Cr. L.J. 185=9 Ind. Cas. 1009, where 30 C. 593 is *distinguished*. The order should clearly specify the place where the parties are to attend. Where a Magistrate issued an order which did not state the place of trial and he being on tour, a party was not able to be present, the order made by the Magistrate was set aside, 7 C.W.N. 705.

Put in written statements of their respective claims.—Written statements of the parties are merely materials to assist the Magistrate in ascertaining the grounds on which they claim possession. The fact that the written statement of one party is not required to be served upon the other is conclusive to show that its contents, neither found nor limit the jurisdiction. It is the preliminary order which defines the issues to be determined and founds the jurisdiction to determine it and not written statement, 3 L.W. 164 at 167=6 Cr. L. Rev. 15 at 18=16 Cr. L.J. 523=29 Ind. Cas. 541. The allegations in the written statement are required to be proved like any other fact, and so on a written statement alone a Magistrate is not entitled to base an order, 5 C.W.N. 71; 34 C. 840; 8 C.W.N. 642; 12 C.W.N. 771; 30 C. 918; 17 M.L.J. 533; 17 Bom. L.R. 382, but where possession of the opposite party is admitted expressly in the written statement filed, there is duty cast on the Magistrate to take evidence, 7 C.W.N. 331; 9 M.L.T. 91; 1914 M.W.N. 793. When a party fails to appear and file a written statement, the Magistrate cannot when there is evidence, say that he could not decide possession, but he must proceed and come to a conclusion, if possible, 11 W.R. (Cr.) 9.

As respects the fact of actual possession.—The words 'actual possession' require to be heavily underlined. It is the omission to consider the meaning of these words 'actual possession' which has led to the numerous conflicting rulings. Actual possession means actual physical possession, the possession of a person who has, his feet on the land, who is ploughing it, sowing it or growing crops on it entirely irrespective of whether he has any title or right to possess it. Actual possession is not the same as a right to possession nor does it mean lawful or legal possession. If the code has meant legal or lawful possession it would have said so. The very fact that the expression actual possession is used shows that the legislature was contemplating a possession other than lawful or legal. This is clear from sub-section (4) for the Magistrate is not to determine the right to possession. Actual possession is not necessarily lawful possession. It may be the possession of a trespasser without any title whatever and the Magistrate is expressly prohibited from determining whether possession is lawful or not in other words whether the person in possession has any title or right, 55 C. 826 at 834. The Magistrate has no jurisdiction to inquire into the rights of the parties. By his training and experience he will very often be incompetent to decide such a question. All that he is to look into is the fact of actual possession and that too on a particular date, viz., the date of his preliminary order under sub-section (1), 7 C.L.J. 369=15 Cr. L.J. 470; 27 Cr. L.J. 784=96 Ind. Cas. 320; 30 C.W.N. 873=97 Ind. Cas. 78; 33 C.W.N. 574. In proceedings under this section the inquiry is limited to the fact of actual possession of the subject of dispute. In view of the imperative provisions of sub-section (4) the question as to which of the parties has a right to possess the subject of dispute is irrelevant as the proceedings are of a summary nature and initiated to prevent a breach of the peace. The question of title is exclusively within the jurisdiction of the Civil Court, 28 Cr. L.J. 437=101 Ind. Cas. 469; 56 C. 290 (F.B.). See also cases cited under heading sub-section (4) inquiry as to possession at p. 241. Once a trespasser a judgment-debtor in a civil suit who had been dispossessed under the decree of the Civil Court is found to be in actual possession 12 months after delivery of possession by the Civil Court and by the decree holder's neglect to take steps to recover possession from the trespassers possession of the trespasser ought to be maintained and protected by the Magistrate even though he had no right to retain possession, 56 C. 290 (F.B.). This section is concerned solely with actual physical possession, whether lawful or unlawful, whether in contemplation of law enjoyed

by the possessor in his own right or on behalf of others. This seems clearly to follow from the words of the section, 3 L.W. 164 at 167=6 Cr. L. Rev. 15 at 17=16 Cr. L.J. 25=29 Ind. Cas. 54; 27 C. 918; 9 C.W.N. 837; 4 C.W.N. 426; 25 B. 179; 35 C. 375; Weir II, 98; (1926) Pat. 160; 27 Cr. L.J. 764=95 Ind. Cas. 320. By actual possession is meant not merely bodily possession, but also possession of a master by his servant, possession of a landlord by his immediate tenant that is the person who pays rent to him; possession by receipt of rent is actual possession, 11 C. 413; 16 C. 513. 17 M.L.T. 223; 12 M. 88; 1915 M.W.N. 267=17 M.L.T. 225; 16 Cr. L.J. 284; see 16 C. 231 as to possession of forest land. The Magistrate cannot call upon the parties to furnish a statement of their titles. He is not entitled to consider the claims of the parties as regards the right to possess except in so far as it might assist him in determining the *factum of actual possession*, 25 B. 179; 30 C. 153 (F.B.). The Court is to decide the fact of actual possession and that alone, 4 C.L.J. 562; 27 Cr. L.J. 44 (2)=91 Ind. Cas. 76 (2), "actual possession" in dispute between rival landlords need not be taken to exclude possession by receipt of rent and be taken to include possession of a landlord by his immediate tenants, (1915) M.W.N. 267=17 M.L.T. 225=16 Cr. L.J. 284=23 Ind. Cas. 382 where 12 M. 88; 11 C. 413; 15 C. 527; 16 C. 513; Weir. II, 105, are followed and 23 C. 80; 7 C.W.N. 432 are distinguished. A Magistrate cannot go behind the decision of a Civil Court even in a case where the Civil Court had no jurisdiction or in a case where symbolic delivery of possession was made by the Civil Court, 27 C.W.N. 267. It is the duty of the Magistrate to uphold possession given by a Civil Court, so that a person who had obtained a decree declaring his right to possession, and had been put in possession might not find himself again forced to litigate his title, 2 C.L.J. 147. Where in a proceeding under this section a party has once been declared to be in possession of land, no order to the contrary should be passed in a subsequent proceeding under this section concerning the same land unless the Magistrate finds that there has been a change of possession since the passing of the last order, 27 Cr. L.J. 815=93 Ind. Cas. 479. A Magistrate is bound to maintain the party in possession who has obtained a decree and recovered possession in execution of the decree. He is not competent to interfere with the execution of the Civil Court's decree and there would never be an end to litigation if the Magistrate will not keep in force the decision of the Civil Court regarding lands but if a decree-holder after obtaining possession in execution lost possession and the judgment-debtor was found to be in actual possession 12 months after the delivery of possession by the Civil Court, the Magistrate is bound to maintain the possession of the judgment-debtor even though he is only a trespasser, 56 C. 290 (F.B.).

Sub-section (2) ; Land or water.—The expression was formerly *tangible 'immoveable property'* and much difficulty and inconvenience was felt in construing the expression. This sub-section must be read in conjunction with sub-section (1) which deals with land or water and the sub-section purports to give a definition of what land or water is supposed to comprise. No doubt this is a new provision and extends the provisions of the prior Code but clearly the meaning of the sub-section is that the Magistrate has jurisdiction to deal with moveable property which represents the produce of the disputed land if the produce is attached to or the same cut and lying on the land at the time of initiation of proceedings but if removed and wholly disassociated from the land in dispute, then the Magistrate is deprived of jurisdiction to deal with it. Thus when mica is dug and removed to a godown and stored there, that cannot be dealt with by the Magistrate as there is a severance from the land and removal to a godown, 2 Pat. L.J. 637=18 Cr. L.J. 756=51 Ind. Cas. 132. The expression 'land' was held to include a temple, Weir II, 99, 110 and 112; crops, 15 A. 334, rents, 11 C. 413; 15 C. 527; 16 C. 513; 12 M. 88; the expression 'land or water' now includes buildings, markets, fisheries, crops, rents or profits of land. The definition of land is wide enough to cover mining rights, and even prospecting or boring licences, which can only be utilised by going upon the land and exercising some rights relating to it, 21 Cr. L.J. 103=71 Ind. Cas. 236. Proceedings cannot be instituted under this section with respect to moveables, 25 Cr. L.J. 440=77 Ind. Cas. 723. The Madras High Court in Weir II, 103, held that the mere fact that the crops which are the subject of dispute have been removed from the land is not sufficient to oust the jurisdiction of the Magistrate under this section, but in

30 C. 110, it was held that when the crops were severed from the land no action could be taken as the heading of Chap. XII is disputes as to immovable property. This is followed in 29 Cr. L.J. 857=111 Ind. Cas. 441. See also 28 A. 266 where it was held that a Magistrate has no jurisdiction to attach under S. 146, *infra*, a crop of *mohra* no longer growing on the trees. This sub-section seems to enlarge the scope of sub-section (7), for the section refers not only to crops but also to rents and profits of the property and the word 'crops or other produce' in this sub-section is the same as crop or other produce occurring in sub-section (8). Had it been the intention of the Legislature to restrict the meaning of 'crops' in this sub-section to standing crops, the words would have been used. The utility of the section would have been much reduced if a restricted meaning were applied to the word 'crops', in this sub-section, for disputes of this kind usually arise, after the crops are harvested, cut and stored. The principle laid down in cases such as 30 C. 110; 28 A. 266; 27 Cr. L.J. 1363=93 Ind. Cas. 433, would be applied had there been not this sub-section, 28 Cr. L.J. 939=103 Ind. Cas. 813 where *Weir II*, 108; 13 Cr. L.J. 203=14 Ind. Cas. 750 are followed. The new sub-section (8) introduced in 1923 seems to set at rest the conflict of decisions and the early rulings in 30 C. 110 and 28 A. 266 cannot now be considered to be good law. Crops that have been severed from the land are not immovable property at all and a dispute relating to such crops cannot be said to be one relating to immovable property within this section 27 Cr. L.J. 1363=93 Ind. Cas. 433 following 28 A. 266 but see 18 Cr. L.J. 652=40 Ind. Cas. 300, but crops of a disputed land being cut and entrusted with a third party before the initiation of proceedings under this section can validly be ordered to be divided between the parties by the Magistrate when he drops proceedings holding that the parties are in joint possession ousting his jurisdiction to pass an order under this section, 18 Cr. L.J. 616=39 Ind. Cas. 934. Trees severed from the land and lying on the land do not come within the purview of this section, 18 Cr. L.J. 461=39 Ind. Cas. 301. By a private arrangement between dealers in a market a *Chaudri* was appointed to regulate trade and he was to be remunerated by voluntary payments by dealers, such payment having no connection with the ordinary rents and profits of the market, due to the zemindar, in a dispute between the servants of the zemindar and the *Chaudri*, it was held that the dispute did not relate to the profits of the market, and so proceedings under this section could not be taken and the proper course is to proceed under S. 107, *supra*, 36 A. 143. A dispute as to the hereditary right to perform the duties of a *pujari* of an idol in a temple is not a right to the use of land, 37 C. 578; where 29 M. 237 is not followed, 52 C. 959. But the Madras High Court consistently took a different view, 27 M.L.J. 587; 29 M. 237 where 11 M. 323 is followed. But a claim to perform a religious ceremony in a public temple when such claim is the subject of dispute likely to cause a breach of the peace comes within this section, 24 B. 527. The offerings given by the worshippers of a deity for the worship are not profits arising out of a building or the land upon which the deity was installed and the order made under this section that a certain person is in possession of such offerings is one made without jurisdiction, 38 C. 387; 5 Pat. L. J. 246=21 Cr. L.J. 572=57 Ind. Cas. 92. A dispute as to division of offerings made to a deity in a temple by the worshippers is not within this sub-section because it is not profits arising out of land on which the deity is installed. To hold otherwise would be to allow Criminal Courts to interfere with the Customary law of the country. The dispute becomes one relating to moveable property and no declaration can be made under this section, 28 Cr. L.J. 687=103 Ind. Cas. 415 following 37 C. 784 and 38 C. 387. A dispute between two parties as to the collection and distribution of fees paid by pilgrims at *Gaya* for performing *Sradha* although there is a likelihood of a breach of the peace on account of such dispute does not come within this section as such fees can in no sense be said to be profits arising out of land, 3 C.L.J. 137. In 4 Bom. L.R. 433, it was held that a dispute as to the right to take the sandal paste from the decorations of the idol does not come within this section. A dispute as to the right of succession to a *muff* and its appurtenances does not come within the purview of this section, 11 W.R. (Cr.) 23. But a dispute as to the possession of a temple is one regarding immovable property within this section and it could be attached under S. 146, *infra*, *Weir II* 110 and 112. See also 38 C. 337. A right to collect payments for carrying passengers to

and fro a ferry cannot be treated apart from the possession of the lands used on either side of the stream for landing the passengers, and so where the dispute is with regard to a ferry including the land and water on which the right is exercised, the case properly comes within this section, 26 C. 188. The right to use a ferry may come within S. 147, *infra*, 3 C.W.N. 148. A right to tap a tree may be the subject of a proceeding under this section 3 Pat. L.J. 316. A fishery right comes within this section, 35 C. 117. A dispute not relating to the possession of a share in a fishery, but to a share in its profits may be dealt with under this section, 11 C.L.J. 412, but a dispute as to a right of mooring and drying fishing nets claimed by one party on the land of another without any claim to the possession of the land is not within this section but only an easement right falling under S. 147, *infra*, 21 Cr. L.J. 697=57 Ind. Cas. 937. A dispute as to the right to collect rents is a dispute within the operation of this section, (1915) M.W.N. 267=17 M.L.T. 225=16 Cr. L.J. 284=28 Ind. Cas. 322; 11 C. 413; 16 C. 513; 12 M. 83; 18 Cr. L.J. 156=37 Ind. Cas. 524; 15 C. 527. The question for decision in such a case must always be, who was actually collecting rents at the date of the preliminary order, (1915) M.W.N. 267=17 M.L.T. 225=16 Cr. L.J. 284=28 Ind. Cas. 332, but it must relate to the whole property in dispute and a right to collect rent in respect of a share of an undivided joint property does not come within this section, 6 C.W.N. 841; 5 A. 607; 23 C. 80; 36 C. 986. But a dispute regarding the right to collect rent between joint owners governed by Mitakshara Law is within this section and the Magistrate has jurisdiction to appoint a receiver to such joint estate, 27 C. 259, *followed* in (1925) Pat. 142, unless by such right an attempt is made to exclude a sharer from possession and enjoyment of his share. A mere dispute as to the right to collect rent from tenants when there is no dispute either as to the extent of the shares or as to the *factum* of possession is not a dispute as to rents and profits within the meaning of this section, 5 Cr. L.J. 354; see also 19 C.W.N. 959=16 Cr. L.J. 590=30 Ind. Cas. 142. Where the traders in a market owned by a zemindar appoint a *chaudri* to regulate sale etc., agreeing to remunerate him by means of a small contribution for each beast of burden that brought goods to the market and where the servants of the owner object to his collecting the same, the dispute does not relate to a market or its rent within the meaning of this section, 35 A. 143. Where there is no question of shares as between parties to the proceeding and the question of shares arises only at the time of payment of rent this section does apply, 19 C.W.N. 959=30 Ind. Cas. 142. Joint possession is not within the scope of this section, 2 C.L.R. 62; 4 C.W.N. 426; 7 C.W.N. 118; 11 C.W.N. 512; 11 C.L.J. 412; 10 C.W.N. 1088; 40 C. 982. But if it is found that one co-sharer is in actual possession and the other is not, an order may be made under this section, 40 C. 992. No proceeding can be taken under this section to determine the question as to which partner is in exclusive possession of the partnership properties as manager, 32 C. 249; a Manager of a Hindu family is entitled to be protected in his possession by proceedings under this section against the other members of the family, 31 M. 318. In a dispute between two brothers with regard to the possession of certain *sir* land the Magistrate is legally entitled to declare the possession of one brother when on the evidence he finds him to be in actual possession and the fact that the brothers are members of a joint Hindu family is immaterial, 1 Luck. 201.

Sub-section (3) copy of the order shall be served, etc.—The object of this sub-section is to give notice to all persons interested in the subject-matter of dispute so that they can appear in Court at the time of the hearing, 30 C. 155 (F.B.) at 197. A person on whom a preliminary order under sub-section (1) has not been served and who has not been given an opportunity to prove his possession of the subject of dispute cannot be subjected to a final order under this section, 26 Cr. L.J. 1581=90 Ind. Cas. 531. This sub-section is in accordance with the decisions in 20 C. 520 and 513; and follows the suggestions contained in 4 C. 650 and overrules the decision in 24 C. 53. When objection is taken that the order has not been served, the Magistrate ought not to be satisfied by the mere written return of the process-server, but should examine him and allow the party to cross-examine him on this point, 8 C.W.N. 719. This sub-section also lays down that at least one copy of the preliminary order passed under sub-section (1) must be published by affixing it in some conspicuous place at or near the subject of dispute. This is an indication that the binding

character of an order under this section is not under all circumstances to be confined to the persons who were actually made parties to the proceeding, but may, under certain circumstances, extend to persons other than parties themselves. This view has been adopted in 11 Bom. L.R. 377 holding that an order under this section is binding not only on the actual parties to the proceedings but also on those who may have notice of the proceedings, See also 33 C.W.N. 1002 at 1004.

In the manner provided for service of summons.—See Ss. 68 to 72, *supra*. If parties are absent they may be declared *ex parte* after due proof of service of notice on them, 8 C.W.N. 632. Failure to comply with the provisions of this sub-section can be cured by S. 537, *infra*, and will not invalidate the proceedings, 27 Cr. L.J. 680—94 Ind. Cas. 703. See also 30 A. 41; 30 M. 543; 15 Cr. L.J. 279—23 Ind. Cas. 437.

Upon such person or persons as the Magistrate directs.—A Magistrate ought before entering on his inquiry to satisfy himself to the best of his ability on the information before him, as to who are the persons claiming to be in present possession of the subject of dispute, 30 C. 155 (F.B.); 24 C. 55; 21 C. 915; 24 B. 527; 6 C.W.N. 101; 3 C.W.N. 329. Parties concerned in such dispute are not limited to the parties actually concerned in the dispute, but also those persons concerned in the subject-matter of the dispute who would be affected by the Magistrate's order declaring possession, and therefore they must also have notice of the proceedings, 4 C.W.N. 613. The decision in 30 C. 155 (F.B.) is an authority for the view that the question of misjoinder and non-joinder of parties does not ordinarily affect jurisdiction. It is a question of procedure by which jurisdiction is not affected, whether a party has been wrongly included or excluded. The invalidity of proceeding against one member of a party does not necessarily invalidate the whole proceedings, e.g., a minor though interested in the dispute and a proper party may not be an essential party especially as he would not be a likely person to cause a breach of the peace. Thus the proceedings cannot be held to be bad in respect at least of persons who are actually parties and who are not prejudiced, 26 Cr. L.J. 1287—89 Ind. Cas. 151. This section contemplates one proceeding against all parties known to be concerned in the dispute so as to conclude the matter definitely so far as the Criminal Courts are concerned, 27 C. 892. The object of the section being to obtain a settlement of disputes regarding possession of land, as are likely to cause a breach of the peace, any person who is really interested in the subject-matter of the dispute ought not to be left unserved, as this course would operate mischievously on the absent party, as the orders behind the back of such a party would be inoperative, and would tend not to settle disputes, but to a renewal of it in different directions, and between other parties, 4 C.W.N. 753 at 755.

The issue of a warrant to enforce the attendance of an absenting party under this section is illegal as the matter under enquiry under this section is not one relating to the commission of an offence but the settlement of a dispute as to possession and it was entirely optional with the parties or any of them to be present or not, 5 C.W.N. 71.

One copy shall be published.—The object of the publication is to give notice to all parties interested in the subject of dispute, 30 C. 153 (F.B.) at 197 See also 33 C.W.N. 1002. It was once held that the provision herein contained is *mandatory* and the publication is a condition precedent to the exercise of the Magistrate's jurisdiction in an inquiry as to possession, 8 C.W.N. 590; 9 C.W.N. 993; but now see the Full Bench ruling in 33 C. 68, where it was held that the provision was *directory*, and related to a matter of procedure only, and not of jurisdiction and the omission to comply with it does not destroy the jurisdiction of the Court which arises as soon as the preliminary order is passed under sub-section (1). See 30 A. 41 where it was held that such a defect was only an irregularity cured by S. 537, *infra*. See also 30 M. 543; 15 Cr. L.J. 279—23 Ind. Cas. 437. But when a Magistrate did not serve any notice upon a party, and failed also to affix a notice to some conspicuous place at or near the subject of dispute as required by this sub-section and passed a final order without receiving a written statement or recording evidence produced, it was held that the irregularities committed by the Magistrate were so great as to amount to want of jurisdiction justifying interference by the High Court, 35 C. 774.

The use of the word "then" is very significant and makes the publication of the notice under sub-section (3) a condition precedent to the holding of the inquiry as to possession, 33 C. 63 (F.B.)

Sub-section (4), Inquiry as to possession.—The scope of the inquiry under this section is confined strictly to the fact of actual possession irrespective of the merits of the claim of the parties concerned. A claim therefore merely to a right to possession as distinguished from a claim to be in possession would be outside the scope of the inquiry, 30 C. 155 (F.B.); 27 C. 918; 36 C. 83; 49 C. 992; 31 M. 416; Weir II, 48; 21 Cr. L.J. 136=54 Ind. Cas. 616; 6 C.L.J. 182; 7 C.L.J. 369; 25 B. 179; 16 Cr. L.J. 736. The whole scheme of the chapter contemplates an inquiry solely with reference to the fact of actual possession irrespective of title. The mere fact that one party's title has been disproved or that his title as one of the co-owners has been incidentally held to be established in a suit for damages will be of no avail in proceedings under this section. In order that the decree of the Civil Court may be binding on the Magistrate as conclusive evidence of possession, it has to be established that the decree is one for possession of the property in suit and actual possession was obtained in execution of that decree. It is an order for delivery, of possession contained in such a decree that a Magistrate is bound to maintain. Where a Civil Court deals only with the question of title, its decree will not bar a Magistrate from deciding a question of possession under this section. It is no doubt open to the Magistrate to take into consideration evidence of title to enable him to adjudicate on the question of actual possession but neither proof of title nor an adjudication on the question of title in favour of a party constitutes proof of actual possession what the Magistrate has to determine is which of the contending parties was in peaceful possession of the property at the time of his preliminary order. It is quite immaterial whether that possession was lawful or unlawful. The section is concerned with actual possession irrespective of its lawful or unlawful character, 29 Cr. L.J. 902 at 903=111 Ind. Cas. 667. See also 56 C. 220 (F.B.) and 3 L.W. 164=16 Cr. L.J. 523=29 Ind. Cas. 541. In proceedings under this section the Court is asked to say "I cannot look into your title. Possession is now the only question and therefore if your title is not clothed with possession you must go to another Court to establish your title," 5 Moore I.A. 413 at 424. See 7 Moore I.A. 283. A Magistrate's function is merely to go into the question of actual possession and he is precluded from going into the question of title, 28 Cr. L.J. 328=100 Ind. Cas. 712, 28 Cr. L.J. 437=101 Ind. Cas. 469; 27 Cr. L.J. 342=95 Ind. Cas. 320; 21 Cr. L.J. 136=54 Ind. Cas. 616. The words 'without reference to the merits of the claim of any of the parties to a right to possess the subject of the dispute' appear to have been specially inserted to fortify a Magistrate from the temptation to which he would naturally be inclined to yield in a case in which it appeared that a true owner had been dispossessed. The Magistrate is reminded that the object of the section is limited strictly to the prevention of violent self help even by a true owner, where there is no indication that the decision was influenced by any sympathy with the true owner, the order will not be interfered with, 48 Cr. L.J. 858=41 Ind. Cas. 826. See also 56 C. 290 (F.B.) and 55 C. 826. A Magistrate has no jurisdiction to inquire into the rights of the parties as by his training and experience he will very often be incompetent to decide such a question. All that he has to look to is the fact of actual possession and that generally, possession at a particular date, viz., the date of his preliminary order under sub-section (1), 7 C.L.J. 369=7 Cr. L.J. 336; 42 M.L.J. 147; 27 Cr. L.J. 735=95 Ind. Cas. 82, 29 Cr. L.J. 721=110 Ind. Cas. 880. A Magistrate cannot call upon the parties to furnish a statement of their title and he is not at liberty to enter into the merits of their respective claims as regards the right to possess except so far as it might assist him in determining the question of actual possession, 25 B. 179; 30 C. 155 (F.B.); 6 C.L.J. 182; 21 Cr. L.J. 136=54 Ind. Cas. 616; 34 M. 138. Documents of title are often of very great help in arriving at a conclusion upon the question of possession and such documents ought not to be rejected, 19 Cr. L.J. 764=48 Ind. Cas. 604; 23 C.W.N. 910. Where there is a conflict of evidence the Magistrate is justified in looking into evidence of title in corroboration of the evidence as to possession 7 C. 48; 19 Cr. L.J. 717=48 Ind. Cas. 301. This section is concerned solely with the fact of actual physical possession whether lawful or unlawful,

whether in the contemplation of law enjoyed by the possessor in his own right or on behalf of others. Therefore in proceedings under this section any question as to whether possession is on behalf of others or in one's own right is quite irrelevant, 3 L. W. 164 at 167=16 Cr. L.J. 525=29 Ind. Cas. 541; 7 Bom. L.R. 18. Actual possession is to be found by the Magistrate regardless of the symbolical possession given to one of the parties by a Civil Court, 16 Cr. L.J. 736=31 Ind. Cas. 176. Evidence of title is admissible in an inquiry under this section to enable the Court to decide the question of actual possession, but proof of title is not proof of actual possession. If a Magistrate uses evidence of title to supplement the evidence of user by both parties but not establishing exclusive possession by either party, then he is deciding with reference to the claims of the parties to a right to possess the subject of dispute which the Code forbids him from doing, 34 M. 138. If a Magistrate uses evidence of title in order to guide and assist his mind in coming to a decision upon the question of possession, he would not be transgressing the provisions of this section by using the evidence of title for his limited purpose but if instead of proceeding to decide as to the actual possession he virtually puts aside the consideration of this question and determines the question of title alone he is clearly doing that which the law has forbidden him to do, 7 C. 46 at 50 followed in 14 C. 169. See 34 M. 133, which holds that evidence of title is admissible to enable the Court to decide the question of actual possession but proof of title is not proof of actual possession. 15 L.W. 62=(1922) M.W.N. 12; when a Magistrate ignoring the evidence as to actual possession of one party merely gave effect to an order of the Settlement Department, and dealt with the case as if it were a civil suit, framing several issues and discussing them at great length without deciding the *factum* of actual possession, his order was set aside as one passed without jurisdiction, 35 C. 793. Possession under this section must be absolute continuous and not occasional, 49 C. 871, followed in 28 Cr. L.J. 342=100 Ind. Cas. 323. But it is not intended that the possession must be such possession which a party in possession may have occasion to exercise and has exercised and exercises when he likes, continuity of possession must be understood with respect to the object over which it is exercised. A fallow land not yielding much profit but gets covered with water at certain seasons is used at times for storing bricks or for drying jute can be said to be in actual possession of the person who had so used, 28 Cr. L.J. 343=100 Ind. Cas. 823. Possession through the exercise of a right of collecting rents from tenants in possession though not in a juristic point of view of actual possession, is possession within this section, 26 Cr. L.J. 398=84 Ind. Cas. 932. Possession that can be pleaded under this section must be based on a claim of right to possession. Possession of an agent or servant which is permissive cannot give a party to a proceeding a *locus standi* as against his principal or master, 27 Cr. L.J. 212=92 Ind. Cas. 164, where 10 C.W.N. 1083 is followed. In order that the decree of a Civil Court may be binding on the Magistrate as evidence of possession, it has to be established that the decree is one for possession of the subject of dispute and that the decree-holder obtained possession of the subject of dispute through Court in execution of such decree. It is the order for delivery of possession contained in such decree that the Magistrate is bound to maintain. Where the Civil Court decree deals only with the question of proprietorship of land it will not bar the Magistrate from deciding the question of possession under this section 29 Cr. L.J. 902=111 Ind. Cas. 662 following 2 A.L.J. 274=2 Cr. L.J. 236. A Civil Court's decision as to possession is therefore not conclusive but the Magistrate must come to his own conclusion on the evidence on record, 13 Cr. L.J. 663=25 Ind. Cas. 551, but possession can be declared on the admission of a party as to the possession of his opponent, 9 M.L.T. 91=12 Cr. L.J. 47=9 Ind. Cas. 285. A Magistrate cannot refer the question of possession to a Tahsildar for inquiry and on receipt of his report without hearing the evidence himself, pass an order declaring possession, 10 A.L.J. 455=13 Cr. L.J. 777=17 Ind. Cas. 409. See also 17 C.W.N. 144=17 C.L.J. 610=14 Cr. L.J. 40=13 Ind. Cas. 264. As to possession of forest lands, see 18 C. 231.

The power under this section is very much limited and a very exceptional jurisdiction has been conferred on a Magistrate by this section and he must act in strict accordance with statutory provisions; power is given for purposes of preserving the peace and it is only for that purpose where a breach of the peace is imminent he can attach the property in

dispute. Where therefore a Magistrate made an order attaching certain land and arranged for its cultivation to prevent future litigation about the produce, *held*, the Magistrate acted in excess of his powers and his order was set aside, 7 Lah. 134. There is nothing in the Code which directs the Magistrate in the course of his subsequent inquiry to record evidence on the question of the likelihood of a breach of the peace and he confines his inquiry entirely to the question of actual possession and decides the matter accordingly, declaring the possession of the party found to be in possession, 28 Cr. L. J. 847=103 Ind. Cas. 463. A party to a proceeding is not in the position of a plaintiff in a civil suit and has no right to require a decision by the Magistrate upon the question raised by them, 30 C. 112. Elaborate inquiry, framing of issues, etc., is outside the scope of the inquiry, 35 C. 375; 32 C. 1093; 27 C. 918; 17 C.W.N. 144; 18 Cr. L.J. 692; 11 W.R. (Cr.) 35.

Peruse the statements put in.—The allegations in the statement put in by a party require to be proved, and therefore a Magistrate is not competent to pass an order in favour of one party merely on the strength of the written statement filed by him under sub-section (1) of this section, 5 C.W.N. 71; 30 C. 112; 13 Cr. L.J. 296=14 Ind. Cas. 790; an order under this section cannot be based solely on the written statement of one of the parties without any evidence whatever though the other party is absent, 8 C.W.N. 642; but an order made on a perusal of the written statement of the parties that the possession of the first party was that of an agent and the second party the principal was entitled to possession, was upheld by the Madras High Court, (1914) M.W.N. 795. A Magistrate has no jurisdiction to found an order in favour of one party upon the mere absence of the other party on the date fixed for hearing without recording evidence to satisfy himself that the party is entitled to possession, 1929 M.W.N. 708 *following* 8 C.W.N. 642, 6 C.W.N. 925 and 12 C.W.N. 771. It is the duty of the Magistrate to inquire into the question and in the absence of the parties, he would be well advised to abstain from passing any final order, 12 C.W.N. 771. When a party applies for time to file a written statement, it is within the discretion of the Magistrate to grant it or not, 8 C.W.N. 642.

Hear the parties—These words mean, hear the evidence of parties and arguments of counsel or pleaders appearing on their behalf, or arguments addressed by the parties themselves and if the Magistrate refuses to receive arguments he is not complying with the provisions of law which are imperative, 5 Pat. L.J. 246 at 247; 21 Cr. L.J. 672=57 Ind. Cas. 92; 11 C. 762. No order can be passed merely upon a Tahsildar's report without hearing parties and recording their evidence, 10 A.L.J. 465=13 Cr. L.J. 777=17 Ind. Cas. 409. See 7 Pat. 1 as to parties to the proceeding.

Receive all such evidence as may be produced by them respectively.—These words mean that the Magistrate is to receive the evidence produced by the parties one after another. The order in which the evidence is to be received is not dealt with in the section at all and there is nothing to suggest that the second party is to begin, 21 Cr. L.J. 136=53 Ind. Cas. 616. Proceedings under this chapter are summary proceedings of a quasi-civil nature, the object being to prevent a breach of the peace, and no right or title is decided, no one's life or liberty is in question. In recording evidence under this section the Magistrate must follow the instructions of S. 356, *infra*. When the evidence is recorded in the language of the Court in vernacular by a clerk, the Magistrate should make a memorandum of the statement of each witness to strictly comply with the provisions of S. 356 (3) *infra* 29 Cr. L.J. 70=106 Ind. Cas. 582, but the imperative provisions of S. 360, *infra*, have no application and therefore it is not obligatory on the Court to read over the depositions of the witnesses in the presence of the parties or their pleaders, 28 Cr. L.J. 915=86 Ind. Cas. 979. It was held previously that the Magistrate was not bound to summon witnesses at the instance of the parties or to compel their attendance after they have been summoned, but failed to appear, 33 C. 24. But the new sub section (9) provides that the Magistrate may, if he thinks fit, at any stage of the proceeding on the application of either party, issue summons to any witness directing him to attend, or to produce any document or thing. A Magistrate may issue a commission to examine a witness under S. 503 *infra* if he is satisfied that the ends of justice require him to do so 33 C.W.N. 1088. This section does not

specify that the procedure to be followed is either that prescribed for summons-cases or warrant-cases. On the other hand sub-section (4) provides that the Magistrate shall receive all such evidence as may be produced by the disputing parties, consider the effect of such evidence and take such further evidence, if any, as he thinks necessary. The Legislature has deliberately omitted to extend the procedure prescribed in summons cases or warrant-cases to proceedings under this section. This difference is undoubtedly remarkable, and the reason is not difficult to find. This section was intended to provide a speedy remedy for prevention of the breaches of the peace arising from disputes as to immoveable property and the Code contemplates a determination of the question of possession without reference to the merits of the respective claims of the disputing parties to a right to possess the subject-matter in dispute, and the question of possession has to be determined with reference to a specified time. The Legislature could hardly have contemplated an elaborate and protracted investigation, the result of which might, in many cases, be to defeat the very object in view, namely, an effective prevention of a breach of the peace, which might be defeated if the Court could be compelled to summon and re-summer witnesses at the choice of the parties. Having regard to the nature of the question to be determined, the parties ought not to have any difficulty in producing, without the assistance of the Court, evidence which would ordinarily be at their disposal. The Magistrate is given no choice in receiving the evidence produced. From the provisions of the Code it is not obligatory upon the Magistrate to assist the parties to produce their witnesses and they cannot claim as a matter of right that process should be issued by the Court to enable them to bring forward their evidence, 32 C. 1093 at 1099-1107. The Magistrate is therefore bound to receive the evidence produced and he has no jurisdiction to pass an order without recording such evidence, 18 Cr. L.J. 36=36 Ind. Cas. 868; 17 Cr. L.J. 129=33 Ind. Cas. 603. The Magistrate is entitled to declare possession of one of the contending parties after trying the question of possession in Court according to the procedure laid down herein. He cannot act on the statement in the police report before him admitting the possession of one of the parties without instituting proceedings, giving notice to the parties hearing parties what they had to say and receiving the evidence produced by them, 10 Cr. L.J. 6=2 Ind. Cas. 428. After this decision in 32 C. 1093 which is followed in 38 C. 24 little reliance could be placed on the decisions in 30 C. 508; 21 C. 29; 11 C. 762; 18 W.R. (Cr.) 64. But the Magistrate is given a wide discretion to summon witnesses on the application of either party under sub-section (9) which did not exist before, 17 M.L.T. 225=(1915) M.W.N. 267. Moreover on the date originally fixed the Magistrate should take all the evidence that is produced before him, and unless he considers it necessary for good reason to require further evidence, should decide *then and there*, if he can, which of the parties is in actual possession, 17 C.L.J. 610. A Magistrate cannot refuse to examine the witnesses present in Court on behalf of one of the parties, on the ground that sufficient evidence has already been recorded, and the High Court has power to interfere as he acts in contravention of the express terms of sub-section (4), 31 C. 685; but this decision was distinguished in 3 C.L.J. 478=3 Cr. L.J. 423, where it was held that it was not intended in 31 C. 685 to lay down the broad rule that the Magistrate had no discretion but was bound under all circumstances to examine every witness, and if he omitted to do so, he acted without jurisdiction; and he has a discretion in the circumstances of each particular case. The view taken in 29 M. 561 is somewhat different. There, one party wanted to produce evidence to show that there was no dispute likely to cause a breach of the peace so that the preliminary order under sub-section (1) might be cancelled under sub-section (5). The Magistrate refused to receive the evidence tendered and the High Court held that the refusal to receive the evidence gave the High Court no option but to declare that the Magistrate's order was one passed without jurisdiction and set it aside. See 11 A.L.J. 586; 15 Cr. L.J. 470=24 Ind. Cas. 350. If the party does not choose to appear and examine his witnesses the Magistrate is not bound to examine them himself, assuming that they were present, 4 Cr. L. Rev. 253. This section directs the Magistrate to receive the evidence produced by the parties and on a consideration thereof to come to a decision and therefore the question as to who is in actual possession should not be delegated to arbitrators even by the consent of the parties, 32 C. 552. Where at the instance of the parties arbitrators are appointed to settle the question of possession and the Magistrate passed final orders taking into consideration the finding arrived at by the arbi-

trators, it was held that proceedings were legally terminated, 7 C.W.N. 461. The Magistrate who is to pass an order under this section after applying his judicial mind to the facts of the case and to the evidence adduced by the parties, cannot divest himself of the case by delegating the decision to arbitrators even though they were appointed by the consent of the parties; to accept their award as the sole basis of the decision is to substitute the mind of the arbitrators for the mind of the Court and that is where the refusal to exercise jurisdiction arises. A Court has always power to direct inquiries, call for reports and may take such reports into consideration but an arbitration is a different matter altogether for the Court there accepts the award of arbitrators as the final pronouncement upon the facts. Looked at in this light, the award was entirely without jurisdiction and its acceptance by the Magistrate as the only basis for his decision constitutes a refusal to exercise jurisdiction, 18 Cr. L.J. 685=1917 Pat. 251=40 Ind. Cas. 333 following 7 C.W.N. 461; 32 C. 552; 17 Cr. L.J. 369=1 Pat. L.J. 333=35 Ind. Cas. 801. See 18 Cr. L.J. 145=2 Pat. L.J. 86. If the parties express a desire to settle their dispute by reference to arbitration, the proper course for the Magistrate seems to be to stay further proceedings on the ground that there was no longer any dispute likely to cause a breach of the peace, 30 C 1084. The scheme of the section is against the view that a reference to arbitration and the award thereon can be made the basis of an order declaring possession. A compromise can only be taken as evidence for an order under sub-section (5), that there was no longer any dispute likely to cause a breach of the peace and cannot possibly be made the basis of an order under sub-section (6) declaring possession, 3 Pat. 288; 32 C 552. When a dispute was referred to arbitration, and the trying Magistrate recorded an order, "further proceedings are unnecessary and they are therefore stayed," but the arbitration having failed, the Magistrate nearly two years later purported to revive the proceedings and called upon the parties to appear with evidence, held that the Magistrate acted without jurisdiction as his previous order was in terms one under sub-section (5) and directly it was passed he was *functus officio*, and fresh proceedings should be drawn up only on the basis of the then existing circumstances and not on what existed two years previously and that it should not be assumed that the causes which existed previously still continued to exist, 15 C.W.N. 271. Where a Magistrate decided the question of possession upon the evidence not taken by himself but taken by his predecessor, his proceedings are not bad, as S. 350, *infra*, governs such a case since proceedings under this section is only an inquiry within S. 4 (1) (b), *supra*, and not a trial 13 C.W.N. 420; 22 C. 893; See also 25 Cr. L.J. 82=76 Ind. Cas. 25, where it was held that a Magistrate has jurisdiction to decide a case under this section upon evidence partly recorded by himself and partly by his predecessor even though a party demanded a *de novo* hearing. The rulings in 4 M.H.C.R. Appx. 20; Weir II, 97, are no longer law. Where a Magistrate without examining witnesses on either side though one of the parties was present in Court, passed an order relying on the documents filed before him, the latest of which was ten years old, it was held that he ought not to have exercised his jurisdiction unless and until he had sufficient evidence before him and that he was bound to take such further evidence as became necessary after consideration of the document, 18 C.W.N. 700=19 C.L.J. 355. Where a Magistrate without recording evidence as required by sub-section (4) based his decision on evidence recorded by a Subordinate Magistrate at the local inquiry, it was held that the order was one made without jurisdiction and the High Court in setting aside the order directed the Magistrate to take the case again on file, and hold a fresh inquiry, 31 M. 82; a Magistrate may depute a Subordinate Magistrate to hold a local inquiry and on receipt of the report of such Magistrate, he should himself receive the evidence produced by the parties and himself conclude the inquiry under this section, Weir II, 118; and he cannot act merely on such report and pass an order without recording evidence himself, 10 A.L.J. 465; 13 Cr. L.J. 777=17 Ind. Cas. 409 where an order was made on local inspection and inquiry from persons present at the time without taking any evidence in the case the order was set aside as one made without jurisdiction, 46 C. 1056; 38 M.L.J. 73=11 L.W. 285; 4 C.W.N. 779; 13 Cr. L.J. 296=14 Ind. Cas. 760.

If possible decide which party at the date of his order was in such possession.—The words 'If...possible decide' are very significant. The Magistrate is not

bound to come to a decision. In cases falling under this section "the tribunal trying the case is not under the necessity which a Court trying a civil case or ordinary criminal case is under, of coming to a conclusion at all. The Legislature contemplates circumstances in which it may be desirable for such a tribunal as that of a Deputy Magistrate, presumably unacquainted with the conduct of civil proceedings, being strictly a criminal tribunal, to say that the facts of the case do not enable him to come to a conclusion and looking at the circumstances of the case and the conflicting nature of the evidence and the various other circumstances which were before the Magistrate, the wise and proper course for him to have adopted would have been to have accepted the liberty which the Code gave him of not coming to a conclusion as to the fact of possession and to have passed an order under S. 146," 13 C. 361 at 364. A compromise cannot possibly be made the basis of an order declaring possession, 3 Pat. 283. The crucial question to be decided is which party was in actual possession at the date of the preliminary order and not who has the right to such possession, 27 Cr. L.J. 44=91 Ind. Cas. 76; 16 Cr. L.J. 239=27 Ind. Cas. 911; 28 Cr. L.J. 328=103 Ind. Cas. 712; 28 Cr. L.J. 929=105 Ind. Cas. 449. The date of the order under sub-section (1) is taken as the critical date for the purpose of determining possession and the question of possession is to be decided on evidence taken by the Magistrate. Where a Magistrate discarded the evidence on record as unreliable, and decided the case upon what he saw and heard and inferred at a local inquiry held by himself, it was held that the Magistrate acted with material irregularity in his jurisdiction and his final order was bad, 10 C.W.N. 181; 7 Cr. L. Rev. 443. A final order should embody a clear finding as to possession at the date of the preliminary order. It cannot go beyond the preliminary order and include property not referred to in the preliminary order, 3 Pat. 238; 28 Cr. L.J. 929 at 931=103 Ind. Cas. 449, nor can the Magistrate, in his final order decide the mode of possession or how the possession is to be exercised. He has jurisdiction only to declare by his final order which party was in actual possession at the date of his preliminary order, 30 C.W.N. 873=97 Ind. Cas. 73. It is not enough to find possession a year before that date, 9 Cr. L.J. 505=2 Ind. Cas. 159; see also 1 L.W. 939=15 Cr. L.J. 703=26 Ind. Cas. 156; 16 Cr. L.J. 239=27 Ind. Cas. 911. The word 'such possession' must relate back to sub-section (1) which lays down the conditions under which action should be taken, 27 M.L.J. 169 at 170=15 Cr. L.J. 572=25 Ind. Cas. 323. The words 'such possession' obviously refer to actual possession referred to in sub-section (1). Actual possession means actual physical possession, the possession of the person who has his feet on the land, who is ploughing it, sowing it, growing crops on it, entirely irrespective of title, 55 C. 826. A Magistrate also cannot summarily deal with the matter after a mere inspection of the locality, 4 C.W.N. 779; 38 M.L.J. 73=11 L.W. 285, nor can he pass an order against a party who is absent without recording some evidence, 6 C.W.N. 924; 6 M.L.T. 91=10 Cr. L.J. 6=21 Ind. Cas. 423; 7 C.W.N. 351; 8 C.W.N. 642, but a Magistrate can pass an order without making any inquiry when the party against whom the order is made admits the possession of the opposite party, 9 M.L.T. 91. The police report on which proceedings are initiated and the evidence contained therein on the *factum* of possession are not legally admissible as evidence for any purpose at the inquiry by the Magistrate and cannot be taken into consideration for finding actual possession, 21 Cr. L.J. 737=58 Ind. Cas. 231. So also the Magistrate cannot pass an order on the agreement of the parties to have the case decided on documents alone without adducing oral evidence as to actual possession, 24 Cr. L.J. 279=71 Ind. Cas. 993. The Magistrate cannot go behind the decision of the Civil Court in the matter between the parties, 37 C.L.J. 256; 22 C.W.N. 479; 29 C. 208; 6 C. 835; 17 A.L.J. 434; 32 C. 798; 5 Pat. L.J. 104; 27 Cr. L.J. 43=91 Ind. Cas. 73. The Civil and Criminal Courts are but the products of the same legislature, and to permit the proceedings of Civil Courts is to attribute an inconsistency to the legislature, and to assume against it an intention to create a conflict where harmony is to be presumed, 56 C. 290 (F.B.) at 361. 'If we are to administer justice as a civilized country, if we are to avoid those conflicts between Civil and Criminal Courts which ordinarily must be fraught with evil and can produce no good if, in short, we are to make the actual administration of justice in this country bear a proper relation to that which we profess it to be, then we cannot have Criminal Courts trying over again matters which have been thoroughly dealt with and finally

decided by a Court of competent jurisdiction. It may be that to this principle there would be rare exceptions founded on, possibly, the discovery of new, cogent and important evidence. But ordinarily that principle must prevail, then it is a matter of first importance, of the very highest relevancy to show to a Criminal Court that the matter which the Criminal Court is asked to adjudicate or has already been fully dealt with by a Civil Court,' 41 B. 1 at p. 45 followed in 56 C. 290 (F.B.) at 361. See also 18 Cr. L.J. 301=38 Ind. Cas. 333. If the plea of a party who was defeated in the Civil Court and ousted from possession is that in spite of the delivery of possession by the Civil Court, he still continued to be in possession or he was in possession in defiance of the Civil Court, no court of law will listen to such a plea. In other words in the eye of law and for purposes of this section such possession cannot be recognized at all, 56 C. 290, but where a judgment-debtor is found to be in actual possession, some 12 months afterwards notwithstanding the delivery of possession by the Civil Court to the decree holder and the decree-holder/purchaser had not taken appropriate steps in proper time against the trespasser the judgment-debtor, and the decree-holder seeks to take possession without having recourse to law and a breach of the peace is likely, such decree holder cannot complain if the Magistrate declares the possession of the trespasser who is found to be in actual possession and the Magistrate by so declaring possession acts within his jurisdiction, 53 C. 233 (F.B.). See also 53 C. 826 where it was held that the Magistrate is not bound to maintain the decree of the Civil Court in favour of a party blindly if after the passing of the decree he finds in the evidence that possession had been disturbed or it had changed hands but if the decree is recent and no disturbance of possession or change of possession is proved, the Magistrate is bound to respect the decree of the Civil Court and declare possession in accordance with it. The Civil Court's decree to be binding must be recent, 26 C. 625; 33 C. 33; 32 C. 796; 29 C. 208; 22 C.W.N. 479; 18 C.W.N. 700; 8 C.W.N. 719; 2 C.L.J. 147; but the question of possession must have been directly in issue, 1914 M.W.N. 798; 15 Cr. L.J. 663; 17 A.L.J. 431; 4 C. 378; 5 C.W.N. 563; 2 A.L.J. 274. The Magistrate should accept the finding of the Civil Court as to possession and boundaries of properties in dispute, 6 N.W.N. 181; 8=C.W.N. 845, 23 C. 208; 26 C. 625. An order made without a judicial determination of the fact of possession is illegal. As to the question of possession the law contemplates not the opinions of Magistrates on such questions but their *judicial decisions* arrived at on proper materials in regular proceedings, 2 C.L.J. 853; it is the duty of the Magistrate under this section to complete the inquiry after he had passed a preliminary order, 24 Cr. L.J. 64=71 Ind. Cas. 112, where a Magistrate found that the evidence as to possession was equally unreliable but declared possession of one of the parties relying on the presumption as to possession arising on title, it was held that the order was bad and he was directed to proceed under S. 146, *infra*, 24 Cr. L.J. 141=71 Ind. Cas. 365. Where an order is passed after due inquiry against a party, that party cannot by merely transferring the subject of dispute evade the binding character of the final order of the Magistrate and the Magistrate was not entitled to initiate fresh proceedings on the application of a transferee but must maintain the possession of the party previously declared by him to be in possession, 37 C.L.J. 39; 27 C.W.N. 171. In the absence of any other evidence of possession a Magistrate would be justified in finding possession to be with a person to whom symbolical possession is shown to have been given in execution of a decree of Civil Court, 14 C. 162. A presumption as to possession may in certain cases be legitimately be drawn in favour of a person whose name is recorded as in actual possession in the register kept under the Land Regulation Act, 21 Cr. L.J. 785=33 Ind. Cas. 513. Where there was no actual or symbolical delivery of possession, mere certificate holder's possession cannot be declared, 31 M. 416. Possession that can be pleaded and found under this section must be based on a claim of right to possession. Possession of an agent or a servant which is permissive cannot give a party to a proceeding a *locus standi* as against his principal or master, 27 Cr. L.J. 212=92 Ind. Cas. 164 where 10 C.W.N. 1033 is followed. Possession through the exercise of a right of collecting rent from tenants in possession though not in a juristic point of view of actual possession, is possession within the meaning of this section, 28 Cr. L.J. 338=84 Ind. Cas. 912; 17 M.L.T. 225; 12 M. 85; 11 C. 413; 16 C. 513; 16 Cr. L.J. 234. In passing the final order, the Magistrate should write out a judgment showing that he has duly considered the contentions

of the parties and the evidence adduced before him and give reasons for his order, 23 L.W. 664; 55 M.L.J. 693=1928 M.W.N. 921=43 M.L.J. 56.

At the date of the order before mentioned.—The crucial question for decision is actual possession *at the date of the preliminary order*, 27 Cr. L.J. 44=91 Ind. Cas. 56; 15 Cr. L.J. 708=1 L.W. 939=26 Ind. Cas. 156; 16 Cr. L.J. 239; 28 Cr. L.J. 929 at 931=105 Ind. Cas. 449; 28 Cr. L.J. 328; 10 Cr. L.J. 712; 16 Ind. Cas. 239; 17 Ind. Cas. 217. The time of possession which the Magistrate has to find is the date of the preliminary order, passed by him under sub-section (1) initiating proceedings. He cannot treat a subsequent proceeding as a continuation of the earlier one and cannot refer back to the possession held by one or other parties upon the date of the earlier proceeding in determining which of them should be declared to be in possession on the date of the subsequent proceeding, 5 C.W.N. 900; 18 C.W.N. 700; 27 Cr. L.J. 471=93 Ind. Cas. 695.

In such possession.—The words 'such possession' obviously refer to actual possession mentioned in sub-section (1), *supra*. Actual possession means actual physical possession, i.e., it means the possession of the person who has feet on the land, who is ploughing, it, sowing or growing crops on it irrespective of title to the land, 55 C. 826. When the Magistrate failed to decide which party was in actual possession at the date of his preliminary order, there is abundant authority for the position that the High Court can interfere in revision on the ground that he acted without jurisdiction, 45 M.L.J. 56 at 59 following 16 Cr. L.J. 239; 7 Cr. L. Rev. 430; 27 Ind. Cas. 911=18 M. 41. See also 15 Cr. L.J. 703=1 L.W. 933=25 Ind. Cas. 153; 9 Cr. L.J. 505. But the party in whose favour the final order is passed was found in possession 5 days before the date of the preliminary order that there was nothing on record to suggest that there was any change of possession during the short interval, it was held that the case was not a fit one for interference in revision even though the order in question was irregular, 42 M.L.J. 147. See also in this connection 5 L.W. 165=18 Cr. L.J. 23=36 Ind. Cas. 855.

First proviso to sub-section (4).—This proviso has been enacted practically to give the Magistrate a margin of 2 months' time to come to a decision on the question of possession, whether the case is a fit one for the issue of a preliminary order by limiting the order for want of possession to only 2 months next before the date of the preliminary order. It has thus imposed on the Magistrate a very great responsibility of being alert, active and prompt or how he is going to prevent a breach of the peace. If he delays, then, he is sure indirectly to deprive the party admitting dispossession, of a benefit of a presumed continuity of his possession after the lapse of that period from the date of his admitted dispossession, which the law declares him to be entitled to under this proviso, 23 Cr. L.J. 929 at 931=103 Ind. Cas. 449. It is incumbent on the Magistrate to find possession on the date of his preliminary order and the proviso only applies if there is forcible and wrongful dispossession within two months thereof, 3 Pat. 288; 32 C. 1093; 33 C. 33; 19 Cr. L.J. 977, 16 Cr. L.J. 239; 25 B. 179; 21 C. 404. If a party is out of possession more than two months previous to the preliminary order no presumption under this proviso will arise, 27 Cr. L.J. 68=91 Ind. Cas. 244; 27 Cr. L.J. 471=93 Ind. Cas. 695. The proposition that a party taking possession by force must be retained in possession if owing to delay, after the dispossessed party has asked the Court to take action, on the part of the Court taking action, over two months, have elapsed before the Court finally makes up its mind to issue a preliminary order cannot be accepted and the High Court will not interfere in revision on behalf of such a party who had dispossessed the other since clearly no injustice has been done, 28 Cr. L.J. 782=104 Ind. Cas. 110. A reasonable interpretation ought to be placed on this proviso and not a literal interpretation which would defeat the very object of sub-section (4) which relates to dispossession of immoveable property. Though the words of the proviso are capable of the interpretation that forcible dispossession must be within two months of the order yet the intent and object of the section must be taken into consideration before a literal interpretation is put upon it. When a person forcibly dispossessed complains to a Magistrate immediately and if for no reason or fault of his the Magistrate not making a preliminary order at once but delays in passing the order, the party complaining of dispossession should not be deprived of the benefit of the proviso by reason

of the delay of the Court. 52 M 66 following the earlier decision in 28 Cr. L. J. 782=104 Ind. Cas 110 A party who obtained dispossession more than 2 months next before the date of the preliminary order and retaining such possession by virtue of an order under S. 144, *supra*, restraining the opposite party from entering on the disputed land should be declared to be entitled to possession thereof until evicted in due course of law and the period during which the injunction order under S. 144 was in force cannot be deducted, 18 Cr. L.J. 301=38 Ind. Cas 333. As the law stands at present, the date of the order under sub section (1) of this section is taken as the critical date for the purpose of determining actual possession. This appears to give unfair advantage to a person who has forcibly dispossessed another. But difficulties arise when the test of actual possession at the time of the institution of proceedings is departed from. We think that the proviso we have added to sub-section (4) as far as possible will meet the evil in question without involving the Magistrate in an inquiry into title or right to possession which is the function of a Civil Court"—*Report of the Select Committee*. The possession of the party forcibly and wrongfully dispossessed must be deemed to continue. The scheme of the inquiry is retrospective and not prospective, 3 Pat. 288. The dispossession herein contemplated must be a forcible and wrongful dispossession and not necessarily forcible dispossession. The proviso does not apply to a case of a peaceful dispossession though wrongful. Where the tenants of a landlord refused to pay rent to him but willingly paid it to another, the landlord cannot be said to have been forcibly and wrongfully dispossessed within this sub-section, 28 Cr. L.J. 437=101 Ind. Cas 469. Where a party having no title to land is ousted therefrom by means of removing the things he had put on the land by the lawful owner without the use of any physical violence, it cannot be held that there was any forcible and wrongful dispossession within the meaning of this sub-section, 44 C.L.J. 593=28 Cr. L.J. 210=98 Ind. Cas. 101. Where a landlord takes possession of an abandoned holding complying duly with the provisions of the Tenancy Act, it cannot be said that there was any forcible and wrongful dispossession entitling the tenants to oust him from possession, 31 C.W.N 242=28 Cr. L.J. 245=99 Ind. Cas. 117. Once a trespass by a judgment-debtor who was ousted by a decree of the Civil Court has ripened into possession recognized by law, it is the duty of the Magistrate to maintain and protect his possession, leaving the opposite party to seek his proper legal remedy, 56 C. 290 (F.B.). Possession delivered under a decree of a Civil Court will not be a dispossession of that character, 23 Cr. L.J. 379=67 Ind. Cas. 203. Under this section even if a party is wrongfully dispossessed action cannot be taken unless such dispossession was also forcible. The dispossession must be forcible and wrongful, 26 Cr. L.J. 263=84 Ind. Cas. 332; 3 Pat 809. The distinction drawn is between forcible entries which are rightful and forcible entries which are wrongful—and that depends on whether the person entering was entitled to use force and not merely whether he has a legal right to possession. If for instance a landlord came armed with a writ or a warrant in his favour to eject his former tenant then although force might in the end be used, it will not be a wrongful dispossession. If, on the other hand, he took the law into his own hands and used force without any such legal sanction then that would be forcible and wrongful dispossession of the tenant. The word, "wrongful" means no more than "otherwise than in due course of law" Possession taken by show of force is forcible dispossession, 27 Bom. L.R. 1333=27 Cr. L.J. 661 (2)=94 Ind. Cas. 709 (2); see 22 C. 297, where it was pointed out that to hold that the Magistrate is precluded from inquiring into anything before the date when he actually commenced his own proceedings might in some cases lead to a person who has been acting in an unwarranted manner misusing the process of the law to enable him to carry out a high-handed and improper scheme which could never have been the intention of the Legislature. The jurisdiction of a Magistrate to initiate proceedings under this section is not determined by the date of dispossession of one of the parties claiming the land. It is determined by an apprehension based on reliable information that a dispute likely to cause a breach of the peace exists between two parties concerning some land. This proviso merely recites a circumstance under which presumption of possession may be made in favour of one of the disputants. Where the Magistrate has failed to record a finding but made general observations as to the ownership of the property in dispute, the order is not one made in accordance with law, and the High Court is justified in

setting aside the order, 24 Cr. L.J. 156=71 Ind. Cas. 508; 7 Cr. L. Rev. 448. Forcible dispossession within 2 months of the preliminary order constitutes one of many possible circumstances under which the presumption can be made. It does not deprive the Magistrate from deciding the question of actual possession on other grounds also. In any case a Magistrate does not act without jurisdiction if he decides the question of actual possession on grounds other than the presumption referred to in this proviso, 11 A.L.J. 305 at 308=14 Cr. L.J. 223=19 Ind. Cas. 319; where two months elapse after the death of the person in possession there is no forcible dispossession within two months, 23 C.W.N. 978=17 Cr. L.J. 443=36 Ind. Cas. 123; 16 Cr. L.J. 284, possession obtained subsequent to the initiation of proceedings is of no avail 27 C. 253; 15 C. 527; 12 C. 539; so also possession three months anterior to the preliminary order 16 C. 513; 16 Cr. L.J. 239, when during a local inspection one party alleges forcible dispossession by the opposite party on the day of the inspection, the Magistrate is bound to inquire into the truth of the allegation before declaring the possession, 8 Lah. 156. The law does not allow delegation of jurisdiction of the Court to arbitrators. The utmost the code allows is that the court may direct a local inspection and inquiry and bring on record the report submitted as evidence, 3 Pat. 233.

Second proviso to sub-section (4).—Power to attach given to the Magistrate by this proviso is quite different from that given by S 146, *infra*. The power under this proviso is to be exercised in cases of emergency before holding an inquiry regarding possession, while S. 146, *infra*, authorizes attachment only after the conclusion of the inquiry, and if the Magistrate decided that none of the parties was in actual possession or is unable to satisfy himself as to which of them was in actual possession at the date of his preliminary order, (1910) M.W.N. 821=8 M.L.T. 314. It is not obligatory on a Magistrate to attach the subject of dispute when he is unable to decide which party was in possession; the proper course in such a case is to follow the procedure in S. 146, *infra*, and attach, but, if a Magistrate fully conscious of the powers vested in him declined to follow it, the High Court should not interfere with his discretion in revision, 6 Cr. L. Rev. 236. In cases of emergency a Magistrate has power under this section to attach the subject of dispute. When after receiving evidence the Magistrate finds there is no danger of a breach of the peace he has no jurisdiction to direct the attached property to remain in Court custody pending the decision of a competent Court on the question of title, 26 Cr. L.J. 1378=85 Ind. Cas. 514. Where the Hindus of a certain locality were using a well and the Mahomedans of the locality moved the Magistrate who initiated proceedings and ultimately not being satisfied that either party was in exclusive possession attached the well, it was held that the attachment was not justified as the only question before the Magistrate was whether the Mahomedans also were entitled to use the well and therefore the Magistrate had no power to prevent the Hindus from using the well, 23 A. L.J. 41. A receiver cannot be appointed when the Magistrate acts under this proviso as he could do when acting under S 146, *infra*, (1910) M.W.N. 821=8 M.L.T. 314, followed in 26 Cr. L.J. 1378=85 Ind. Cas. 514, under this section a Magistrate has in cases of emergency power to attach the subject of dispute but he has no power to appoint a receiver at that stage. The object of the section is that the Magistrate is to confirm the party in actual possession and he is not competent to dispossess such party by appointing a receiver and the order of attachment can have no greater force than any Civil Court attachment which has the effect of preventing alienation. A receiver can be appointed only after investigation under the powers given under S. 146 *infra* and any order under this section appointing a receiver is *ultra vires*, 3 Lat. L.J. 147=19 Cr. L.J. 24=44 Ind. Cas. 41 followed in 30 Cr. L.J. 411=115 Ind. Cas. 29; 26 C. 625; 1922 M.W.N. 512=16 L.W. 452=23 Cr. L.J. 633=63 Ind. Cas. 369. The appointment of a receiver is not prohibited by this proviso, but he has not and cannot exercise all the powers of one appointed under S 146, *infra*. A receiver appointed under this proviso must be treated only as an agent or servant of the Magistrate whose order is only an administrative order passed for the management of the property, 13 Cr. L.J. 255=14 Ind. Cas. 752. This view receives support from sub section (1) newly added. It is competent to a Magistrate under this proviso to order the attachment not only of the land about the possession of which there is a dispute but also of the crops harvested and rents received since the beginning of the disturbance, 13 Cr. L.J. 255=14 Ind. Cas. 759. An elephant cannot be attached under this

of land refuse to allow a tenant of the land an opportunity to show that there was no dispute likely to cause a breach of the peace, 37 C. 283. Proceedings under this section should terminate in one or other of the ways contemplated by law and it is improper for the Magistrate to stop proceedings by recording an order "*parties absent, case filed*," 6 C.W.N. 523; 20 Cr. L.J. 464=51 Ind. Cas. 352. Where both the parties admitted that there was no likelihood of a breach of the peace, the Magistrate is not bound to enquire into the matter, 33 C.L.J. 69, where there is undeniable evidence that the parties have compromised and settled their dispute, the compromise may be taken as evidence to drop proceedings under this sub-section, 3 Fac. 233, and where he finds that there is no likelihood of a breach of the peace and refuse to take action he cannot direct the proceeds of the sale of attached crops to be handed over to one of the parties, 17 L.W. 421. When proceedings started with regard to a dispute to a ferry was stayed owing to the parties referring their differences to arbitration and the Magistrate passed an order "*further proceedings are unnecessary and they are therefore stayed*," held that the order was one in terms of this sub-section and directly it was passed, the Magistrate ceased to have jurisdiction. When once proceedings are cancelled under this sub-section the Magistrate has no jurisdiction to allow one of the parties to reap the crops to the exclusion of the other, 3 C.L.J. 573=3 Cr. L.J. 466. Any party interested may intervene under this sub-section for the purpose of showing that no such dispute likely to cause a breach of the peace concerning any land exists or has existed but he cannot become nor can he be made a party to the dispute, 30 C. 155; 3 C.W.N. 323; 5 C.W.N. 900. A Magistrate has jurisdiction to cancel the order of his predecessor made under sub-section (1) and stay proceedings under this sub-section and also to order the restitution of property attached and placed in the hands of a receiver Weir II, 103. When a Magistrate cancels his preliminary order under this sub-section on the ground that a dispute likely to cause a breach of the peace no longer existed whatever be the source of his information, the High Court has no power to interfere in revision with the order of the Magistrate, 30 C. 112; 47 M. 713; 47 M.L.J. 784=22 L.W. 524=(1525) M.W.N. 732. Nor can a District Magistrate, revise an order once cancelled by a Subordinate Magistrate under this sub-section, 20 C. 729, but a District Magistrate may initiate proceeding under this section independently, 23 C. 242. A Magistrate is not entitled to strike off proceedings under this section. There must be some evidence before him that there is no apprehension of a breach of the peace and in that case only he is entitled to drop proceedings 26 Cr. L.J. 105=33 Ind. Cas. 665; 3 Fac. 288. To stop proceedings (1) a party may disclaim the lands in dispute thereby showing no likelihood of a breach of the peace and no necessity to continue the inquiry, (2) one of the parties may show that title to the disputed land is already before the Civil Court and so there is no necessity for putting the parties to expense and trouble by continuing the proceedings. A decision arrived at incidentally by a criminal or even by a Civil Court is of no avail to stop proceedings, 26 Cr. L.J. 870=86 Ind. Cas. 806. When a Magistrate drops proceedings under this section, the sale proceeds of the crops on the land deposited in Court may be ordered to be restored to the persons who raise them. But it is also proper to order that deposits made in Courts may be kept in Court, until one party or other obtains an order from a Civil Court, 47 M. 713; 20 L.W. 124; 17 L.W. 429; 1 L.W. 1032; 16 Cr. L.J. 103=27 Ind. Cas. 152. But in 45 M. 232 it was held that it was not right for the Magistrate after having dropped proceedings under this sub-section to make any further order in the matter. He must leave the parties to settle their rights in the manner they think best, meanwhile holding his hands and the money realised by the sale of the crops will have to be kept in Court deposit and not handed over to any party until a decree of the Civil Court is produced entitling to receive the same. After cancelling the order the Magistrate cannot attach the subject of dispute, 5 Cr. L.J. Rev. 402. See also 20 C. 867 and 6 C.W.N. 923. Where it was held that once proceedings have been dropped, fresh proceedings can be initiated on fresh materials on record.

Any person interested.—These words are important. A third party can intervene and satisfy a Magistrate that no dispute likely to cause a breach of the peace exists or existed. Such a person joins the proceedings to bring the proceedings to a determination, 30 C. 155; 5 C.W.N. 329. But it is doubtful whether such party can appear to prove his

own possession under sub-section (1) or (4) as he does not become a party to the proceedings. Where proceedings were drawn up under this section with regard to a plot of land, a person who is a tenant of a part of the property in dispute ought to be allowed an opportunity to show that there is no dispute likely to cause a breach of the peace, 11 C.L.J. 414.

Sub-section (6).—This sub-section and form No. 22 of Sch. V of the Code permit a Magistrate to give directions as to possession with a legal effect that it is valid until actually evicted or ousted in due course of law and not merely until the institution of a civil suit for determining the legal rights to the property in dispute, 27 Bom. L.R. 1353=27 Cr. L.J. 661 (2); 94 Ind. Cas. 709 (2). By the addition newly made to this sub-section power has been expressly given to the Magistrate to restore to possession a party forcibly and wrongfully dispossessed. "The object of the section is to enable a Magistrate to intervene and to pass a temporary order in regard to the possession of the property in dispute, to have effect until the actual right of one of the parties has been determined by any competent Court. It is consequently his duty when that right has been declared within a time not remote from his taking proceedings under this section to maintain any order which has been passed by any competent Court and therefore to take proceedings which necessarily must have the effect of modifying or even cancelling such orders is to assume a jurisdiction which the law does not contemplate. The duty of the Magistrate was to carry out the orders of the Civil Court and to maintain those orders by assisting the possession of any person whose title is found by that Court," 26 C. 625 at 628, 629. This view has been accepted and followed in 29 C. 203 at 210. The final order under this section decides no question of title. It merely maintains the possession of the successful party who can only be evicted in due course of law by one who can establish better right to possession. 29 C. 187 (P.C.) at 197—199. The order is no bar to a suit and decree under S. 9 of the Specific Relief Act and the remedy of the unsuccessful party in that suit is to file a suit based on his title, 6 Ran. 667 following 30 A. 331. The order is valid until the actual right of one of the parties is determined by a competent Court, 2 C.L.R. 62; 26 C. 625; 29 C. 203; 35 C. 795; the order is merely declaratory and the Magistrate cannot order specific acts to be done by way of consequential relief, 27 A. 309; 17 C.W.N. 205. Where possession of immoveable property is delivered to an auction purchaser under O. 21, r. 35, O.P.C. a Magistrate acts without jurisdiction in proceeding under this section, as such possession is actual possession and not symbolical possession, 5 Pat. L.J. 104; 25 Cr. L. J. 88=76 Ind. Cas. 24; 39 C.L.J. 353. It seems contrary to all principles of justice that a judgment-debtor should be allowed to retain possession against his decree-holder who has actually been given possession, against him, by a Civil Court and in a criminal proceeding, to assert that possession and by force of the order of the Magistrate drive the decree-holder and auction-purchaser back to the Civil Court for a further declaration of his right, 23 C.L.J. 553; 40 C. 982. Where the rights of parties are determined by a competent Court the dispute is at an end and the successful party should be maintained in possession; the defeated party will not be allowed to seek further redress in a Criminal Court alleging existence of the breach of the peace, 6 C. 835. See also 37 C.L.J. 123=20 C.W.N. 796. When once the rights of the parties have been determined by a competent Court the dispute is at an end, and the defeated party will not be allowed to seek the assistance of a Criminal Court and the police to neutralize the effect of the decree of a competent Civil Court, 6 C. 835 at 841; 16 W.R. (Cr.) 24; 24 W.R. (Cr.) 17, but a Magistrate is competent to proceed under this section with regard to properties which form the subject-matter of a pending suit under S. 9 of the Specific Relief Act 35 C. 370 and can also pass a prohibitory order under this section for preserving the public peace, notwithstanding that the Civil Court had refused an injunction, 7 M. 460. A Magistrate is bound to maintain possession of the person who had been actually put in possession by the Civil Court, 6 W.R. (Cr.) 10, and he cannot go behind the order of the Civil Court delivering possession to a party, 6 C.W.N. 841; 24 B. 527; 9 C.W.N. 392; 37 C.L.J. 123. If a decree-holder or auction-purchaser who obtained actual possession through the Civil Court or such possession as in the eye of law is equivalent to actual possession is subsequently forcibly and wrongfully dispossessed by the judgment-debtor, he can come to the Magistrate within two months of the dispossession under sub-section (4)

supra, and the Magistrate can reinstate him in possession but if he does not do so within the two months and sleeps over his rights the claim for reinstatement by the Magistrate becomes so to speak barred by limitation, 53 C. 233 (F.B.). When the defeated party is attempting to regain possession which he had lost in execution of the decree of the Civil Court, and a breach of the peace is apprehended, the proper course for the Magistrate to adopt is to bind down that party to keep the peace, 7 C.L.R. 515 but the decree of the Civil Court must be recent, 8 C.W.N. 719; 6 C.W.N. 33 and 161; 32 C. 796; but (1914) M.W.N. 798, where *Ayling, J.*, not accepting the view taken in the Calcutta decisions held that the jurisdiction of the Magistrate to take proceedings under this section is not affected by the existence of a decree of the Civil Court *re* the possession and title of one of the parties, and where the Magistrate is satisfied of a breach of the peace, and records a formal order under Sub-section (1) his proceedings are not *ultra vires*, as the whole scheme of the chapter contemplates an inquiry solely with reference to the fact of actual possession irrespective of title, but where no possession either actual or symbolical was given to a purchaser at a Court sale but he obtained only delivery certificates he cannot on the strength of such certificates alone be declared in possession under this section, 31 M. 416 *distinguishing*, 32 C. 793 and 6 C.W.N. 38. An order for possession could not be made against a mere servant without his master being on record, 6 C.L.R. 193 *followed* in 9 Cr. L. Rev. 17. An order under this sub-section binds only the actual parties to the proceedings, *Weir II*, 106, 18 M. 51; 3 C.W.N. 329, but this view has not been followed in 11 Bom. L.R. 377; 33 C.W.N. 1002 at 1003 where it was held that the provisions of this section make it clear that the parties whom the Magistrate has to deal with are not merely the actual parties before him, but all persons who may be concerned in the dispute. A Magistrate has jurisdiction to make an order in favour of a manager when the actual proprietors are non-residents of the place, 31 C. 43; 24 B. 527; 25 C. 423, "such possession" in sub-section (1) must mean actual possession; the possession of an agent or manager where the proprietors are absent is within the section. In 32 C. 287 it was held that when the proprietor was residing within the jurisdiction of the Magistrate was a mere irregularity or at the most an error of law to make the manager a party to the proceedings, and such procedure did not affect the Magistrate's jurisdiction. See also 27 Cr. L.J. 142 = 21 Ind. Cas. 815. When the manager who was made a party instead of his employer and he filed a written statement on behalf of his employer and asserts the claim of his employer, the order against the manager is proper and valid.

For form of order declaring a party entitled to retain possession of land, etc., see Sch. V form No. 22 infra.

Shall issue an order.—The order contemplated is the final order deciding the question of possession of the subject of dispute and is only a police order made to prevent a breach of the peace. It decides no question of title, 29 C. 187 (P.C.) The magisterial order is to remain in force until the Civil Court has *seen* of the matter, 3 B.L.R. (Ap. Cr.) 27; 2 C.L.R. 52. A disobedience of the order is punishable under S. 188, I.P.C.

Declaring such party to be entitled to possession.—The Magistrate by his order declares that the party found by him to be in actual possession should be permitted to retain possession until evicted therefrom in due course of law. This is made clear by the marginal note to sub-section (6) and also the language used in form No. 22 in Sch. V *infra*, to the effect "entitled to retain such possession until ousted in due course of law." The word "entitled" is not happily used, as its use is likely to form an impression that the decision is on the question of title which the Magistrate is prohibited from going into under sub-Section (4). There is no specific provision in the Code authorising a Magistrate to take proceedings in the nature of execution after passing a final order under this section. The final order merely declares the right to possession of the successful party. Apparently any disobedience of the order can be dealt with by a prosecution under S. 198, I.P.C. but it is very doubtful whether they could otherwise be enforced. Form No. XXII, of Sch. V *infra* shows how a formal order declaring possession and forbidding all disturbances of such possession is to be drawn up and it contains no indication directing the police or any other officer to deliver possession to any of the parties, 14 C.W.N. 78 = 11 Cr. L.J. 26 = 5 Ind. Cas. 40.

The addition newly made towards the end of sub-section (6) *supra* now authorizes the Magistrate to restore to possession a party who has been forcibly and wrongfully dispossessed and this means that the Magistrate will have to take proceedings in such a case to put the party dispossessed in possession.

Until evicted in due course of law.—The expression "in due course of law" does not necessarily mean a decree of the Civil Court but an order which evicts a party must be either an order of a Civil Court or of a Court acting under a statutory authority. In the latter case, there must be a clear indication express or implied in the terms of the statute itself to show that the order has the effect of a decree, 18 Cr. L.J. 682 at 633=40 Ind. Cas. 330, following 12 C.W.N. 686=7 C.L.J. 547. The expression 'evicted in due course of law' is as much applicable to proceedings under the Tenancy Act as it is to ejectment under the decree of a Civil Court, 32 Ind. Cas. 651. The Civil Court decrees need not be between the same parties, 5 C.W.N. 563.

This sub-section and the connected form No. 22 of Sch. V *infra* allow a Magistrate to give directions as to possession with a legal effect that is valid until the actual eviction or ouster by due course of law and not merely till a suit is filed in the Civil Court for an adjudication of the rights of the parties, 27 Bom. L.R. 1353=27 Cr. L.J. 661=24 Ind. Cas. 709.

Sub-section (7).—Proceedings under this section do not terminate with the death of any party to the dispute and there was no express provision to bring on record the legal representative. Now provision is made by this sub-section expressly authorizing the Magistrate on the death of a party to make his legal representative party to the proceedings and if necessary to decide who such legal representative is. Express provision is now made for bringing on record the legal representative of a deceased party, and rival claimants even can be added as parties without determining which of them is the legal representative, 21 C. 405, is no longer law. But when during the pendency of a Revision Petition in the High Court, the petitioner dies, it was held, before the amendment, that his legal representatives have no right to be brought on record to enable them to continue the proceeding in the High Court, 31 M.L.J. (Sh. n) 18=17 Cr. L.J. 389. See also 1919 P.R. (Cr. J) 23; 1893 P.R. (Cr. J) 6. These rulings hold good even now after the amendment. The words of the sub-section are "when a party to any such proceeding dies the Magistrate may cause the legal representative of the deceased party to be made a party to the proceeding and shall thereon continue the enquiry" and cannot apply to proceedings in revision in the High Court.

Sub-section (8).—This new sub-section empowers the Magistrate to pass necessary orders for the custody or sale of property in dispute which is subject to speedy and natural decay if such an order would be for the benefit of the parties. Power is also given to the Magistrate upon the completion of the inquiry to make such orders as to the disposal of the property or the sale proceeds thereof as he thinks fit.

Sub-section (9).—This is new. On the application of either party the Magistrate, if he thinks fit, may issue summons to witnesses to attend the Court to give evidence or to produce any document or thing. The wording before was 'receive the evidence produced by the parties.' This worked great hardship as Magistrates refused to assist parties to secure attendance of witnesses holding that they were not bound to issue summons to witnesses under this section; the decisions in 32 C. 1098, 31 C. 24; 17 M.L.T. 225, held a Magistrate was not bound to assist parties to secure witnesses, but 18 C.W.N. 53, took a different view. See also 21 C. 29; 30 C. 508, 10 Cr. L.J. 221=3 Ind. Cas. 64; 10 Cr. L.J. 231.

Sub-section (10).—Is new and is in accordance with the view expressed in 33 C. 150 (F.B.); 26 M. 471; 25 B. 179. This section is not the only weapon which a Magistrate is entrusted for maintenance of peace in connection with disputes over land. He has power under S. 107 if he is of opinion that an order under S. 107 will meet the case and without taking action under this section an order under S. 107 can be passed binding the parties to keep the peace. In exercising his discretion the Magistrate will regard as supreme the necessity of maintaining the public peace, 55 C. 220 (F.B.); where there is a keen dispute between two parties about certain lands the proper procedure would be to institute proceedings under this section and to decide the dispute as to possession once for all so far as the

Criminal Court is concerned. Another course which is open to the Magistrate is to proceed under S. 107 *supra* against both parties as the Magistrate is empowered to do under this sub-section and to bind down the party who is proved not to be in possession. It is not proper to proceed against one of the parties alone under S. 107 *supra* and to bind him over without determining the question of possession 30 Cr. L.J. 492=115 Ind. Cas. 545; where there is a dispute as to a water course likely to cause a breach of the peace, the action of the Magistrate in taking security proceedings under S. 107 *supra* against both parties leaving them to have their rights determined by a Civil Court was held proper, 28 Bom. L.R. 438=27 Cr. L.J. 704=95 Ind. Cas. 662; 12 C.W.N. 606=7 Cr. L.J. 403. So also in a case, where a dispute likely to cause a breach of the peace exists with regard to a bund put up in a channel, one party alleging that it was newly put up to prevent his irrigating his land, the Magistrate has no power to order the removal of the bund under S. 147 *infra* but he ought to proceed under S. 107 *supra*. 27 Cr. L.J. 801=95 Ind. Cas. 465; 33 C.W.N. 1003. The fact that one party has been bound over under S. 107 *supra* does not take away the jurisdiction of the Magistrate to act under this section when the circumstances of the case require such action being taken, 13 Cr. L.J. 432=13 Ind. Cas. 830.

Powers of High Court in revision.—Orders passed under Chapter XII of the Code are now held to be proceedings revisable under S. 435 *infra*, by the repeal of sub-section (3) to S. 435, 1929 M.W.N. 708, and the High Court's power to revise is not limited to matters of jurisdiction only, i.e., to cases in which the Magistrate taking proceedings under this section acts without jurisdiction as was held in the following decisions, 26 C.225; 23 C. 416; 30 C. 155; 31 M. 318; 36 M. 275; 19 C.W.N. 123; 33 C. 68; 35 C. 774; 43 C. 522. The object of the law being prevention of a breach of the peace, by determining actual possession and declaring the possession of one of the parties, the Legislature intended that the party dissatisfied with the order of the Magistrate should obtain a final decision of the question in dispute elsewhere. The High Court when exercising its powers of revision will not promote uncertainty and restlessness by an overnice scrutiny of proceedings that aim at promptness rather than refinement, 1 Pat.L.J. 336=17 Cr.L.J. 369=35 Ind. Cas. 801, *following*, 30 C. 155; 7 B. 341 at 363. In 36 M. 275 the power of the High Court was very much restricted and in 25 A 134, the power of the High Court to interfere under S. 15 of the Charter Act was even doubted. There is no longer any necessity to resort to the provisions of S. 107 of the Government of India Act and orders under S. 145 can be revised now under Ss. 435 and 439 of the Code. But the High Court will not interfere with the Magistrate's discretion in starting proceedings as he thinks proper according to his judgment, 37 C.L.J. 39. Where the Magistrate has decided on the evidence in favour of one party as being in possession of the land in dispute the High Court cannot reconsider the Magistrate's decision, 15 W.R. (Cr.) 36; 25 W.R. (Cr.) 16, unless he has acted illegally or with material irregularity, 30 Cr. L.J. 381=114 Ind. Cas. 810. Ordinarily the High Court will not interfere with the findings of fact in the exercise of its revisional jurisdiction. But there can be no doubt that it has jurisdiction to review even questions of fact as the words of S. 435 clearly indicate, and it will do so where there is a clear miscarriage of justice. A perverse finding of fact contrary to a mass of un rebutted evidence regarding possession of one of the parties is liable to be set aside in revision, 25 Cr. L.J. 1068=81 Ind. Cas. 890. It is for the Magistrate to decide who is in actual possession at the date of his preliminary order and if there is material before the Magistrate he is the only judge as to whether the material is sufficient or not, and the High Court cannot interfere in such a case with the findings arrived at by the Magistrate, 27 Cr. L.J. 471=93 Ind. Cas. 695. The High Court in revision ought not to enter on the question of sufficiency of evidence in support of the finding arrived at by the Magistrate, where there is evidence on record to support the finding of the Magistrate, 18 Cr. L.J. 301=38 Ind. Cas. 333; 14 C. 169; 22 C. 998 at 1001; 19 C.W.N. 123; 22 C.W.N. 499. The High Court should not lightly interfere in revision with orders under this section made solely to preserve peace of the locality, pending the settlement of the dispute between the parties by a competent Civil Court, 17 Cr. L.J. 143=33 Ind. Cas. 319; 18 Cr. L.J. 23=36 Ind. Cas. 855; 1 Pat. L.J. 336 (Sp.B.) The High Court has no power to entertain a petition for the appointment of a receiver pending a Criminal Revision against the order of the lower Court 49 M. L. J. 593=22 L.W. 723=(1925)

M.W.N. 772, where the order is partly good and partly bad, e.g. by attachment of certain mica mines and also the mica stored in a godown, the High Court in revision will sever the good from the bad rejecting as bad the attachment of the mica in the godown and confirming the good namely, the attachment of the mica mines 2 Pat. L.J. 637=18 Cr. L.J. 756=41 Ind. Cas. 132. In setting aside an order passed by the Magistrate the High Court in revision has no power itself to pass such an order as should have been passed by the Magistrate in the case, 22 C. 297, nor can the High Court require the Magistrate to proceed under Chapter XII when setting aside the order, as the matter is entirely within the discretion of the Magistrate who must be satisfied of a likelihood that a breach of the peace still existed, 23 W.R. (Cr.) 58; where Magistrate passed not final order under sub-section (6) but stopped proceedings warning one of the parties that if he persisted interfering with the possession of the other party he will be constrained to start security proceedings against him under S 107 *supra*, the High Court in revision declined to interfere with such an order, 1918 M.W.N. 37, but the High Court may point out to the Magistrate that mere binding over both parties to keep the peace in a dispute concerning land does by no means put an end to the contention whereas by taking proceedings under this section an order declaring and maintaining the possession of one of the contending parties until the right is established in a Civil Court may be passed, 3 C.W.N. 297; the High Court also cannot direct the revival of proceedings when the Magistrate in the exercise of his discretion dropped further proceedings, 30 C. 112. Where the High Court decided that a particular case fell under Chapter XII of the Code and directed the Magistrate to take the case on his file and dispose of it according to law and the District Magistrate under his powers transferred the case to another Magistrate, the latter Magistrate was bound to inquire into the matter and it is not open to him to go behind the High Court's order. 3 Bom. L.R. 416. Persons who are not parties to the proceedings in the lower Court have no right to apply to the High Court in revision. 25 Cr. L.J. 1033=87 Ind. Cas. 923.

The High Court has interfered in revision in the following cases (1) When the Magistrate has passed an order disregarding the decree of a competent Civil Court, 29 C. 208; 26 C. 825; 5 C.W.N. 563; 2 A.L.J. 274=2 Cr. L.J. 236; 2 C.L.J. 147; 6 Bom. L.R. 246, (2) when the Court below has refused to examine witnesses produced by the parties, 29 M. 56; 31 C. 685; 34 C. 840; 11 A.L.J. 586; 15 Cr. L.J. 470=24 Ind. Cas. 350, (3) where the Magistrate initiates proceedings when there was no likelihood of a breach of the peace, 11 C.W.N. 193 and 835, (4) where the Magistrate failed to record a finding as to possession on the date of his preliminary order 16 Cr. L.J. 239; (M.H.C.) Cr. R.C. Nos. 301 and 588 of 1908 and 205 of 1909, (5) when the Magistrate passed his final order without issuing a preliminary order which is the foundation of his jurisdiction, 1907 A.W.N. 43; 34 C. 840; 30 C. 443; 32 C. 552, 4 Lah. 66; 23 Cr. L.J. 1177=88 Ind. Cas. 631, 23 Cr. L.J. 973=103 Ind. Cas. 683; 30 M. 543, (6) where the Magistrate passed his final order on mere local inspection without recording evidence, 31 M. 82; 3 M.L.T. 422=8 Cr. L.J. 150; 38 M.L.J. 73=11 L.W. 283; 45 C. 1065; 4 C.W.N. 779; (7) rejection of material evidence by the Magistrate and then passing a final order, 19 Cr. L.J. 529=45 Ind. Cas. 337; 22 C.W.N. 499. When an inquiry has been properly entered upon, it is not every error which makes the result invalid. The distinction must not be neglected between things done without jurisdiction and things done within jurisdiction though erroneously and irregularly, 2 M.I.A. 293. Before want of jurisdiction can be predicated a vice must clearly be established which infects the whole proceedings. There must be an illegality as opposed to irregularity 22 C.W.N. 312. It has been definitely settled that the High Court will not interfere in revision unless it is satisfied that the party invoking it and has been prejudiced by the proceedings had in the Court below. It is unquestionably a sound principle that the High Court's judicial discretion instead of being crystallised ought to be fairly exercised according to the exigencies of each individual case, 33 C. 68 (F.B.); 33 C. 33. The High Court will not interfere except in very exceptional cases, 17 Cr. L.J. 286.

High Court's power to transfer.—It was held in 26 M. 183 that the High Court has power both under S. 526 *infra* and S. 29 of the Letters Patent to transfer a case under this section. It was argued on the strength of 25 B. 179 that proceedings under this section is not a 'criminal case,' but their Lordships held that they were unable to agree with the

decision of the Bombay High Court and that if this was not a criminal case it was difficult to conceive what it was. In 23 C. 709 the Calcutta High Court held that the Magistrate taking cognizance of a case under this section is a Criminal Court and the High Court has power to transfer such a case both under the Charter Act and the Letters Patent, but the power to do so under S. 526 *infra* was doubted. But in 2 C.L.J. 615, it was held that under S. 526, *infra*, a transfer can be made as proceeding under this section is a criminal case, explaining 23 C. 709 and following 22 C. 893 and 26 M. 188. See also 34 A. 533. See 7 Cr. L.J. 423 where it was held following 26 M. 188 that proceedings under this section are criminal cases within the meaning of the words in S. 526, *infra*, and so S. 526 applied to such proceedings; but sub-section (8) of S. 526 *infra*, does not apply to proceedings under this section. The parties to the proceedings under this section are described as parties and the use of the words '*complainant accused*,' *public prosecutors*' and non mention of *party* in sub-section (8) of S. 26 of *infra*, make it perfectly clear that it was not the intention of the Legislature to include proceedings under the section within sub section (8) and it is not obligatory on the Magistrate to adjourn the proceedings pending an application for transfer to the High Court, 50 C.L.J. 331.

Powers of Sessions Judge or District Magistrate to revise or make reference to High Court.—Proceedings under Chapter XII of the Code are now proceedings with regard to which a Sessions Judge has power of revision or reference he has the power to call for records in such proceedings. The decision in 28 C. 416 is no longer law. A Sessions Judge has power also to draw the attention of the Magistrate to the nature of the dispute in the trial before the Judge, so that the Magistrate might exercise his own discretion whether proceedings under this section were necessary to settle matters pending the regular determination by a competent Civil Court, 20 C. 520 at 526. A District Magistrate has no power to set aside an order passed by a Magistrate under the section because such an order is neither a dismissal of a complaint nor a discharge of the accused within the meaning of S. 436 *infra* 6 Ran. 655; but if he is satisfied that the order passed is erroneous, the proper course open to him after due notice to the opposite party is to make a reference to the High Court under S. 438 *infra*, 28 Cr. L.J. 1166; 89 Ind. Cas. 526; 6 Ran. 655. In a reference under this section, it is not the duty of the High Court to examine the evidence to consider whether it might have come to a different finding from that arrived at by the Magistrate 28 Cr. L.J. 901=105 Ind. Cas. 229.

Review and revival of the previous order.—The section gives the Magistrate an absolute discretion to initiate proceedings when he thinks that proceedings are necessary to preserve the peace of the division under his charge. No private person has any right whatever to insist proceedings being initiated under this section when the Magistrate cancels his preliminary order or refuses to make an order at all or to contest the Magistrate's proceedings refusing to make an inquiry under this section, 38 C. 23; 30 C. 112; 30 A. 41. There is no authority for holding that a Magistrate can review a final order passed by himself under this section, 35 C. 330; 21 Ind. Cas. 477; Weir II, 107 nor can he revive his proceedings after the dispute has been settled and an order has been passed striking off the case. An order passed under this section is a final order and it is not open to a Magistrate who passed the same or his successor to review it or set it aside in any way, 48 A. 238. A new proceeding could not be started on the old materials, 20 C. 867; 27 C. 931. To enable a Magistrate to take fresh proceedings it would be necessary to set forth new materials, 6 C.W.N. 923; 20 C. 867; 9 C.W.N. 923, and the Magistrate will have to pass a fresh preliminary order under sub-section (1). Fresh proceedings cannot be started unless it is shown that the order declaring possession has been vacated in due course of law or possession has been surrendered amicably and fresh proceedings started without the above condition is without jurisdiction, 18 Cr. L.J. 682=40 Ind. Cas. 330, followed in 21 Cr. L.J. 753=58 Ind. Cas. 337. In 4 C.L.J. 418, pending a revision in the High Court and after a rule has been issued on the District Magistrate to show cause why his order should not be set aside, a Magistrate subordinate to the District Magistrate instituted fresh proceedings on the old materials. The High Court held that during the pendency of the rule in the High Court proceedings in the lower Court in the same matter

must be considered to have been stayed and the institution of proceedings by a subordinate Magistrate was highly improper. The High Court can interfere in revision if after initiation of proceedings the Magistrate refuses to exercise jurisdiction without sufficient cause, 38 C. 24; 4 C.W.N. 799; 1931 A.W.N. 154. The High Court is entitled to require from the trying Magistrate a statement of his reasons for his decision, sufficient to enable the High Court to determine whether he has or has not complied with sub-section (4) of this section and whether he has directed his mind to the consideration of the effect of the evidence adduced, 39 C.L.J. 366. The possession of a receiver appointed under this chapter should properly be regarded as possession on behalf of the party who should ultimately be found by the Magistrate to be in possession, 22 M.L.J. 154. Where the Deputy Commissioner quashed the proceedings of a Deputy Magistrate without a full consideration of all the facts and without hearing all the objections, the High Court quashed the proceedings and sent it for fresh disposal, 13 C.W.N. 125=10 Cr. L.J. 860=4 Ind. Cas. 354.

Costs of proceedings under this section.—See notes under S. 148, *infra*. Proceedings under this section is a quasi civil case and according to the law as enacted in S. 148, *infra*, the successful party may recover his costs from his adversary in such a case, 8 C.W.N. 178. The costs contemplated as specified in sub-section (3) of S. 148 may include any expenses incurred in respect of witnesses and pleaders' fees which the Court may consider as reasonable, 27 Cr. L.J. 474=93 Ind. Cas. 693. The High Court has no power to award costs incurred before it when disposing of a Revision case against an order of the Magistrate under this chapter as S. 148, *infra*, empowers only the Magistrate passing a decision to award costs, 43 M. 262 (F.B.) but the Bombay High Court took a different view in 27 Bom. L.R. 1353=27 Cr. L.J. 661 (2)=94 Ind. Cas. 709 (2). Costs cannot be awarded as payable by a party who is not a party to the proceedings but can be made only with regard to the parties before the Court, 27 Cr. L.J. 21=91 Ind. Cas. 83.

Limitation for suits by unsuccessful party.—Article 47 of the second schedule to the Limitation Act, 1908, applies to a suit for possession of land in respect of which an order under this section has been passed even though the Magistrate acted illegally and with material irregularity provided the plaintiff had notice of the proceedings even though the notice was not served in due course of law. The suit must be brought within three years from the date of the order, 38 M. 432; 43 M.L.J. 372; 23 C. 731; 19 C. 646; 9 M.L.T. 91. Where a Hindu father acted as manager of the Joint family in proceedings under this section, the final order of the Magistrate is binding on all the other members of the family though they were not parties and a suit to recover possession of the property by a member after settling aside the Magisterial order is governed by Article 47 of the 2nd Schedule of the Limitation Act and must be brought within 3 years of the date of the final order, 55 M.L.J. (Sh. n) 14. The period of three years runs from the date of the order of the Magistrate and not from the date on which a rule issued by the High Court under S. 15 of the Charter Act was finally disposed of, 12 C.W.N. 340, 6 C. 709, and not from the date of attachment, 28 C. 680. The effect of the order of the Magistrate under the section is that on a failure by the unsuccessful party to sue, to get rid of the order in three years the successful party acquires title under S. 28 of the Limitation Act, 13 Ind. Cas. 24. See also 22 C.W.N. 342.

146. (1) If the Magistrate decides that none of the parties was then in such possession, or is unable to satisfy himself as to which of them was then in such possession of the subject of dispute, he may attach it until a competent Court has determined the rights of the parties thereto, or the persons entitled to possession thereof :

Power to attach subject of dispute.
Provided that the District Magistrate or the Magistrate who has attached the subject of dispute may withdraw the attachment at any

time if he is satisfied that there is no longer any likelihood of a breach of the peace in regard to the subject of dispute.

(2) When the Magistrate attaches the subject of dispute, he may, if he thinks fit, and if no receiver of the property, the subject of dispute, has been appointed by any Civil Court, appoint a receiver thereof, who, subject to the control of the Magistrate, shall have all the powers of a receiver appointed under the Code of Civil Procedure.

Provided that, in the event of a receiver of the property, the subject of dispute, being subsequently appointed by any Civil Court, possession shall be made over to him by the receiver appointed by the Magistrate, who shall thereupon be discharged.

Amendment.—Provisos to sub-section (1) and sub-section (2) are new, and in sub-section (2) the words "if no receiver of the property, the subject of dispute, has been appointed by a Civil Court" have been newly added.

Scope of the section.—This section is a sort of corollary to the preceding section and its legality depends upon the strict observance of the provisions of the preceding section, i.e., the Magistrate holding an inquiry as to the fact of actual possession and finding either that none of the parties were in actual possession at the date of his preliminary order or that he was unable to decide as to which party was in such possession, 40 C. 105; 34 C. 840; 14 C.W.N. xci; 9 C.W.N. lxxv; 11 Cr.L.J. 90; 16 M.L.T. 52; Weir II, 108 and 110; 10 C.W.N. 1088; 11 C.W.N. 512; 17 C.W.N. 205. This section cannot be applied where the Civil Court has not only determined the rights of the parties but has also determined the possession so far as it was in its power to do, 43 A. 397. The jurisdiction of the Magistrate to attach property under this section arises only when he has made the inquiry contemplated by S. 145, *infra*, and considered the evidence produced by the parties and he cannot then satisfy himself as to which of the parties is in actual possession of the subject-matter in dispute, 15 Cr. L.J. 470; 24 Cr. L.J. 880=74 Ind. Cas. 80; 6 Bom. L.R. 723; 23 Cr. L.J. 117= Ind. Cas. An order of attachment made without recording evidence is bad in law, 32 C.W.N. 843. The Magistrate is neither called upon nor empowered to consider the question of rightful possession, 7 Bom. L.R. 18; 3 L.W. 164. An attachment can only be made after the Magistrate had made a reasonable effort varying, of course, with the circumstances of each particular case, to decide the question of possession. When under extraneous consideration and without considering the evidence a Magistrate attaches the property the order of attachment is bad, 24 Cr. L.J. 734=74 Ind. Cas. 258; 40 C. 105; 20 Cr. L.J. 17=43 Ind. Cas. 497; 27 C. 785; 22 C. 297; 14 C. 361; 9 C.W.N. 887; 16 M.L.T. 52; 17 Bom. L.R. 382; 7 Bom. L.R. 18; 6 Bom. L.R. 723; 16 Cr. L.J. 235=27 Ind. Cas. 911. When the Magistrate finds that neither party is in possession of the immovable and moveable property of a certain *mull* in dispute and there is a likelihood of a breach of the peace, he can attach the property both moveable and immovable under this section, the moveable property being appurtenant to the *mull* and therefore the attachment is valid 24 A.L.J. 383=27 Cr. L.J. 429=63 Ind. Cas. 157, following 1 Pat. L.J. 355=18 Cr. L.J. 287=38 Ind. Cas. 319. It should be held as a very important principle in cases under S. 145, *supra*, that a Magistrate should be extremely reluctant to attach property in dispute. Where land is admittedly subject year by year and season by season to cultivation, it is his duty to collect and sift the evidence and come to a conclusion as regards possession, 23 Cr. L.J. 1293=82 Ind. Cas. 366. An order of attachment made without recording his inability to find possession with either party is *ultra vires*, 27 Ind. Cas. 911. See 29 Cr. L.J. 861=111 Ind. Cas. 445. Where proceedings have been instituted in respect of two plots of land and the Magistrate found one plot to be in the possession, of one of the parties and with regard to the other attached the same, finding that both the parties were in possession *held*, that the

order of attachment was *ultra vires* as this section had no application when parties were in joint possession the section applying only when the Magistrate finds that neither of the parties is in possession, 9 C.W.N. 887; 27 M.L.J. 169; 15 Cr. L.J. 572=25 Ind. Cas. 324. Where each of the parties had the keys of certain rooms in dispute and the Magistrate made an order of attachment under this section saying he was unable to find which of them was in possession his order was held bad, *Weir II*, 774 (2nd Ed). It was recently held by the Madras High Court that if the parties were in possession by turns, it was possible for the Magistrate to make an order under S 145, *supra*, by declaring who was in possession at the date of the preliminary order and consequently no attachment could be made; when land in dispute is not in the possession of two rival contending parties an order for attachment was held good, 5 C.W.N. 105. Once an order has been passed by a Court it can come to an end only in one or two circumstances, first being, that there is no longer any likelihood of a breach of the peace in regard to the subject of dispute, in which case the Magistrate would be justified in withdrawing the attachment at any time. Secondly, the Magistrate is competent to release the subject-matter of dispute from attachment if a competent Court has decided the rights of the parties thereto, 26 Cr. L.J. 1035=87 Ind. Cas. 975. See also 17 M.L.T. 332=16 Cr. L.J. 481=29 Ind. Cas. 321; 24 A.L.J. 399=27 Cr. L.J. 559=93 Ind. Cas. 1055. Where an attachment was raised by the lower Court relying solely on the entry in a record of rights, the High Court set aside the order and directed the land to be attached holding that the entry could at the most be treated as a presumptive evidence of a relation of landlord and tenant existing, but could not be considered as a final decision of a competent Court, 30 C.W.N. 616. It is obvious that orders of this sort attaching property might easily be turned to the prejudice of the party in actual possession, *e.g.*, in a sham dispute between A and B when no evidence is offered by either party the Magistrate might proceed to attach the property and the person actually in possession might thereby be ousted, 24 W.R. (Cr.) 40. When one party is in possession of a portion but not in possession of the whole of the property in dispute and the effect of declaring possession was to place the party in possession of the portion in the possession of the other party, the proper order under the circumstances was to attach the whole property under this section, 22 C. 297. If the component parts of the subject-matter in dispute are distinct and separate, the Magistrate may, if necessary, deal with different parts separately, 5 C.W.N. 710. The jurisdiction of a Magistrate to act under this section is not ousted by the fact that he had passed a previous order under S. 107, *supra*, against the parties when he finds that neither party is in actual possession, 18 Cr. L.J. 1007=42 Ind. Cas. 735; 39 C. 150 (F.B.)

Unable to satisfy himself as to possession—The special provision of this section is not meant to relieve the Magistrate from his duty of deciding on the merits but only allows an order for attachment to be made, when it is impossible to decide which party is in possession, *Weir II*, 110. The doubt on which a Magistrate can act arises from his inability to decide on the evidence offered by the contending parties as to the actual possession and not on a doubt entertained without inquiry, 1 C.L.R. 273. Until the Magistrate has received and considered the evidence produced by the parties he has no power to attach the property in dispute under this section, 20 Cr. L.J. 117; 40 C. 103; Ind. Cas. 12 C.W.N. 896; 34 C. 840; *Weir II*, 110; 14 C.W.N. 80; 11 Cr. L.J. 90; 32 C.W.N. 843, 6 M.H.C.R. Appx. 4; 18 Cr. L.J. 357=39 Ind. Cas. 701. A summary order of attachment cannot be made without passing a preliminary order under S. 145, *supra*, 1 C.L.R. 86; 15 Cr. L.J. 470=24 Ind. Cas. 350; 16 M.L.T. 52; 30 C. 918; 40 C. 103. When a Magistrate is in an indecisive state of mind he should record a clear finding that he is unable to satisfy himself as to who is in possession of the subject of dispute at the date of his preliminary order and then proceed to attach the property if there is still an apprehension of a breach of the peace. A failure to record an express finding and consequent disregard of the express provision of the section are very much to be deprecated and failure to record a finding of a negative character is calculated to involve the order for attachment in obscurity and to the risk of being misunderstood 29 Cr. L.J. 861; 115 Ind. Cas. 445. Proceedings under this section are legal only if proceedings under S. 145, *supra* are legally and

properly taken, 16 M.L.T. 42; 2 A.L.J. 139. An order for attachment made without examining any witness although a number of them were present in Court was invalid, 35 C.L.J. 291; 32 C.W.N. 843; (1922) Pat. 543=23 Cr.L.J. 277. When a Magistrate after refusing to grant time to a party to produce evidence heard the parties and being unable to satisfy himself as to which of them was in possession attached the subject-matter in dispute, it was held he acted without jurisdiction, 12 C.W.N. 896; 17 Bom. L.R. 382; 18 Cr. L.J. 413=33 Ind. Cas. 573. But it was held in 13 C.W.N. 80, distinguishing the decision in 12 C.W.N. 896, that when on the date fixed for filing written statement, both parties failed to appear before the Magistrate and to adduce evidence as to the fact of actual possession, an order under this section may be perfectly justifiable. In proceedings under S. 147, *infra*, instituted with regard to a dispute as to the right to use a well by turns the Magistrate cannot attach the well in dispute. 4 Cr. L. Rev. 474.

Decides that none of the parties was then in such possession.—The word "then" refers to sub-section (4) of S. 145, *supra*. The words "if possible decide" are very significant. To enable a Magistrate to make an order of attachment he must decide either that one of the parties was in possession as defined by S. 145, *infra*, or that he is unable to satisfy himself as to which of them was in possession. This is the plain meaning of the section apart from authorities and an order made without one or the other of these findings is without jurisdiction, 18 Cr. L.J. 557=39 Ind. Cas. 701. A Magistrate acting under this chapter unlike a Civil Court is not bound to come to a conclusion on the question of possession. The law says it is only when the Magistrate decides that none of the parties was in possession or is unable to satisfy himself as to which of them is in possession that he can attach the property under this section. When the Magistrate finds that neither party is in possession but a third party is in actual possession but he does not claim possession, the proper course is to attach the property, 20 Cr. L.J. 215=49 Ind. Cas. 778. When the Magistrate finds that both the parties were in possession by receipt of rent from tenants of different portions of the land in dispute, it was open to him to find that neither party was in possession, 1 C.L.J. 331; 9 C.W.N. 887. In the absence of information the Magistrate himself may hold a local inquiry under S. 148, *infra*, or in various ways may inform himself as to the facts of the case. He may send a *Kanungoo* out to the spot and make him submit a report or send for the headman of the village and ask him what the facts were. If he had done these, he would have fully armed himself with jurisdiction; but when he did nothing of the kind but passed the order "*no evidence produced by either side, land attached*" under S. 146 the order was set aside and attachment raised, 40 C. 103; 9 Cr. L.J. 272; 12 C.W.N. 893; 14 C.W.N. 80; 15 Cr. L.J. 470=23 Ind. Cas. 350. Such possession means actual possession from the date of the preliminary order under S. 145, 7 Bom. L. R. 18.

Competent Court.—Originally the expression was "Civil Court" and it was held in 15 A. 394 that the section did not give jurisdiction to pass an order of attachment of the subject-matter in dispute which would have to be determined in a Revenue Court. The words "competent Court" are not confined to mean only competent Civil Court. The words "competent Civil Court" occurred in the Code of 1882, but the word "Civil" was deliberately omitted in 1891 amendment. An order of a Revenue Court directing mutation to be made in favour of a certain person is an order of a competent Court within the meaning of this section, 46 A. 879. An order by the survey authorities under S. 41, Bengal Tenancy Act, has the force of Civil Court decree, 37 C. 331. This section is not exclusive and an attaching Magistrate has inherent power to release from attachment when the likelihood of a breach of the peace has disappeared and he cannot refuse to raise the attachment in such a case, holding that no competent Court had determined the rights of the parties, 1 Lah. 451. A Magistrate acts *ultra vires* in refusing to act up to the terms of a Civil Court's decree, 20 M.L.T. 247; 17 M.L.T. 392; 19 C.W.N. xci.

proviso to sub-section (1).—This proviso is new and empowers the District Magistrate or the Magistrate who attaches property to withdraw the attachment if he is satisfied without the parties obtaining the decision of a competent Court as to their rights, that there is no longer any likelihood of a breach of the peace in regard to the subject in

dispute. This is a very salutary provision and the decision in, 2 Cr. L. Rev. 441, which held that a Magistrate who attached the property cannot review his order and raise the attachment is no longer law. It is open now to the Magistrate under this proviso to make over possession to any person he thinks fit. But he must exercise a judicial discretion in the matter of handing over possession. He is not bound to make over possession to anybody and there may be cases in which it is sufficient for him to make an order withdrawing the attachment and leave some party to take possession, but he is not bound to direct the receiver to hand over property without making over possession of the books of account to anybody and thus leave the party to scramble for the estate, 26 Cr. L.J. 1623=90 Ind. Cas. 925. Where a Sub-divisional Magistrate attached certain lands and appointed a receiver under this sub-section until a competent Civil Court decided the rights of parties, he cannot refuse to put the party who has succeeded in establishing his rights to the attached property in the Civil Court on the ground that the unsuccessful party was going to appeal from the Civil Court's decree and the order of the Magistrate refusing to put the successful party in possession is clearly without jurisdiction, 15 Cr. L.J. 500=24 Ind. Cas. 588. See also 20 M.L.J. 247=17 M.L.T. 392; 19 C.W.N. and xci.

Effect of Attachment—An attachment under this section connotes more than a Civil Court's attachment and implies the taking and keeping possession of the attached property by the Magistrate, 21 Cr. L.J. 73=54 Ind. Cas. 473; 3 Pat. L.J. 147. Although an attachment under this section interferes with the physical possession, it does not affect the legal rights of the parties concerned and the property under attachment is held for the person ultimately shown to be entitled to the same, 15 C.W.N. 163; 20 C.W.N. 431=22 C.L.J. 283=31 Ind. Cas. 242, where 30 M. 12 is followed. An attachment under this section operates in law for purposes of limitation, simply as a detention or custody of the property by the Magistrate who, pending the decision of a competent Court, holds it merely on behalf of the party entitled on the date of attachment, whether he be one of the actual parties to the dispute before him or any other. For purposes of limitation the *seisin* or legal possession will, during the attachment, be in the true owner, and the attachment will not amount to a disposssession of the owner. The Magistrate's possession is on behalf of the particular party who may be able to establish his right to possession in a competent Civil Court and the title of the true owner cannot be extinguished however long such attachment may continue, 26 M. 410; 10 M.L.T. 573; 28 C. 86; 32 C. 856. A magistrate is not entitled to treat the profits of the land attached as *derelict* and treat it as lapsing to Government, 12 Cr. L.J. 403=11 Ind. Cas. 557. A civil suit for mere declaration only under S. 42 of the Specific Relief Act will lie without asking for recovery of possession, 15 C.W.N. 758. If subsequent to the attachment by Magistrate the land is left waste, damages cannot be recovered by a successful party by a suit from the defendant, as the loss of produce was not the probable result of the defendant's act but the consequence of the Magistrate's order, 12 Cr. L.J. 14=9 Ind. Cas. 137; 14 C.W.N. 96; 6 M. 426. When a temple, the subject-matter of dispute, is attached, it does not necessarily follow that the temple is to be closed altogether. Weir II, 110 and 112. The Magistrate should after determination of the rights withdraw the order of attachment and release the property, 17 M.L.T. 392. An attachment cannot be kept in force merely on the ground that the unsuccessful party in the Civil Court intends to file an appeal, 15 Cr. L.J. 500=24 Ind. Cas. 588. A Magistrate is not entitled to retain in his hands the profits of the attached property 1913 A.W.N. 100, and can not treat it as *derelict* and treat it as having lapsed to Government when the parties had not gone to the Civil Court and obtained a decision, 1911 P.L.R. 123 but Magistrate is entitled to sell perishable articles after attachment of the property, 1 L.W. 1032. If a forest is attached, livestock such as cattle, elephants, etc., found in it can be kept under attachment, 1912 M.W.N. 540; 1 Pat. L.J. 356. On the passing of an order adjudicating rights with respect to the attached land the attachment should be raised, 37 C. 331. A Magistrate is not entitled after the decision of the Civil Court to withhold the profits of the attached property during the period of attachment, 1893 A.W.N. 103. After attaching the property the Magistrate is entitled to lease out the properties, 17 W.R. (Cr.) 35, or to cancel an existing lease and make other proper arrangements, 29 C. 331. After leasing out he is not precluded

from proceeding under S. 107, *infra*, if an emergency arises. Where a Magistrate after attaching the property leased the lands to a lessee for a stipulated rent and a dispute arose between the said lessee and other rival claimants, it cannot be said that the Magistrate was precluded from proceeding against the lessee under S. 107, *supra*, as the lessee cannot claim any such exemption. The Magistrate was perfectly competent in spite of his letting out the land to one party to bind that party and the rival party to keep the peace if there is a likelihood of a breach of the peace, 18 Cr. L.J. 1007=42 Ind. Cas. 735.

Sub-section (2).—A receiver cannot be appointed before completing the inquiry under S. 145, *supra*, and such an order of appointment is *ultra vires*, 13 Cr. L.J. 535=15 Ind. Cas. 808. A Magistrate should on appointing a receiver under the section give him proper instructions with regard to the management of the property attached, 18 C.W.N. 1245. It is a well settled rule that as a matter of principle a person ought not to be appointed a receiver who has shown a partiality for one of the parties and that a party to the action should not be appointed unless by consent or unless there are special circumstances justifying his appointment in preference to others. The rule is not a technical one but is founded on the desire of the courts to see that the parties are placed on a footing of equality. A receiver is an officer of court and has to act under its directions and it is far less mischievous to appoint a party to a proceeding as a receiver than to place him exactly in the position which he would have occupied if an adverse order has not been made against him 28 Cr. L.J. 776=104 Ind. Cas. 104. The remuneration of a receiver appointed under the Code should not in any case exceed the net annual income realized by the receiver from the property in his custody and management, 27 Cr. L.J. 22=94 Ind. Cas. 54.

The words "and if no receiver of property, the subject of dispute, has been appointed by the Civil Court" have been newly added. The Magistrate may appoint a receiver only if no receiver is appointed by a Civil Court, and thus emphasising that it is the proper function of a Civil Court to appoint a receiver pending the civil suit instituted to adjudicate title to the property. The amendment removes the difficulty of two receivers being appointed, one by the Civil Court and the other by the Magistrate under this section.

The proviso newly added makes the intention of the Legislature very clear and restricts the power of the Criminal Court to appoint a receiver very much.

Revision.—The amendment newly made provides that orders under this section are subject to the revisional jurisdiction of the High Court for the restriction which existed before the amendment in S. 435 (3) has now been repealed but the High Court should not lightly interfere with an order under this section passed for the management of attached properties. The question is not one of want of jurisdiction now but the proper exercise of the discretion by the Magistrate and where the order passed offends against an elementary rule founded on the desire of the Magistrate to place both the contending parties on a footing of equality, the High Court can in revision set aside the order, 7 Pat. 1. When an order passed under this section is on the face of it *ultra vires*, the High Court will interfere in revision, 15 Cr. L.J. 600; 14 C. 361; 18 M. 14; 22 C. 297. When a Magistrate attached certain property and appointed a receiver under sub-section (2) of this section but refused to make over the property to the successful party in the District Court, on the ground that the other party was going to prefer an appeal his order was set aside as one made without jurisdiction, 15 Cr. L.J. 500=24 Ind. Cas. 588; when a Subordinate Magistrate attached certain lands and leased out the same but the District Magistrate cancelled the lease and made another arrangement for management, *held*, the High Court had no jurisdiction to revise the order of the District Magistrate, 29 C. 382.

For Form of warrant of attachment, See Form No. 23 of Sch. V, *infra*.

147. (1) Whenever any District Magistrate, Sub-divisional Magistrate or Magistrate of the first class is satisfied, from a police report or other information, that a dispute likely to cause a breach of peace exists regarding any alleged right of user of any land or water as

Disputes concerning rights of use of immovable property, etc.

explained in section 145, sub-section (2) (whether such right be claimed as an easement or otherwise), within the local limits of his jurisdiction, he may make an order in writing stating the grounds of his being so satisfied and requiring the parties concerned in such dispute to attend the Court in person or by pleader within a time to be fixed by such Magistrate and to put in written statements of their respective claims and shall thereafter inquire into the matter in the manner provided in section 145, and the provisions of that section shall, as far as may be, be applicable in the case of such inquiry.

(2) *If it appears to such Magistrate that such right exists, he may make an order prohibiting any interference with the exercise of such right :*

Provided that no such order shall be made where the right is exercisable at all times of the year, unless such right has been exercised within three months next before the institution of the inquiry, or where the right is exercisable only at particular seasons or on particular occasions, unless the right has been exercised during the last of such seasons or on the last of such occasions before such institution.

(3) *If it appears to such Magistrate that such right does not exist, he may make an order prohibiting any exercise of the alleged right.*

(4) *An order under this section shall be subject to any subsequent decision of a Civil Court of competent jurisdiction.*

Amendment.—This section which deals with disputes concerning easements, etc., has been re-drafted in order to make its meaning clearer. The principal changes introduced are—(1) the definition of the subject-matter in dispute has been modified so as to avoid difficulties which have been created by decisions raising doubts as to the applicability of the section, to rights not resembling easements or to rights acquired by contract; (2) the specific reference to the rights of way has been omitted as it has been questioned whether it may not, by implication exclude negative easements from the scope of the section; (3) the nature of the orders which a Magistrate may pass and their continuance pending the order of a competent Civil Court to the contrary have been clearly defined—*St. of Obs. and Reas.*

From a police report or other information.—These words are new. Before the amendment the word “as aforesaid” occurred in the section. Now the language in this and §. 145 *supra*, is identical. For commentaries see p. 223 *supra*.

Dispute likely to cause a breach of the peace exists.—Unless there are special circumstances giving rise to an apprehension of a breach of the peace there is no jurisdiction to make an order under this section, 23 Cr. L.J. 333=77 Ind. Cas. 289 For commentaries see p. 224 *supra*.

Scope of the section.—The words of the section as amended do not give the Magistrate any power of directing one of the parties to do a positive act by way of a mandatory injunction, say, directing a party to demolish a wall built by him. It seems that the power given to a Magistrate under this section is analogous to the power given to a Civil Court to grant a temporary injunction restraining a person from doing a certain act, but

the section does not authorize the Magistrate to make an order in the nature of a mandatory injunction directing a party to perform a certain act. The order of the Magistrate may be declared erroneous by a Civil Court which grants a mandatory injunction with great care and caution. It was never intended that the Magistrate should exercise the power of making such an order by a summary procedure. Form No. 24, Sch. V, gives a form of the order under this section and it merely contains a direction that the person against whom it is made, shall not do certain things. The change in the wording of the section was made with a view to make it clear that the Magistrate has only the power to issue a prohibitory order restraining any person from doing any act of interfering with the right of another when the Magistrate finds that the right exists and no order can be passed, such as to demolish a wall put up, 30 C.W.N. 238=41 C.L.J. 568=26 Cr. L.J. 1265=88 Ind. Cas. 1041. This section is not confined as to the use of private property although S. 145 (1) *supra* is so confined but also relates to the use of a public street by one section which is resisted by another opposing section of the public, 51 M. 174. The provisions of this section are of an emergency character and are of a summary nature. The Magistrate is not to usurp the functions of a Civil Court. If a Magistrate on perusing the evidence produced holds that reasonable grounds have been shown that a *bona fide* claim of right exists, he is justified in passing such order, as he thinks fit, and it is unnecessary that full proof of the existence of the right claimed should be given, because the actual rights of the parties is for the Civil court to decide; '*such rights exist*' mean such right as is claimed to exist, (1926) Pat. 187=27 Cr. L.J. 841=95 Ind. Cas. 761. A dispute concerning a right to take water from an artificial water channel for irrigation comes within this section. 20 Cr. L.J. 209=49 Ind. Cas. 769, but where there is a dispute likely to cause a breach of the peace with regard to a bund put up in an irrigation channel, which one party alleges as having been newly put up by the opposite party to prevent his irrigating his land, the Magistrate has no jurisdiction to direct the removal of the bund but the proper order is to take action under S. 107 *supra* against both parties and leave them to have their right adjudicated by a Civil Court, 27 Cr. L.J. 801=95 Ind. Cas. 465, where the dispute between the parties is with regard to an existing and complete bund at the end of a *bit* and not with regard to a right to erect a bund, this section has no application but action is to be taken under S. 145 *supra* if there is a likelihood of a breach of the peace, 33 C.W.N. 1004 where 15 C.L.J. 267 and 4 C.W.N. 779 are distinguished. If a subject matter in dispute has already been adjudicated by a competent Civil Court, then clearly a Magistrate has no jurisdiction to inquire into the claim which is entirely contrary to the decree of the Civil Court, 29 Bom. L.R. 715=28 Cr. L.J. 578=102 Ind. Cas. 546, following 11 B. 584.

Regarding any alleged right of use of any land or water.—The words before the amendment were 'the right to use any land or water including any right of way.' The language of the section as it stood before the amendment was very much criticised in 5 C.W.N. 67 by *Prinsep, J.*, as inartistic and meaningless. It was held in 4 M. 121 that a Magistrate has no jurisdiction to direct the removal of an obstruction as the proper course is to proceed under Chapter X of the Code for removal of an unlawful obstruction from a thoroughfare; but in 25 M.L.J. 233=15 M.L.T. 230=(1914) M.W.N. 394=15 Cr. L.J. 352=23 Ind. Cas. 780, it was held *dissenting* from 4 M. 121, that the fact that S. 183 *supra*, expressly provides for an order by the Magistrate directing the removal of obstruction to pathways did not necessarily imply that a similar order cannot be passed under this section. It was further held that the section applied both to public and private pathways. But see 39 C. 560. There is nothing to prevent a party claiming a pathway as a personal easement as well as public right. If the pathway is proved to be a public one then no question of easement arises, but if he fails to prove the public nature of the path, then he may prove his right of easement, (1926) Pat. 187=27 Cr. L.J. 841=95 Ind. Cas. 761. The words concerning the use of land cannot be altogether qualified and section construed as if it contained words that the user to which the dispute relates is a user by a party other than the person in possession. This is a very restricted construction. The alteration of the language of the section seems rather to enlarge the scope than restrict it, 15 M.L.J. 894=3 Cr. L.J. 31, where 4 C.W.N. 779 is disapproved and 11 C. 52; 7 M. 460 are

referred to A dispute as to a right to enter a temple and officiate at a ceremony whenever necessary is a dispute within the scope of this section, 27 M.L.J. 587=16 M.L.T. 427=15 Cr. L.J. 671=5 Ind. Cas. 999; 48 M.L.J. 528=26 Cr. L.J. 1057=88 Ind. Cas. 2; 11 M. 323; 29 M. 237. But a mere right to perform *pūja* of an idol without any dispute as regards the temple or any land belonging to the idol, cannot be said to be a right of user of any land as explained in S. 145, *supra*, and therefore such a dispute cannot be considered as one coming under the provisions of this section, 52 C. 959. So also a dispute to collect offerings at a temple which dispute cannot be said to come within S. 145 *supra* 5 Pat. L.J. 246=21 Cr. L.J. 572=57 Ind. Cas. 92 *following* 38 C. 38. A right to worship at a particular grave does not exist, for example, at the grave of a *Peer* situated in the land of another person without whose express or implied permission, no Mahomedan can, under Mahomedan law utter prayers at such a grave on the land of another and therefore the ancillary right to go over the land to the grave cannot exist, (1925) Pat. 64=27 Cr. L.J. 44 (1)=91 Ind. Cas. 76 (1). Right to worship for one day in a year and the right to make due and proper preparation for the holding of that worship by erecting huts for the *pūja* is in the nature of an easement and comes within this section and not under S. 145, *supra*, 17 C.W.N. 205=13 Cr. L.J. 789=17 Ind. Cas. 553. So also a dispute likely to cause a breach of the peace concerning a right to perform a religious ceremony in a mosque, 11 M. 323; 29 M. 237; 24 B. 527, but a contrary view was taken in 37 C. 578, which was dissented from in 27 M.L.J. 587. See 52 C. 959. A right to use a privy was held to be within the section, 15 Bom. L.R. 329=14 Cr. L.J. 400=20 Ind. Cas. 224. It is doubtful whether the right of using a highway is within the scope of this section. The carrying of a corpse along a highway is not an unlawful use of the highway except when danger to public health is occasioned thereby, and therefore an order preventing a Hindu funeral procession from passing along a highway to which the Mahomedans objected is bad in law, 7 M. 49; 6 M.L.J. 193; 6 M. 203. The expression 'land or water' as used in this section does not necessarily refer to private property as in S. 145 (1) *supra*. The right of the Hindus to use a public street, which user was asserted and exercised previously but had been resisted by the Mahomedans is within this section and a valid order prohibiting the Mahomedans can be made under this section, 51 M. 174 *following*, 26 M.L.J. 233 and 31 Ind. Cas. 367 and 7 M. 49 and 6 M.L.J. 193. This section in no sense authorizes a Magistrate to prohibit the use of a public highway by any class of persons unless he apprehends a breach of the peace which cannot be avoided without an order from him. But when no present breach of the peace is apprehended, no action can be taken under the section, 15 Cr. L.J. 291=23 Ind. Cas. 499. The right to drag a car in procession along a highway to a temple is a right of user of land within this section. 27 Bom. L.R. 1058=26 Cr. L.J. 1422=89 Ind. Cas. 846. A right of mooring boats and drying fishing nets by one party on the land of another, without any claim to the land is an easement right coming within this section and not under S. 145 *supra*, 21 Cr. L.J. 697=57 Ind. Cas. 937. The right to bury the dead in a burial ground is within this section and the Magistrate has to see whether the right which is exercisable on particular occasions was in fact exercised during the last of such occasions and improper use of a vacant portion of a burial ground for cultivation will not take away the right of persons entitled to bury their dead when occasion arises, 51 M. 522, no order can be passed under this section on proceedings taken under S. 193, *supra*. The two proceedings are entirely distinct, 15 C.W.N. 667=12 Cr. L.J. 43=9 Ind. Cas. 262.

Whether such right be claimed as an easement or not.—The language of the section is made very clear now. The claim to a pathway as an easement is not inconsistent with a public right of way. It is not necessary under this section to give full proof that a right exists. That is for a Civil Court to decide. The inquiry contemplated herein is more or less of a summary character and reasonable ground of a *bona fide* claim is to be shown; the Magistrate is not to usurp the functions of a Civil Court in a dispute under this section, (1925) Pat. 187=27 Cr. L.J. 841=95 Ind. Cas. 761. A Magistrate has power under this section to issue an order protecting persons exercising their right of taking water from a well when the right is threatened to be interfered with by others, 21 M.L.J. 430=

(1911) 1 M.W.N. 44. So also where the dispute relates to the right of the use of a well on two days out of every eight days, this section applies, not S. 145 *supra*, 4 Cr. L. Rev. 473; 21 M.L.J. 486=9 M.L.T. 209=(1911) 1 M.W.N. 44=11 Cr. L.J. 721=8 Ind. Cas. 843; but in disputes regarding easements the provisions of this section are to be used with care, as inquiries by Magistrate may lead to injustice being done by defective procedure which may involve complicated questions relating to rights of parties which can only be determined only by a Civil Court, 21 C. 727; 4 C.W.N. 779; 23 C. 557; the proper course for the Magistrate to adopt is to take action under Chapter VIII of the Code.

May make an order in writing.—Doubt was expressed in 21 C. 727 whether a Magistrate was bound to pass a preliminary order under this section also as he was bound to do under sub-section (1) of S. 145, *supra*. This doubt has now been cleared, by enacting "he may make an order" etc.; compare the language used in S. 145 (1), *supra*, "shall make an order in writing." It is only after serving the order on the parties concerned requiring them to attend the Court on a fixed date and put in their written statements of their claims that the Magistrate gets jurisdiction to inquire into the matter as provided in S. 145, *supra*.

Shall thereafter inquire in the manner provided in S. 145.—The inquiry contemplated by this section is an inquiry by the Magistrate and not by the police and the Magistrate cannot act on the result of a police inquiry, 53 C. 831. An order under this section is not bad merely because the Magistrate has not formally recorded a proceeding that there is likelihood of a breach of the peace. 27 M.L.J. 587 where 2 C.W.N. 670 is followed. What the section says is that he *may* make an order in writing and inquire in the manner provided by S. 145, *supra*. It may not be obligatory on him to record a formal proceeding stating the grounds or his being satisfied that a dispute likely to cause a breach of the peace exists before issuing process. The inquiry contemplated by this section is a judicial inquiry after due notice to the parties concerned and the Magistrate is to form a judicial opinion based upon evidence legally recorded by him in the manner provided by S. 356 *infra*, 21 C. 727; 2 C.W.N. 670. A person against whom proceedings are taken under this section is entitled to produce evidence to prove that the case does not fall within this section. In 19 M.L.J. 48, when objection was taken that the case did not fall within the section as the Magistrate made an order under S. 145, *supra*, without notice to the parties of his intention to proceed under this section and without a preliminary order under sub-section (1) of S. 145 *supra*, it was held that the Magistrate acted without jurisdiction.

Make an order prohibiting any interference of such right.—It was held by the Calcutta High Court in 5 C.W.N. 67 and 335, that the Magistrate was competent to direct the removal of an obstruction to the exercise of a right, but the Madras High Court held in Weir II, 119; Weir I, 153; that an order directing the removal of a fence so as to allow the use of a right of way cannot be passed under this section. But the section as amended authorizes the issue of a prohibitory order only and does not give a Magistrate any power of directing one of the parties to do a positive act by way of a mandatory injunction, e.g., to demolish a wall shutting out light and air of the other party. The power is analogous to the power given to the Civil Court to issue a temporary injunction restraining a person from doing an act interfering with the right of another, 30 C.W.N. 238=41 C.L.J. 568=26 Cr. L.J. 1265=88 Ind. Cas. 1041. In 26 M.L.J. 233, it was held that an obstruction to a private or public pathway could be ordered to be removed by the Magistrate under this section. In 13 Cr. L.J. 184=13 Ind. Cas. 1000. It was held that a Magistrate has power to invoke police assistance to carry out an injunction issued by him under this section to have an obstruction removed. But in 38 C. 923 it was held that this section contemplates orders directed to the parties to the dispute and does not enable the Magistrate to enforce his orders thereunder through the agency of the police, and that an order passed sometime after the termination of the proceedings under this section directing the removal of a bund by the police is without jurisdiction. This section does not enable a Magistrate to make a declaratory order but only enables him to forbid arbitrary interference of rights actually enjoyed, 5 C. 194. This section does not authorize a Magistrate to attach the subject of dispute, 5 Cr. L. Rev. 474.

If it appears that such right exists.—The words 'such right exists' mean such right as is claimed by the party, (1926) Pat. 187=27 Cr. L.J. 841=95 Ind. Cas 761 (2). An order under this section cannot be made without legal proof. An order passed solely on the written statement of one of the parties without recording some evidence in proof of the allegations contained in the statement is illegal even though the other party remains *ex-parte*, 30 C. 913, but when allegations of one party are admitted by the other party no evidence is necessary, 7 C.W.N. 351. Where the only evidence is that of user, it should be such as to show some considerable length of time. 4 M.H.C.R.; Appx. xxiv. In the absence of a finding that the right has been exercised within the period specified by this section the final order cannot be maintained, 25 Cr. L.J. 996=81 Ind. Cas 703, but where the non-exercise of the right within the period specified was due to circumstances beyond the control of the person claiming to exercise the right, this proviso cannot apply. 27 Bom. L.R. 1038=26 Cr. L.J. 1422=89 Ind. Cas. 845.

Proviso to Sub-section (2).—The inquiry contemplated by this proviso is the inquiry by the Magistrate and not the inquiry by the police and the magisterial inquiry begins when the proceedings are drawn up under this section. Where proceedings are drawn up more than 3 months after an alleged obstruction to a pathway, the Magistrate has no jurisdiction to proceed under this section, 53 C. 851. 'The institution of the inquiry' within the meaning of this proviso does not refer to the date when formal proceedings are drawn up by the Magistrate. Such an interpretation would make its working difficult. An inquiry is instituted within 3 months of the obstruction complained of by a party within the meaning of this section when the Magistrate hears the pleadings of the parties concerned in the dispute and directs a local inquiry within 3 months of the date of the obstruction even though the formal order is drawn up after the expiry of the period of three months and the words of the section are wide enough to justify this conclusion, 28 Cr. L.J. 1=99 Ind. Cas 33. When once the condition in this proviso as to the exercise of the right asserted is found the order is good and cannot be questioned in revision, 51 M. 174, but an order under this section is made without jurisdiction if it is made in the absence of a finding that the right was exercised within three months anterior to the inquiry, 14 Cr. L.J. 303=19 Ind. Cas. 359; 20 Cr. L.J. 558=51 Ind. Cas. 846. When a right which is exercisable only on particular occasions e.g. the right to bury dead bodies in a burial ground, what the Magistrate has to see is whether the right was exercised on last of such occasions and the fact that a portion of the burial ground was ploughed and sown is no ground for holding that the ground is not a burial ground and then finding it to be in the possession of the person who had ploughed and sown it and directing the continuance of possession, 51 M. 522. Under this section the Magistrate has no power of attaching the subject-matter in dispute, *viz.*, a well, the right to use the water of which by turns was in dispute, the order of attachment of the well was held to be made without jurisdiction, 4 Cr. L. Rev. 474.

Sub-section (3).—This sub-section is new and enacts that if the Magistrate finds that the right claimed does not exist the Magistrate is entitled to make an order prohibiting the exercise of the alleged rights.

Sub-section (4).—This sub-section is new. When a competent Civil Court has given a decree as to the rights of the parties, the magisterial order is vacated. The sub-section expressly says that the order of the Magistrate under this section is subject to any subsequent decision of a competent Civil Court. See 2 C.L.J. 535 (F.B.) For Form of the order under this section See Form No. 24 of Sch. V, *infra*.

148. (1) Whenever a local inquiry is necessary for the purposes of this chapter, any District Magistrate or Sub-divisional Magistrate may depute any Magistrate subordinate to him to make the inquiry, and may furnish him with such written instructions as may seem necessary for his guidance, and

Local inquiry.

may declare by whom the whole or any part of the necessary expenses of the inquiry shall be paid.

(2) The report of the person so deputed may be read as evidence in the case.

(3) When any costs have been incurred by any party to a proceeding under this chapter the Magistrate passing a decision under section 145, section 146, or section 147, may direct by whom such costs shall be paid, whether by such party or by any other party to the proceeding, and whether in whole or in part or proportion. *Such costs may include any expenses incurred in respect of witnesses and of pleaders' fees which the court may consider reasonable.*

Order as to costs.

Amendment.—The words "all costs so directed to be paid may be recovered as if they were fines" have been now omitted on account of the amendment in S. 547 *infra*, which deals with the recovery of all monies other than fines ordered to be levied under the provisions of the Code. The last portion of sub-section (3) is new and it is now made clear what legitimate costs are meant to be included within this section.

Whenever a local inquiry is necessary.—The local inquiry referred to in the section should be restricted solely to some question relating to the features of the property about which the dispute has arisen and not to any matter which can be proved before the Magistrate by oral evidence such as the question of actual possession. 3 C.L.R., 134 at 136. The rule that in criminal cases, courts are only justified in holding local inspection in order to explain the facts appearing does not apply to cases under S. 147, *supra*; nor is there anything in the law to prevent the presiding Magistrate making a local investigation himself provided he records what is said and does not act on hearsay evidence, 15 C.L.J. 267=12 Cr. L.J. 319=10 Ind. Cas. 615. An order of the Magistrate referring the case to a Magistrate subordinate to him for local inquiry under this section should point out how any local inquiry is necessary. Such reference cannot be made merely because a case of criminal trespass is pending before the subordinate Magistrate 3 M.L.T. 402=8 Cr. L.J. 153. Before a Magistrate begins to record evidence he may make a local inspection to see the exact lie of the land and its features and when he restricts his inquiry to those points and makes a note of the area, and prepares a plan and places it on record, he will not be acting outside his jurisdiction. 24 Cr. L.J. 507=72 Ind. Cas. 991; See also 24 Cr. L.J. 487=72 Ind. Cas. 951. The result of the local inquiry may be used to test the evidence recorded but the Magistrate cannot discard the evidence on what he may have seen and heard and inferred from such inquiry when there is nothing on record on that subject. If he does so he acts without jurisdiction, 10 C.W.N. 181. A Magistrate is entitled to inspect a place in order to understand the evidence but if he receives impression in favour of one party he should give an opportunity to the other party against whom he forms the impression to explain away, if possible, the impression created in his mind by his local inspection and if he without doing so, allows the impression created in his mind to outweigh the evidence on record, his proceedings will be set aside 54 M.L.J. 442=27 L.W. 654. The object of local inspection is to understand and appreciate the topography of the land in dispute, in order to aid the Magistrate in appreciating the evidence offered in Court. But the local inspection cannot take the place of legal evidence, much less the result thereof be used as a basis for the decision, 25 Cr. L.J. 412=77 Ind. Cas. 492; 25 Cr. L.J. 545=81 Ind. Cas. 33; 61 Ind. Cas. 712; (1921) Pat. 74.

May Depute any Magistrate Subordinate to him.—The power to depute does not necessarily imply that the Magistrate before whom the proceedings are pending may not himself hold the local inquiry as is provided for by this section, 5 C.W.N. 686. The duty of making the local inquiry should be deputed to a Magistrate and not to a Kanungo,

7 C.L.R. 352 but it was held in 12 Cr. L.J. 480=12 Ind. Cas. 88, that this section is an enabling section and the deputation of a *Kanungo* to make an investigation under this section is not bad under the general provision of law; anybody who has seen a place may be examined as to what he saw and the *Kanungo* may give evidence and his report is admissible under S. 157 Ind. Ev. Act to corroborate his sworn testimony. In 1 Pat. 75 it was held that a Magistrate, had no jurisdiction to direct a pleader as commissioner to hold a local inquiry and to receive in evidence a report submitted by him after completing the inquiry.

Furnish him with written instructions for his guidance.—The instructions contemplated herein, may include instructions to examine witnesses, inspection of the locality, time and place of inquiry or local inspection, the nature of the report to be submitted, the date on or before which proceedings are to be returned, etc.

The report may be read as evidence.—The Magistrate ought not to depute to a Subordinate Magistrate the *whole investigation* under S. 145, *supra*, but on receipt of the report of such Magistrate, he should himself take written statements from the parties and receive the evidence produced by them and conclude the investigation, Weir II, 118; 31 M. 82. The report is evidence without the Magistrate being called on to prove it. 1 Pat. 75. When an inquiry has been made and the result reported, it becomes part of the proceedings in the case and the party affected by it is entitled to be acquainted with the result thereof and to have an opportunity of rebutting the report of such inquiry if he thinks necessary, 21 W.R. (Cr.) 25.

Sub-section (3): Order as to costs.—Whether an order for costs is to be made in any particular case or not must depend on the facts of each case. The word used is the 'Magistrate may direct thereby,' indicating that a discretion is given to the Magistrate, 29 Cr. L.J. 957=111 Ind. Cas. 441. A Magistrate has power under this section to direct by whom any costs incurred by the parties in a proceeding before him under this chapter are to be paid. The costs include any expense incurred in respect of witnesses and pleaders, fee which is considered reasonable and these items can be awarded as costs, 8 Lah. 47 costs cannot include penalty paid by a party on a document not properly stamped, 13 M.L.T. 224=144 Cr. L.J. 210=19 Ind. Cas. 306. The costs referred to in this section are evidently the costs incurred in the Magisterial proceedings. This sub-section gives a wide discretion to the Magistrate for awarding and assessing costs but his jurisdiction is limited to the costs which might have been incurred and admissible under the much wider provisions of the Code as to costs incidental to the proceedings. The words 'which the Court may consider reasonable,' are very significant. All costs incurred cannot be awarded. The whole of the pleader's fee certified cannot be allowed unless the Court considers the sum to be reasonable, otherwise a rich party by the employment on high fees of pleaders or counsel from a distance might effectively prevent a poorer party from taking part in the proceedings lest he might have, in the case of an adverse finding against him have to pay an enormous bill of costs incurred by the opposite party nor should costs include additional costs for extra fees and travelling and other expenses etc., incurred by bringing a pleader from a distance, 9 C.W.N. 837, 14 C.W.N. 1xiii 21 Cr. L.J. 625=57 Ind. Cas. 449. It cannot include the expense for cutting crops which have been incurred, 32 C. 602. The Magistrate should not arbitrarily decide what the costs should be (1922) Pat. 564; 23 Cr. L.J. 508. Power to award costs is a good deal restricted now, and can be exercised with regard to parties to the proceeding only, 27 Cr. L.J. 21=93 Ind. Cas. 53. A wide discretion is given to the Magistrate to award costs by this section and with the exercise of that discretion the High Court will not ordinarily interfere in revision, 13 Cr. L.J. 297=14 Ind. Cas. 761.

The Magistrate passing a decision may direct.—As to the mode of recovery, see S. 547, *infra* S. 336 only refers to cases where there has been a conviction and sentence of which fine forms a part, 24 Cr. L.J. 126=71 Ind. Cas. 254. A dismissal for default is not such a "decision" as is referred to in this section as will entitle a Magistrate to award costs and the order made was set aside as one passed without jurisdiction, 4 Cr. L. Rev. 253. An order allowing proceedings initiated under S. 145, *supra* to be withdrawn is not a

"decision" within the meaning of this section and an award of costs is illegal and made without jurisdiction, 9 M.L.T. 324=12 Cr. L.J. 49=8 Ind. Cas. 239, but in, 29 Cr. L.J. 837=111 Ind. Cas. 441, a different view was taken and 9 M.L.T. 324 was *dissented* from holding that a final irrevocable order staying proceedings initiated under S. 145, *supra*, indicated that a Magistrate has applied his mind to the case and had arrived at a conclusion on the evidence placed before him that no dispute exists justifying his continuing the proceedings and thus destroying the proceedings altogether. In such a case it is a decision by the Magistrate that no dispute exists. Sub-section (5) of S. 145, *supra*, does not prevent the Magistrate from arriving at that decision without recording evidence whatever by acting on the admissions of a party who wishes to withdraw the proceedings that no dispute likely to cause a breach of the peace exists and the Magistrate acting on such admission allows the withdrawal of the proceedings decides no dispute exists. So he is competent to pass an order as to costs under this section. This appears to be within the express provisions of the statute and the intention of the Legislature and to hold otherwise would lead to manifest inconvenience and injustice. The award of costs should be made by the Magistrate at the time of passing his decision, yet the fact that costs were awarded subsequently would not render the award invalid especially where the circumstances of the case necessitated the postponement of the question, 29 M. 373; 16 L.W. 613; 24 Cr. L.J. 80=71 Ind. Cas. 128. An order as to costs does not become illegal simply because it was not made at the time of pronouncing judgment in the proceedings under Chapter XII, 29 M. 373; 23 C. 37; 24 C. 757; 21 C. 609; 11 Cr. L.J. 335=5 Ind. Cas. 943; in 47 C. 974 it was held that an order under this section although it may be made subsequent to the passing of the judgment must be made by the Magistrate who originally disposed of the case. There it was pointed out that an application for costs which is not made at the time of pronouncing the order ought to be made within a reasonable time and should be based on proper materials *vis.*, the actual costs incurred as pleader's fee and cost of witnesses, 30 Cr. L.J. 252=114 Ind. Cas. 193 following 21 Cr. L.J. 625=57 Ind. Cas. 449. Such an order will be good if it is made within a reasonable time while the same Magistrate is sitting and after notice to the parties and allowing them an opportunity of being heard, 22 C. 384 and 387; 23 C. 757 47 C. 974; 15 C.W.N. 649=15 C.L.J. 267=12 Cr. L.J. 319=16 Ind. Cas. 615. But if made without notice and without giving the party an opportunity of contesting the award, the order is one made without jurisdiction, 28 C. 302; 24 Cr. L.J. 80=71 Ind. Cas. 128. The order ought to be made only in the presence of both parties, 10 C.W.N. 1030; 12 C.W.N. ccvii; 13 C.W.N. clxxx. If at the time of passing the decision the Magistrate awarded costs, there is no objection to the amount or such costs being assessed afterwards by his successor, 22 C. 384 and 387; 23 C. 37; (1913) M.W.N. 771; 27 M.L.J. 613=16 M.L.T. 218=(1914) M.W.N. 790=15 Cr. L.J. 676=23 Ind. Cas. 1004; 21 C. 609. The assessment of costs by a separate order after hearing parties is not illegal if provision for costs is made at the time of passing the order, (1913) M.W.N. 771=14 M.L.T. 195=21 Ind. Cas. 170. A successor can not pass an order for costs when the predecessor's order is silent, 11 Cr. L.J. 335=5 Ind. Cas. 943; but it is settled law that provided the trying Magistrate has made an order as to costs his successor is competent to assess the same, if an application for assessment is made within a reasonable time, 23 C. 37; 22 C. 384 and 387; 29 M. 373; 27 M.L.J. 613; 10 C.W.N. 1030; 23 C. 302. This section evidently contemplates costs incurred in the Magisterial proceedings. When the High Court sits in revision it is not exercising the powers of a Magistrate under this chapter and therefore the costs in the revision proceedings cannot be included. The question whether the High Court exercising its powers of revision has inherent power to award costs to the successful party has been settled by the Full Bench decision, 45 M. 913. It is true that S. 261-A *infra* has been newly enacted to save the inherent powers of the High Court. But the Court cannot by invoking its inherent powers extend the powers given to it by the statute; nor can the award of costs be treated as incidental or consequential to the disposal of a revision petition within the meaning of S. 423 (1) (d), *infra*, for it does not necessarily follow from an order passed in revision, 45 M. 262 (F.B.). The Bombay High Court in 27 Bom. L.R. 1353 has taken a different view and held that the High Court can award costs in a revision petition under S. 145 *supra*.

Revision—The High Court is now empowered under S. 439 *infra*, to revise orders as to costs, the restriction which existed in S. 435 (3) having been removed. The High Court will not interfere in revision with an order under this section on the ground that the costs are either deficient or excessive, 15 C.W.N. 811; 17 Cr. L.J. 339=35 Ind. Cas. 515; 43 C. 1143. A wide discretion to award costs is given to a Magistrate by this section, and the High Court has no power in revision to interfere with the exercise of that discretion by the Magistrate if exercised properly, 9 C.W.N. 887. See also 13 Cr. L.J. 297=14 Ind. Cas. 761. In the absence of materials to show that the assessment of costs was not proper the Court refused to interfere in revision, 28 M.L.J. 134=16 Cr. L.J. 156=27 Ind. Cas. 220.

CHAPTER XIII.

PREVENTIVE ACTION OF THE POLICE.

149. Every police-officer may interpose for the purpose of preventing, and shall, to the best of his ability, prevent the commission of any cognizable offence.

Police to prevent cognizable offences.

Police-officer may interpose for the purpose of preventing.—S. 151 *infra* empowers a police-officer to arrest without warrant if it appears to him that the commission of an offence cannot be otherwise prevented, and S. 60 *supra* lays down the subsequent procedure to be adopted by him. See S. 55 *supra*, which empowers officers in charge of police stations to arrest, for the purpose of restraining bad characters to prevent commission of crimes.

Cognizable offence.—For definitions see S. 4 (1) (f) *supra*. See Sch. II *infra* as to what offences are cognizable.

150. Every police-officer receiving information of a design to commit any cognizable offence shall communicate such information to the police-officer to whom he is subordinate, and to any other officer whose duty it is to prevent or take cognizance of the commission of any such offence.

Information of design to commit such offences.

Information of a Design to commit.—This section relates to the design to commit a cognizable offence and not to the actual commission of such an offence.

Shall communicate such information.—Every police officer is bound to give information to his superior officer of the design to commit a cognizable offence and his failure to do so is an offence punishable under S. 176 I.P.C. He is also bound to give information to any other officer whose duty it is to prevent or take cognizance of the commission of such an offence, e.g. an officer in charge of a police station ought to be informed of the design to commit a cognizable offence within the limits of the station.

151. A police-officer knowing of a design to commit any cognizable offence may arrest, without orders from a Magistrate and without a warrant, the person so designing, if it appears to such officer that the commission of the offence cannot be otherwise prevented.

Arrest to prevent such offences.

Knowing of a Design.—The word used is "knowing;" mere suspicion is of no avail. See S. 157 *infra*, as to the procedure to be adopted when a cognizable offence is suspected.

May Arrest without warrant—Under S. 62, *supra*, all arrests made without warrant under this section must be reported to the District or Sub-Divisional Magistrate. After arrest the provisions of Ss. 60 to 63, *supra*, should be followed. A Police-Officer may also arrest any person obstructing him while in the execution of his duty under S. 54 (1) fifth clause, *supra*.

152. A police-officer may of his own authority interpose to prevent any injury attempted to be committed in his view to any public property, moveable or immovable, or the removal or injury of any public landmark, or buoy, or other mark used for navigation.

Prevention of injury to public property.

Scope of the section.—This section is intended to prevent injury to public property made punishable under Ss. 420 to 423, I.P.C., and the Police officer can arrest without a warrant as the offence is a cognizable one. If not cognizable, he must apply for warrant authorizing him to arrest. He is entitled to arrest under S. 54 (1) cl. 5, if he is obstructed in the execution of his duty. If the injury is already committed and the offence is non-cognizable, the Police-officer under S. 24 of Act V of 1861 (Police Act) can only take the name and address of the offender with a view to prosecute the offender.

153. (1) Any officer in charge of a police station may, without a warrant, enter any place within the limits of such station for the purpose of inspecting or searching for any weights or measures or instruments for weighing, used or kept therein, whenever he has reason to believe that there are in such place any weights, measures or instruments for weighing, which are false.

Inspection of weights and measures.

(2) If he finds in such place any weights, measures or instruments for weighing which are false, he may seize the same, and shall forthwith give information of such seizure to a Magistrate having jurisdiction.

Officer in charge of a police-station.—For definition, see S. 4 (1) (p) *supra*.

Within the limits of such station.—The power is to be exercised by the officer within the limits of his station and not outside. Chapter XIII, I.P.C., deals with offences relating to weights and measures. See Act XXXI of 1871 which relates to weights and measures of capacity and S. 11 of the Act empowering rules to be framed.

This section does not apply to the Police in the Towns of Calcutta and Bombay. In Madras Act, III of 1888, S. 12 empowers the Commissioner of Police to keep in his office Standard weights and measures.

Give information of seizure to a Magistrate having jurisdiction.—See Sch. II, Col. 8 and Chapter XIII, I.P.C. offences relating to weights and measures. The Magistrate having jurisdiction as specified in Col. 8 of Sch. II is a Presidency Magistrate or a Magistrate of the first or second class.

PART V.

INFORMATION TO THE POLICE AND THEIR POWERS TO INVESTIGATE.

CHAPTER XIV.

154. Every information relating to the commission of a cognizable offence, if given orally to an officer in charge of a police-station, shall be reduced to writing by him or under his direction, and be read over to the informant; and every such information, whether given in writing or reduced to writing as aforesaid, shall be signed by the person giving it, and the substance thereof shall be entered in a book to be kept by such officer in such form as the Local Government may prescribe in this behalf.

Information in cognizable cases.

Information.—The word 'Information' is not defined in the Code. The information contemplated by this section is a statement made by informants of their own initiative and before the commencement of the investigation. This will be the first step for commencing an investigation. A telegram received by a police officer informing him of the commission of a cognizable offence is not information recorded under this section. In the first place it is difficult to see how the telegram can be a statement contemplated in this section. Such statement, if orally given, has to be reduced to writing and read over to the informant and if it is given in writing signed by the person giving it. Here it was not certainly reduced to writing from an oral statement nor is it a writing given to the Police signed by the person making it. It cannot therefore be the document referred to in this section, 55 M.L.J. 231—29 Cr. L.J. 717—110 Ind. Cas. 461. Information on which an investigation has commenced is the first information of the occurrence. The law does not contemplate that when in the course of investigation something has been elicited; a first information can thereon be recorded. In every trial it is important that it should be known to the judicial officer what are the facts given out immediately after the occurrence and reported to the police and the object of the first information is to make him so acquainted. In addition to the entry of the first information in the diary, if the police-officer makes any memorandum of what the first informant said, that memorandum should be produced, 7 C.W.N. 345; 21 Cr. L.J. 486—56 Ind. Cas. 532. Where A gave information of the Commission of arson to a village headman who under B. 45, *supra* reported the same to the police, and a police-officer came to the village and took a statement from A, it was held that A's statement was one taken under this section, 28 M. 565, but a different view was taken in 31 M. 506 where it was held that such statement was one taken under S 162 *infra*. The Full Bench decision in 32 M. 258 did not approve of the decision in 31 M. 506 and drew a distinction between cases where the village headman was bound by law (S. 45 *supra*) to pass on the information and in cases where he was bound to report to the police or to the Magistrate and in the former class of cases, any statement taken by the police-officer from the person who gave the statement to the police will be treated as information to the police under this section. The object of a first information being to show what was the manner in which the occurrence was related when the case was first started, it should always be carefully and accurately recorded, 11 C.W.N. 554 at 566. The law requires that the first information should be the statement of the person himself giving the information, and it becomes valueless if it is drawn up by some one other than the proper informant. A statement recorded several days after the commencement of the investigation and after there had been some development, is not only no first information but has very little or no value at all, 25 M.L.T. 379; 11 C.W.N. 554 and

7 C.W.N. 343; 27 Cr. L. J. 121=91 Ind. Cas. 697. First information report is information received under this section. It is not information received after the commencement of the investigation which comes under Ss. 161, and 162 *infra*. It is information on the initiative of an informant on which an investigation is commenced and which, though not substantive evidence is yet of acknowledged value, because it shows the material on which the investigation commenced and the manner in which the occurrence was related when the case was first started. It may be used to corroborate or contradict the author of it. The first information is the basis of the case and whether it be true or false it, at any rate, usually represents what is intended by the informant to be the case set up by him at the time. In view of the notorious tendency in this country to improve upon the original statement of facts, to strengthen the case as it proceeds, and sometimes to add to the persons originally named as offenders, it is of great importance to know what was said in the first instance, 30 Cr. L.J. 38 at 39=112 Ind. Cas. 902 following 17 C.W.N. 1213=14 Cr. L.J. 632=21 Ind. Cas. 882. The statement of a person recorded under this section as first information can be proved only to corroborate that person's evidence in Court under the provisions of S. 157 of the Ind. Ev. Act or to impeach his credit under S. 145 Ind. Ev. Act but it cannot be used as substantive evidence against the maker who is subsequently charged with the offence, 29 Cr. L.J. 277=107 Ind. Cas. 701. The statement which is not substantive evidence can only be used to contradict the maker thereof. It cannot be used to contradict various other witnesses whose evidence is all uniform 29 Cr. L.J. 343=108 Ind. Cas. 162 referring to 8 Lah. 605. See also 29 Cr. L.J. 734 (2)=110 Ind. Cas. 596 (2). The first information is always of great importance in a criminal case and where it has been made a considerable time after the occurrence and by a person who knew the facts well, no person whose name is not disclosed in it should be convicted, 11 Cr. L.J. 93=4 Ind. Cas. 980. A first information drawn up by a police-officer and finally settled by an attorney is not a first information within this section, 16 C.W.N. 146=13 Cr. L.J. 65=13 Ind. Cas. 721. The first information if recorded as directed by this section at the time it is made is of considerable help at the trial because it shows on what materials the investigation commenced and what was the story then told, 11 C.W.N. 554. The first information is the first step in the proceeding, 32 M. 238. The report made at a Police Station of the Commission of an offence reduced to writing and entered in the station diary is alone first information and subsequent statement made by the informant to the police is only statements made in the course of police investigation and therefore wholly inadmissible in evidence and cannot be treated as first information, 21 Cr. L.J. 743=58 Ind. Cas. 247. First information under this section is not a statement under S. 162 *infra*, and is therefore not excluded from formal evidence, 54 C. 237 followed in 30 Cr. L.J. 38=112 Ind. Cas. 902. First information is what is given first to the police in point of time whoever the informant may be, and not what the police may select and record as first information, 8 C.W.N. 218; 8 C.W.N. 921; 7 C.W.N. 343; 47 A. 280. Statements made in the course of investigation can be proved only by examining the police-officer to whom the statement was made, 22 Cr. L.J. 410=81 Ind. Cas. 630. First information report, is the well known technical description of a report under this section giving first information of a cognizable crime which is usually made by the complainant or some one on his behalf. The language is inapplicable to a statement made by the accused, 23 Cr. L.J. 490=77 Ind. Cas. 890. Mere absence of detail in the first information report as compared with the subsequent statements of the same person as a witness is no ground for discrediting his evidence given as a witness nor can the prosecution case be discredited on account of the delay in giving the first information provided the delay is explained, 8 Lah. 803.

Relating to the commission of a cognizable offence.—The offence may have been committed within or without the local limits of the particular police station. See Ss. 155-157 as to local limits of police station. See also S. 4 (1) (*q*). *supra*, as to definition of cognizable offence.

If given orally.—An information under this section could be given either orally or in writing; if given orally, the police-officer is required to record it and every such information

whether given in writing or reduced to writing requires to be signed by the person giving it. Such information forms the basis upon which the investigation under this chapter commences. A police-officer making an investigation has power under S. 160, *infra*, to require the attendance of witnesses who appear to be acquainted with the circumstances of the case and examine them. Such persons are bound to attend and are bound to answer all questions relating to the case, other than questions the answers to which would incriminate them. S. 162 lays down that no statements made by a person to a police-officer in the course of such investigation shall, if reduced to writing be signed by him, 3 Ran. 577.

A police-officer is bound to receive a complaint when it is preferred to him or where the commission of an offence is reported to him orally he is to take down the complaint in writing. But a suit for damages cannot be maintained against a police-officer merely because he refused to receive a complaint of theft preferred to him. If he fails to perform his duty as a public servant, he does not render himself liable for damages, but can only be dealt with by his superior officer for neglect of duty, 49 M.L.J. 450=89 Ind. Cas. 945.

To an officer in charge of a police station.—For definition of an officer in charge of a police station, see S. 4 (1) (p), *supra*.

Shall be reduced to writing.—An information to a police-officer should not be made on oath. If it is false it cannot be made the subject of a charge under S. 193, I.P.O., but it might come under S. 182 or 211, I.P.O., but if the person giving the information is examined under S. 161, *infra*, he will be liable under S. 193, I.P.O., if he has intentionally given a false statement, S. B. 216. But a statement, recorded by the police-officer under S. 161 cannot be treated as information given to the police under this section and is false punishable under S. 182, I.P.O. The word "give" in S. 182, I.P.O., does not bear the restricted meaning of the word "volunteer," 3 Ran. 577. The complaint or information reduced to writing forms part of the first information report. The writing containing the first information is not a judicial record and is no evidence of the existence of facts mentioned therein, 1897 A.W.N. 47.

Shall be signed.—A person giving the information is to sign the statement reduced to writing unlike Ss. 161 and 162 *infra*, and refusal to sign is punishable under S. 180, I.P.O.

Entered in a book to be kept by such officer.—This book is the general diary also known as "the station diary" or "station-house register" kept under S. 44, Act V of 1861. Under S. 172 (2), *infra*, any Criminal Court may send for police diaries of a case under inquiry or trial in any such Court and may use such diaries not as evidence in the case but to aid it on such inquiry or trial; neither the accused nor his agent shall be entitled to call for such diaries nor shall he or they be entitled to see them merely because they are referred to by the Court; but if they are used by the Police-Officer who made them to refresh his memory or if the Court uses them for the purpose of contradicting such Police-Officer the provisions of the Indian Evidence Act, 1872, S. 145 or S. 161 shall apply. The Code is silent as to what a Station House Officer should do when he receives information as to the commission of an offence outside his station. There is nothing to prevent him from receiving and recording the information though he may not have power to investigate, 13 Cr. L.J. 622 = 3 Cr. L. Rev. 245=25 Ind. Cas. 630. A false entry in the station diary is punishable under S. 177, I.P.O., 20 A. 151.

- 155. (1)** When information is given to an officer in charge of a police-station of the commission within the limits of such station of a non-cognizable offence, he shall enter in a book to be kept as aforesaid the substance of such information, and refer the informant to the Magistrate.

Information in non-cognizable cases.

(2) No police-officer shall investigate a non-cognizable case without the order of a Magistrate of the first or second class having power to try such case or commit the same for trial, or of a Presidency Magistrate.

Investigation into
non-cognizable cases.

(3) Any police-officer receiving such order may exercise the same powers in respect of the investigation (except the power to arrest without warrant) as an officer in charge of a police-station may exercise in a cognizable case.

Object of the section.—The object of the Legislature in enacting this section is to allow aggrieved persons direct access to justice without the intervention of the Police. This is the only section in Chapter XIV of the Code which applies to the Police in Calcutta, 15 C. 595 at 606 (F.B.); it also applies to the Police in the town of Bombay, 21 B. 495.

Non-cognizable offence.—For definition of non-cognizable offence, see S. 4 (1) (n), *supra*.

Shall enter in a book to be kept as aforesaid.—This book is what is called the *Station or general Diary*. See in this connection, 20 A. 151.

Refer the informant to the Magistrate.—The Police-Officer receiving the information can now submit a report to the Magistrate in non-cognizable cases and Magistrates are entitled to take cognizance of non-cognizable offences upon police reports without examining the police-officer on oath, 49 M. 523 (F.B.) followed in 23 Cr. L.J. 821=104 Ind. Cas. 437; 25 Cr. L.J. 1361=82 Ind. Cas. 753; 29 Bom. L.R. 742=28 Cr. L.J. 939=105 Ind. Cas. 439. If the alleged offence had been committed in his view, and he makes a formal report, it was held that it will amount to a complaint as defined in S. 4 (1) (h), *supra*, 26 B. 150 (F.B.). In 6 M.L.T. 239=11 Cr. L.J. 156=4 Ind. Cas. 1043, it was held that when on a certain information received, the police finding that the facts disclosed a non-cognizable offence, reported the case to the Presidency Magistrate for orders under sub-section (2) of this section, it was competent for them to do so under sub-section (2) and the Magistrate had jurisdiction to pass orders without first taking cognizance of the case in one of the three ways mentioned in S. 190, *infra*. See also 11 A.L.J. 331. This section deals only with powers of a police-officer. It confers no power on Magistrates to direct a local investigation by the police or to call for a police report 12 B. 161; but such a power to order an investigation is conferred in cognizable cases on Magistrates empowered under S. 190, *infra*, by S. 136 (3), *infra*. A Magistrate is competent to order an investigation under this section when he receives a police report in a non-cognizable case if he has reason to doubt its correctness, 16 Cr. L.J. 97=27 Ind. Cas. 145. If a Magistrate not being empowered erroneously and in good faith orders a police investigation in a non cognizable case his proceedings shall not be void, S. 529 (b), *infra*.

Or of a Presidency Magistrate.—This is the only section in this chapter which applies to the police in Calcutta. But this section is not sufficient to amount to a provision that the whole chapter is applicable to the police in Calcutta or to give them any power to make an investigation under it 15 C. 595 at 606. See also 52 C. 67; 5 Pat. 171, 54 C. 218.

156. (1) Any officer in charge of a police-station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XV relating to the place of inquiry or trial.

Investigation into
cognizable cases.

(2) No proceeding of a police-officer in any such case shall at any stage be called in question on the ground that the case was one which such officer was not empowered under this section to investigate.

(3) Any Magistrate empowered under section 190 may order such an investigation as above-mentioned.

Scope of the section—This section is not limited in its application to offences only, but extends also to matters mentioned in S. 55, *supra*, dealing with the arrest of bad character, etc. The reference in this section to Chapter XV, *infra*, is only as to the venue, 1893 A.W.N. 124.

Officer in charge of a police-station.—For definition, see S. 4 (1) (g), *supra*.

Investigate any cognizable case.—For definition of "investigation" and "cognizable offence," See S. 4 (1) (f) and *supra*. Having regard to the definition of judicial proceeding in S. 4 (1) (m), *supra*, the investigation by a police-officer is not in any stage a judicial proceeding, as he has no power to record evidence *on oath* and though persons examined by him are bound to answer under S. 161 (2) all questions put to them, yet they are no longer bound to answer *truly*.

Within the local limits of such station.—Under this section the local limits within which an officer in charge of a police-station can investigate is defined. No provision is made here for an indiscriminate power of such an officer to enter houses in the neighbourhood of the place where a cognizable offence may have been committed. The only authority which a police officer making an investigation has to enter a house without a search warrant is when he has reasonable grounds for believing that anything necessary for purposes of an investigation into an offence which he is authorized to investigate may be found in any place within the local limits of the station he is in charge. Obviously the search indicated here is for stolen property or some other document or some tangible object such as may be summoned to be produced by a Court under S. 94, *supra*, 26 A.L.J. 410=29 Cr.L.J. 272=107 Ind. Cas. 683.

Sub-section (3).—This sub-section enables a Magistrate who under S. 190, *infra*, can take cognizance of an offence, to order a police investigation if it is a cognizable case. An order by a Sessions Judge directing the police to make an inquiry under this section is *ultra vires*, 11 Cr. L.J. 330=5 Ind. Cas. 915. Under S. 202, a local investigation by the police may be ordered only *after* the examination of the complainant, and before issue of process to the accused, here a reference could be made to the police before examining the complainant and the issue of process, 9 M. 282. This sub-section is not intended to provide an alternate procedure to that laid down in S. 200, which finds a place in Chapter XVI and not in Chapter XIV which deals with the procedure and powers of the police, 10 M.L.T. 120=12 Cr. L.J. 463=11 Ind. Cas. 999=(1911) 2 M.W.N. 74. After he has issued process the Magistrate has no power to refer the case to the police for inquiry and report and the police inquiry so started would be illegal, 30 Cr. L.J. 326=114 Ind. Cas. 365. But it was held in 8 Bom. L.R. 589 and 30 C. 923 that under this sub-section the Magistrate may direct the police to investigate, and upon receipt of the police report may hold a judicial inquiry himself under S. 150, *infra*, without proceeding under this Chapter. It is the duty of the committing Magistrate, and falling him, of the Sessions Judge to inquire fully into the circumstances of the delay in the investigation of the police and to consider its bearing on the prosecution story, 2 Bom. L.R. 1092. This sub-section cannot have any application to a case where a District Magistrate taking cognizance under S. 200, *infra*, directs a police investigation under S. 202, *infra* and orders that if the charge is made out to file a charge sheet before a competent Magistrate without himself passing an order under S. 204, *infra*, or direct a transfer under S. 192, *infra*, 54 C. 303 referred to in 31 Bom. L.R. 86.

Chapter V, Ss. 1, 129, p. 89. *Orders of the Madras Police*, give the form showing the proper procedure under the Code on receipt of a of the commission of a cognizable offence and on receipt of an order investigate a non-cognizable offence.

CIRCUMSTANCES.

PROCEDURE.

Cognizable Cases.

proviso (a)]

2. The facts do not appear to constitute an offence, or in cases of a petty nature, there is no chance of procuring any evidence so that the Police think that there is no necessity for entering on investigation [Proviso (b), S. 157, Cr. P. C.]

3. Accused arrested on sufficient grounds. Investigation cannot be completed within 24 hours.

(a) On completion of the investigation, the case is found to be true.

(b) On completion of the investigation, the case is found to be false.

4. On completion of the investigation, the case is found to be true, the Police have done all in their powers to find the offender or offenders and have failed.

5. The accused arrested. Inquiry likely to be completed within 24 hours.

(a) On completion of the investigation, the case is found to be true.

(2) On completion of the investigation the case is found to be false or evidence is insufficient to justify transmission of the accused to Magistrate.

6. The accused not found, but after investigation the case is found to be true, and such facts elicited as would justify his arrest.

7. The accused not arrested or no person accused. After full investigation it is found that no offence has been committed.

8. After investigation it is found that the facts constitute an offence of a less grave nature than at first alleged, e.g., charge of robbery found to amount in fact only to theft.

8-A. After investigation it is found that the facts constitute a graver offence than at first alleged.

9. The parties concerned in a compoundable cognizable case request the Police to stop investigation on the ground that a compromise has been effected.

Send original information, whether it be the Village Magistrate's report or the information written or dictated by complainant or informant, with Occurrence Report, Form No. 44, Volume II, to the Magistrate having jurisdiction.

Send original information, whether it be the Village Magistrate's report or the information written or dictated by complainant or informant, with Occurrence Report, to the Magistrate having jurisdiction, explaining reasons for not investigating.

Case in the station house report.

Note.—If the accused is forwarded to a Magistrate other than the Magistrate having jurisdiction, Occurrence Report as in case 1 must be sent to the latter.

Send Charge Sheet, Form No. 45, Volume II, to the Magistrate having jurisdiction.

Send Referred Charge Sheet, Form No. 46, Volume II, to the Magistrate having jurisdiction through the Divisional Inspector.

Send Form No. 47, Volume II, through the Inspector of the Division, to the Magistrate having jurisdiction.

Detain the accused, Send Occurrence Report as in case 1.

Send the accused, or in bailable cases, Bail bond, Forms Nos. 48, 49 and 50, Vol. II, with Charge Sheet to the Magistrate having jurisdiction.

Release the accused on bail and send bond with Referred Charge Sheet, through the Divisional Inspector to the Magistrate having jurisdiction.

Send Charge Sheet to the Magistrate having jurisdiction asking for warrant.

Send Referred Charge Sheet, through the Divisional Inspector, to the Magistrate having jurisdiction.

Send Referred Charge Sheet through the Divisional Inspector, to the Magistrate having jurisdiction, asking for authority to correct the record.

Send a Supplemental Occurrence Report to the Magistrate having jurisdiction.

Send Referred Charge Sheet, through the Divisional Inspector, to the Magistrate having jurisdiction, for orders.

Non-Cognizable Cases.

- | | |
|---|---|
| 1. After investigation ordered by Magistrate, case found to be true. | Send Charge Sheet to the Magistrate by whom the case was referred, <i>Vide</i> also P.O. No. 136 (b). |
| 2. After investigation ordered by Magistrate, case found to be false. | Send Referred Charge Sheet to the Magistrate by whom the case was referred, through the Divisional Inspector. |
| 3. Accused arrested under S. 57, Cr. P.O. name and residence not ascertained within 24 hours. | Send the accused with Occurrence Report to the Magistrate having jurisdiction. |
| 4. Accused arrested under S. 57, Cr. P. O. name and residence ascertained within 24 hours. | Release the accused and send bond with Occurrence Report to the Magistrate having jurisdiction. |

Note.—(1) Station-house officers should endeavour to ascertain the truth and real nature of the case from the complainant, and get the charge put up in its true character.

(2) A report will be made to the Magistrate under S. 173, Cr. P. O., in all cases investigated by the police, irrespective of results.

(3) An investigation is held to be completed—

(a) when the police have done all in their power to find the offender or offenders and have failed.

(b) when the police arrest and charge an offender,

(c) when the police refer as false a charge that they have investigated.

(4) The results of police investigation into cases connected with other Government departments should be communicated at once by the police-officer making the investigation to the local head of such department or establishment.

157. (1) If, from information received or otherwise, an officer

Procedure where cognizable offence suspected.

in charge of a police-station has reason to suspect the commission of an offence which he is empowered under section 156 to investigate, he shall forthwith send a report of the same to a Magistrate empowered to take cognizance of such offence upon a police-report, and shall proceed in person, or shall depute one of his subordinate officers not being below such rank as the Local Government may, by general or special order, prescribe in this behalf, to proceed to the spot to investigate the facts and circumstances of the case and, if necessary, to take measures for the discovery and arrest of the offender:

Provided as follows:—

(a) when any information as to the commission of any such

Where local investigation dispensed with. offence is given against any person by name and the case is not of a serious nature, the officer in charge of a police-station need not proceed in person or depute a subordinate officer to make an investigation on the spot;

Where police officer in charge sees no sufficient ground for investigation.

(b) if it appear to the officer in charge of a police-station that there is no sufficient ground for entering on an investigation, he shall not investigate the case.

(2) In each of the cases mentioned in clauses (a) and (b) of the proviso to sub-section (1), the officer in charge of the police-station shall state in his said report his reasons for not fully complying with the requirements of that sub-section, and, in the case mentioned in clause (b), such officer shall also forthwith notify to the informant, if any, in such manner as may be prescribed by the Local Government, the fact that he will not investigate the case or cause it to be investigated.

Amendment.—In sub-section (1) the words “if necessary to take measures” make it clear that the police have a discretion in arresting a person accused in a cognizable case; the rank of subordinate officer in this sub-section is now to be fixed by the Local Government. The addition made to the end of sub-section (2) provides that if the police do not investigate a complaint the complainant shall be informed to that effect. It is left to the Local Government to prescribe the manner in which the communication shall be made.

Shall Forthwith send a report.—Reports relating to investigations by the police are: (1) report under S. 157, (2) report under S. 167, (3) report under S. 168 and (4) report under S. 173. The first, under this section is the preliminary report before commencing investigation and the one under S. 168 is the final report after completing the investigation. Report under S. 157 is sent when the investigation cannot be completed within 24 hours as prescribed by S. 61 or within the period specified in S. 167. The report under S. 173 is the completion report called the charge sheet. The report required by this section to be sent is the first report of an offence, what is generally called the *Occurrence Report*. The sending of the report is an essential preliminary to the commencement of an investigation, (1914) M.W.N. 382=1 L.W. 355=3 Cr. L. Rev. 245=15 Cr. L.J. 622=25 Ind. Cas. 630 but it is left to the Magistrate to take action on it under S. 190 (1) (b) or to drop the matter, Weir II, 119; omission to send a report under this section to a Magistrate is a serious neglect of duty liable to result in a failure of justice and will lay the police to grave suspicion of concoction of evidence. 11 Cr. L.J. 498=7 Ind. Cas. 601.

Information received.—This section empowers a police-officer to take action when he has reason to suspect the commission of a cognizable offence from information received or otherwise. The expression “information received” undoubtedly refers to information furnished under S. 154, *supra*. A mere telegram giving information of the commission of an offence is not such an information. The words “or otherwise” are no doubt wide enough to cover the receipt of a telegram or even less definite or less satisfactory source of information. (1914) M.W.N. 382=1 L.W. 355=3 Cr. L. Rev. 245=15 Cr. L.J. 722=25 Ind. Cas. 630. See 53 M.L.J. 231=29 Cr. L.J. 717=110 Ind. Cas. 461, where it was held that a mere telegram giving information as to the commission of a cognizable offence cannot be acted upon by a police officer for so far as its authenticity goes to stands in no better position than village gossip and there is no guarantee that it has been sent by the person who purported to send it; in such a case it is the duty of the officer concerned to verify if the fact that it was really sent by the person purporting to send it. See also 14 C.W.N. 326. A police report submitted under this section entitles a Magistrate to proceed under S. 159, *infra* 43 C. 1152.

Officer in charge of a police station.—Ss. 157-167 make it clear that a station-house officer or his superior officer, within the limits of the local area of his jurisdiction is

alone entitled to investigate an offence. A *C.I.D.* Inspector is therefore not legally competent to investigate and his evidence is inadmissible under S. 156, Indian Evidence Act. The power to investigate must be given to him by law, 35 M. 247 and 397.

158. (1) Every report sent to a Magistrate under section 157 shall, if the Local Government so directs, be submitted through such superior officer of police as the Local Government, by general or special order, appoints in that behalf.

Reports under S. 157
how submitted.

(2) Such superior officer may give such instructions to the officer in charge of the police-station as he thinks fit, and shall, after recording such instructions on such report, transmit the same without delay to the Magistrate.

Under S. 157 *supra* the officer in charge of the police-station shall forthwith send a report to the Magistrate empowered to take cognizance of the offence. The object of this provision is that the Magistrate who is primarily responsible for the condition of the District as regards responsible crimes should know of the occurrence as soon as possible and should watch the various steps taken by the Police and advise them in all cases whenever necessary. This section also emphasises that the report must be submitted without delay by the superior officer after recording the instructions he had given to the police-officer submitting the report, S. 159 *infra* indicates the procedure to be adopted by a Magistrate on receipt of a report.

159. Such Magistrate, on receiving such report, may direct an investigation, or, if he thinks fit, at once proceed, or depute any Magistrate subordinate to him to proceed, to hold a preliminary inquiry into, or otherwise to dispose of, the case in manner provided in this Code.

Power to hold in-
vestigation or prelimi-
nary inquiry.

On Receiving report may direct investigation or preliminary inquiry.—An inquiry can be made under this section only when a police report within the terms of S. 157 is submitted, i.e., a report before the completion of the police investigation or inquiry; but when such report is submitted after investigation the Magistrate has no power to act under this section. In 4 C.W.N. 351 followed in 32 A. 30 on information laid before the Police charging a person with house trespass with intent to commit adultery, the Police reported the case to be one of criminal trespass disbelieving the intent with which the trespass was committed. This report of the Police was not one coming under S. 157 *supra* and the Magistrate was therefore not entitled to act under this section, and his action not being a judicial proceeding, the direction of the Magistrate to prosecute the complainant under S. 211, I.P.O., was held bad. The object of the inquiry is to ascertain whether there are grounds for believing the accusation to be unfounded and when the Police after full inquiry report the commission of an offence, the Magistrate has no jurisdiction to hold a preliminary inquiry under this section or to make a further inquiry under S. 202, *infra*, 1899 A.W.N. 87; 32 A. 30; 17 C.W.N. 825; 43 C. 1152. This section will apply only when a police report is received, not when the complaint is made direct to a Magistrate in which, case the Magistrate is bound to proceed under S. 200, *infra*, 30 C. 923; 10 M.L.T. 120—12 Cr. L.J. 463=11 Ind. Cas. 999. When a Magistrate having taken cognizance of a case refers it to the police for inquiry and report, the police have no power to prefer a charge-sheet before another Magistrate and such other Magistrate has no jurisdiction to take of the case, 16 Cr.L.J. 466=29 Ind. Cas. 99; 11 C.W.N. 832.

Has reason to suspect.—Compare the language of this section with that of S. 154, *supra*. Under the latter section every information relating to the commission of a cognizable offence must be reduced to writing. But under this section it is only when the information gives a reasonable suspicion as to the commission of an offence that compels the officer to take action. It can hardly be contended that every inquiry which a police officer makes must necessarily be an investigation under this section. Most investigations are initiated on information recorded under S. 154 *supra* and vouched for by the informant. But the police must frequently hear of alleged offences from less reliable sources, e.g., village gossip or the receipt of a telegram which so far as authenticity goes stands in no better position. In such cases it is discretionary with the officer to take action or not, before deciding as to the course he may adopt. He may frequently deem it well to make few preliminary and informal inquiries as to whether there is anything in what he has heard to render a formal investigation desirable and such action will not amount to an investigation under this section, (1914) M.W.N. 382=1 L.W. 355=3 Cr. L. Rev. 245=15 Cr. L.J.=622 25 Ind. Cas. 630.

Shall not investigate.—As a rule every complaint of a cognizable offence should be investigated either at the station or by visiting the scene of alleged crime. Investigation should only be refused on the ground of (1) the severity of the offence (2) the absence of any procurable evidence in cases of a petty nature, mere suspicion that the evidence offered is false is no reason for non-investigation and whenever the complainant alleges the existence of any evidence the case should be inquired into. *Madras Police Manual Vol. 1, p. 311*. By the addition now made in sub-section (2) it is provided that when investigation is refused the officer should forthwith give notice of this fact to the informant.

Depute any subordinate magistrate to proceed.—On receiving a police-report if a case is made over to a Subordinate Magistrate under this section he is certainly required to dispose of it judicially, and if he holds a local inquiry and examines the accused he must be careful to observe the requirements of S. 164 and S. 364, *infra*; otherwise any statement so obtained may be inadmissible in evidence, 2 C.W.N. 702.

Otherwise dispose of the case.—He may dismiss the complaint. If the police send a report that there is no sufficient ground for entering on an investigation the Magistrate may dismiss the complaint. But if a complaint is made to a Magistrate himself he is bound to proceed under S. 200, *infra*, 30 C. 923; (1911) 2 M.W.N. 74=10 M.L.T. 120=12 Cr. L.J. 463=11 Ind. Cas. 999.

160. Any police-officer making an investigation under this Chapter may, by order in writing, require the attendance before himself of any person being within the limits of his own or any adjoining station who, from the information given or otherwise, appears to be acquainted with the circumstances of the case; and such person shall attend as so required.

Police-officer's power to require attendance of witnesses.

Scope of the Section.—This section does not authorise a police-officer to require the attendance of an accused person with a view to his answering the charge. The intention of the Legislature seems to have been only to provide a facility for obtaining evidence and for procuring the attendance of the accused who may be arrested at any time, if necessary, without a warrant. The police may order any person whom they believe to be in a position to give information to attend and do so and the person so ordered may decline to make any incriminating statement, but he cannot be summoned to answer the complaint, 7 M. 274 (F.B.) Weir II, 121; 33 C. 1023. Examination of women, especially of *pardanashin* ladies should be conducted in their own houses and not in the police station. 2 C.W.N. 199=2 Cr. L.J. 51; see 5 Bom L.R. 644, where it was held that a police-officer had no power under

this section to call upon the accused to produce any documents in his possession before him. Neither is a police-officer authorised to take a security bond for the production of any person before the police, 11 C. 77. Nor can a police-officer require a surety to attend the police-station to be examined and to give information as to the person for whom he stands surety, 1885 A.W.N. 43. Under this section a police-officer is not empowered to arrest or detain persons whose evidence is required for investigation, 7 W.R. (Cr.) 3 nor can he take a security bond for the production of any person before the Police, 11 C. 77. A Magistrate cannot direct witnesses to attend a police investigation and cannot issue a warrant for the arrest and production of a person to give evidence under this section 24 C. 320, Ratanlal 133.

By order in writing require the attendance.—The order must be in writing. Where a police officer sent a constable without an order in writing to inform and bring two witnesses but the accused induced them not to go and give evidence, it was held that no conviction under Ss 180-182, I.P.C. can legally be sustained Ratanlal 850. When the order is not in writing non-attendance is not punishable under S. 174, I.P.C., Weir I. 86; II, 123; 20 Cr. L.J. 48=48 Ind. Cas. 688; a witness failing to attend before a police-officer making an investigation is liable to be prosecuted under S. 174, I.P.C., 24 C. 320, but a Magistrate is not competent to issue a warrant for the arrest and production of a person to be examined by the police. Refusal to accept the notice issued by the police requiring attendance is not an offence punishable under S. 179, I.P.C., 24 A.L.J. 215=27 Cr. L.J. 284=52 Ind. Cas. 460.

161. (1) Any police-officer making an investigation under this Chapter or any police-officer not below such rank as the Local Government may, by general or special order prescribe in this behalf acting on the requisition of such officer may examine orally any person supposed to be acquainted with the facts and circumstances of the case.

Examination of witnesses by police.

(2) Such person shall be bound to answer all questions relating to such case put to him by such officer, other than questions, the answer to which would have a tendency to expose him to a criminal charge or to a penalty or forfeiture.

Amendment.—The addition of the words in sub-section (1) "or any police-officer not below such rank as the Local Government may, by general or special order, prescribe in this behalf acting on the requisition of such officer" enables an investigating police-officer to examine witnesses. But it is left to the Local Government to prescribe the rank of such police-officer.

Scope of the section.—This section makes a person interrogated by the police making an investigation bound to answer all questions relating to the case put to him by the police officer. The investigation dealt with by this section is limited to an investigation made under Chapter XIV of the Code which relates to information as to the commission of a cognizable offence but not to merely threatened or contemplated offence—in which case action is to be taken under the preventive sections of the Code. It is possible to argue that the words 'every information relating to the commission of a cognizable offence' occurring in S 154 *supra* may be held to cover information relating to the threatened commission of a cognizable offence. It would have been much better if the Code had contained a general power to Magistrates to refer any matter brought to their notice for investigation to the police—without confining it to Chapter XIV. Petitions under S. 107, *supra*, are habitually referred for investigation to police by Magistrates which is a great safeguard to the subject and no class of cases require more scrutiny from the very nature of the allegations made. Any allegation that a man has not committed an offence but contemplates committing one can obviously be made of recklessly. It will be well that the Code should be revised and that an express provision should be made conferring power in terms upon Magistrates to refer petition under S. 107 *supra* for investigation, 49 M. 315 at 319 referring to Weir II, 51.

May examine orally.—The words previously were 'and reduce into writing any statements made by the persons so examined.' The reason for the change is that statements before the police may be hurriedly taken down on rough notes; the police-officer is not trained in taking evidence and the notes are often fairied out by another officer. They bear no resemblance to depositions and ought to have no weight as such attached to them. *Ss. 164 and 364 infra* do not apply to examination of witnesses under this section nor can the witnesses be put on oath, 15 A. 11.

Any person—These words are wide enough to include the person arrested or to be arrested. This may include as remarked in 3 *Ran. 72* the examination of the accused or suspected persons as such persons are examined in the capacity of persons who are supposed to be acquainted with the facts and circumstances of the case; but a clear distinction is drawn in *S. 173 infra* between 'persons who appear to be acquainted with the circumstances of the case' and the accused and this must raise a doubt whether the 'phrase persons supposed to be acquainted with the facts and circumstances of the case' in this section includes an accused after arrests. As this doubt exists, the marginal note to this section may be looked into and used to assist to come to a conclusion that this section was not intended to apply to an arrested accused-person as the marginal note is 'examination of witness by the police' 29 *Cr. L.J. 400* at 402=108 *Ind. Cas. 442*. When a police officer has evidence before him sufficient to justify the arrest of the person accused he should not preliminary to the arrest examine such person and record a statement from him in writing under this section and then immediately afterwards arrest him, 4 *G.W.N. 129* at 140.

Shall be bound to answer all questions.—The word 'truly' which occurred previously has been omitted. The Select Committee in omitting the word observe thus. "We have amended this clause by reverting to the law as it stood under the Code of 1861 and 1872 and a practice which had existed for nearly fifteen years has been deliberately departed from." The result therefore is that there is now no legal obligation on a witness to state the truth in police investigation and consequently a conviction for perjury in an alternative charge of making contradictory statements before the Police and the Magistrate can no longer be had, 23 *M. 544*. The Select Committee further observe, "It seems to us unfair that a man should be liable to be convicted of giving false evidence on the strength or by the aid of a statement supposed to have been given to a police officer but which is not given on oath, which he has not signed and which he had no opportunity of verifying. They bear no resemblance to depositions and ought to have no weight as such attached to them. We are aware that there are inconveniences in abolishing direct liability for giving false evidence to the police but the balance of expediency seems to us to be in favour of the old law. The provisions of *Ss. 202 and 203, I.P.C.* appear to us to afford sufficient safeguard against false information." The law as it now stands is in accordance with the rulings in 7 *C. 121 (F.B.)* In *S. 175 infra* the word 'truly' is still retained and every person summoned shall be bound to answer truly all questions put by the police-officer. A statement to question put by a police officer under this section is privileged and cannot be made the ground of a charge of defamation, 16 *M. 233*, nor will a civil action for damages lie, 29 *C. 794*. It is highly improper for a police-officer to obtain a statement from an accused person professedly under this section and reduce it to writing, 27 *C. 235*. A refusal to answer questions asked by a police-officer under this section is not punishable under *Ss. 176, 179 and 187, I.P.C.* as a person legally bound to state the truth or by any express provision of law to state the truth, 23 *M. 544*; 7 *C. 121 (F.B.)*. Answers to questions put by police-officer under this section do not amount to institution of criminal proceedings within the meaning of *S. 211, I.P.C.* nor does he thereby charge any person within that section, 6 *M.L.T. 133*=4 *Ind. Cas. 1081*; 31 *M. 506*, 20 *M.L.J. 132*; *Weir I. 193*. A statement made by witness to a police-officer in the course of an investigation under this chapter and recorded by him under this section cannot be treated as information given to a police-officer under *S. 154 supra*, and therefore, if false, cannot be punished under *S. 187, I.P.C.*, 26 *Cr. L.J. 1532*=80 *Ind. Cas. 318*.

162. (1) No statement made by any person to a police-officer in the course of an investigation under this Chapter shall, *if reduced into writing, be signed by the person making it ; nor shall any such statement or any record thereof, whether in a police-diary or otherwise, or any part of such statement or record, be used for any purpose (save as hereinafter provided) at any inquiry or trial in respect of any offence under investigation at the time when such statement was made :*

Statements to police not to be signed. Use of such statements in evidence.

Provided that, when any witness is called for the prosecution in such inquiry or trial whose statement has been reduced into writing as aforesaid, the Court shall on the request of the accused, refer to such writing and direct that the accused be furnished with a copy thereof, in order that any part of such statement, if duly proved, may be used to contradict such witness in the manner provided by section 145 of the Indian Evidence Act, 1872. When any part of such statement is so used, any part thereof may also be used in the re-examination of such witness, but for the purpose only of explaining any matter referred to in his cross-examination :

Provided further, that, if the Court is of opinion that any part of any such statement is not relevant to the subject-matter of the inquiry or trial or that its disclosure to the accused is not essential in the interest of justice and is inexpedient in the public interests, it shall record such opinion (but not the reasons therefor) and shall exclude such part from the copy of the statement furnished to the accused.

(2) Nothing in this section shall be deemed to apply to any statement falling within the provisions of section 32, clause (1), of the Indian Evidence Act, 1872.

Amendment.—This section has been redrafted "There has been some conflict of authority as regards the bearing of S. 157 of the Indian Evidence Act, 1872 on S. 162 of the Code, as regards the use which may be made of a statement made by any person to a police officer in the course of an investigation. The amendment provides that when such a statement or any part of it is used to impeach the credit of the witness, it may also be used to corroborate his evidence. Reference may be made to the decision in 36 C. 291".—*Statement of Objects and Reasons.* See 39 B. 58 at 66 67, where conflicting rulings of the various High Courts are collected and considered, and the new amendment is in accordance with the view expressed therein. *Shah. J.*, pointed out "that the anomaly, if any, can be remedied by the Legislature and the duty of the Court plainly is to construe the section without straining the language used by the Legislature." The various rulings which held that the statements can be used only to impeach the credit of a witness, i.e., may be used as evidence for the accused and not against the accused are no longer law and need not be considered after the amendment.

Scope and object of the section.—The provisions of this section have been deliberately enacted by the Legislature and are entitled to respect not merely in the letter but also in spirit so long as the section remains unamended, 29 Bom. L.R. 996 at 1005. The first

paragraph provides that no statement made to the police in the course of their investigation shall be admissible at the trial of an offence under investigation at the time the statement was recorded; consequently no witness may be asked what he said to the police during their investigation nor may any police officer be asked what a witness told him during his investigation nor may any bystander be questioned as to what he heard another person say to the police during their investigation. The second paragraph, however, loosens the rigidity of the first to a certain extent namely when a witness for the prosecution is examined, if the accused has reason to believe that the statement of the witness in Court differs from his statement to the police, then he or his advocate may ask the court to refer to the record of any statement made by the witness to the police and if there is any variation in the statement, the defence is entitled to a copy of the statement to the police and that copy may be proved and the witness cross-examined on that statement under S. 145, Indian Evidence Act and the witness's attention must be drawn to the particular points of difference 6 Ran. 137. This section plainly constitutes an exception to the ordinary rule of evidence, 32 B. 111 (F.B.) Its purpose is to amend certain sections of the Indian Evidence Act which state what evidence is admissible and inadmissible in certain circumstances 45 C. L.J. 199 = 28 Cr. L.J. 446 = 101 Ind. Cas. 478. This section in no way concerns the giving of oral evidence of the statement either by the prosecution or defence. Both sides are at full liberty to give oral evidence of the statement made in accordance with the provision of the Evidence Act for impeaching credit or corroborating and to use the writing for refreshing the memory of the witness. This section only prohibits the use of the writing "as evidence under S. 35 of the Evidence Act and nothing more. The reason is plain enough "such statements are recorded by police officers in the most haphazard manner. Officers conducting an investigation not unnaturally record what seems in their opinion material to the case at the stage and omit many matters equally material and it may be of supreme importance as the case develops. Besides that in most cases they are not experts, of what is and what is not evidence. The statements are recorded often hurriedly in the midst of a crowd and confusion, subject to frequent interruption and suggestion from bystanders. Over and above all, they cannot be in any sense trained depositions, for they are not prepared in the way of a deposition. They are not read over to, nor are they signed by the deponents. There is no guarantee, that they contain much more or much less than what the witness had said." 15 A. 207 at 208 See also the remarks of *Sir George Knox, J.*, in 7 A. L.J. 468 = 6 Ind. Cas. 101, to the same effect. The provisions of this section are enacted in the interests of the accused and have the effect of ensuring that the statement contained in the document can only be proved by calling the officer to whom the statements were made and thus affording the accused an opportunity of cross-examination. Had it been intended to rule out all reference to the statements themselves and to exclude wholly the operation of S. 157 of the Indian Evidence Act the language of the section would have been different, 6 Pat. L.J. 241 at 243. Standing by themselves the police proceedings under this section are not substantive evidence in the case and cannot be used to test the correctness of the evidence given on oath in Court. The entries in the police diaries can be used for the limited purpose of contradiction of the witnesses for the prosecution after duly proving those entries. 29 Cr. L.J. 493 = 109 Ind. Cas. 221. See also 29 Cr. L.J. 282 (2) = 107 Ind. Cas. 766 (2) and 32 C.W.N. 280 = 29 Cr. L.J. 531 = 109 Ind. Cas. 335. The words such statement' occurring in different portions of the section emphasise the view that oral evidence is not excluded, 48 M. 640, but this decision has been overruled by the Full Bench decision in 51 M. 967. (F.B.) which held statement whether written or oral are excluded altogether by this section. It is quite clear that under this section as amended, it is not now permissible that statements to the police, whether oral or written to be put in evidence to corroborate a prosecution witness or to contradict a defence witness. To this extent the rulings in 22 B. 596 and 39 B. 53 which held that evidence of the kind is permissible are superseded by the enactment of the Legislature. It is quite clear from the very strong terms of the present section that a statement to the police can only be used for one purpose and that is by the accused to contradict a prosecution witness in the manner provided by S. 145, Indian Evidence Act, 26 Bom. L.R. 965 = 26 Cr. L.J. 223 = 83 Ind. Cas. 1007. The application of the amended section as before is to the written record, but the new section gives the accused a right to have a copy of such written statement for the purpose of using it

to contradict the witness for the prosecution, 43 M. 640. But see 51 M. 567 (F.B.) which overruled this decision and also 30 C.W.N. 112 = 27 Cr. L.J. 272 = 92 Ind. Cas. 174, where it was held that the statement made to a police officer is inadmissible in evidence and the police officer cannot be examined to prove whether he examined certain witnesses called by the accused as defence witnesses who denied their presence at the scene of occurrence. See also 27 Cr. L.J. 263 = 92 Ind. Cas. 439. Statements to a police officer are inadmissible for any purpose save as provided by this section and the Judge is not entitled to use those statements confronting the witnesses, 27 Cr. L.J. 277 = 92 Ind. Cas. 433. It is quite true that under this section statements made to the police by witnesses can only be used by the defence for the purpose of contradicting a prosecution witness. But where after a witness had made some statement before a Magistrate he was asked if he had made that statement to the police and thereafter when the sub-Inspector of police was examined he was asked whether the witness had made that statement to him, neither the witness nor the sub-Inspector having been asked what statements they made and no statement being introduced into the evidence as having been made by the witness before the sub-Inspector, it was held this section did not prevent the prosecution after the witness has made a statement from asking him simply whether he made that statement to the police, or when a witness has made a statement in his evidence, from asking the sub-Inspector whether in fact the witness had made that statement to him, and in so doing there is no use of the statement recorded by the police during their investigation as the witnesses or the sub-Inspector are merely asked as to a certain fact. 4 Pat 204 at 209. This section does not apply to an investigation by the Calcutta Police ordered by the Presidency Magistrate under S. 156 (3), *supra*. All investigation by the Police must be controlled in the Muffassil by this Code and in Calcutta by the Police Act or by Circular Orders issued and the Police have no inherent power in Calcutta beyond that conferred by the Police Act or circular orders. So the Police in Calcutta cannot take statements generally apart from the provisions of the Act and then put the statements so taken in evidence against persons who made them. That would be to strike at the principles to preserve which the provisions of this section were enacted and would introduce a very dangerous principle. 53 C. 650 at 658. Judging from the cursory way in which these statements are recorded, this section aims at preventing undue importance being attached to the written record which would undoubtedly put too much power in the hands of the police. See 16 A. 207 at 208. Before the F.B. decision in 51 M. 567, it has held that the word "such statement" used in the amended section may be vague to include oral and written statements, but the whole design of the section implies otherwise. The provisos clearly apply only to written statement and exclude oral statements. If otherwise, the section would prevent an accused person using in his favour oral statements and the section did not intend such a result. When the section uses "such statement" it is clear that "such" means "if reduced to writing." The old section had nothing to do with statements not reduced to writing and was designed to prevent entries in police diaries from being used against accused persons. Considering the voluminous case law interpreting the whole section, if the new section was intended to be much wider to cover oral statements also it would have been unequivocally said so. The second proviso is meaningless if "such statement" means "oral statement." If the section is intended to prohibit the use of oral statements made to the police, an amendment of S. 27 of the Indian Evidence Act would have been made. Thus the new section is confined as the old section to written record. The new section was intended to confer on the accused a legal right which he did not possess before and as regards proof and use of oral statements the law is unaltered and is as it was before. All oral statements which were previously admissible under the Indian Evidence Act the use of which is not prohibited by this Code are still admissible and may be used, 43 M. 640 at p. 645-6. But the Full Bench decision in 51 M. 937 has overruled 48 M. 640 and held that on the principle that a general rule is affected by a special rule and not the special by a general rule, S. 27 Ind. Ev. Act is not affected by this section but this section is affected by the former and S. 27 Ind. Ev. Act relates to a more particular matter creating an exception to the general admissibility of statements to the Police. The pronominal use of the word 'such' is a very common expediency in legislation.

to avoid repetition of a long descriptive phrase or clause used earlier. The phrase 'such statement' is intended to avoid a repetition of the statement already described. The words are 'made by any person to a police officer in the course of an investigation under this Chapter.' These are only words descriptive of the word 'statement' and it is to avoid the repetition of such description the word 'such' is used. The words 'reduced to writing' are not parts of the word 'statement' in the opening clause. If the word 'such' is intended to cover also the words 'reduced to writing' in the earlier part of the section the section would have run differently. The Legislature has used the grammatical form. This view is now in accordance with that expressed by other High Courts and the conflict is set at rest. In 42 C.L.J. 524=27 Cr. L.J. 263=92 Ind. Cas. 439 and 42 C.L.J. 528=27 Cr. L.J. 277=92 Ind. Cas. 453, where such statements were held inadmissible for all purposes except as provided in paragraph (2) of sub-section (1). The *Lahore High Court* has also taken the same view and held this section as it existed prior to the amendment of 1923 expressly prohibited the use of the record containing the statement to the police as evidence against the accused, and while the High Courts were at variance as to the admissibility of the oral evidence of such statements to corroborate the prosecution witnesses, they were unanimous that the writing could not be admitted in evidence against the accused. Even the controversy as to the admissibility of oral evidence has now been set at rest by the amendment in 1923 which substituted the words "nor shall any such statement or any record thereof be used for any purpose" for the words "nor shall such writing be used as evidence" which occurred prior to the amendment. The result is that not only the record of the statement of a witness taken under S. 161 *supra* is excluded from evidence, but also the proof of such statement by oral evidence for corroborating the testimony of prosecution witnesses, 6 Lah. 171 at p. 174 followed in 7 Lah. 264. See also 6 Lah. 23; 29 Cr. L.J. 343 at 345=103 Ind. Cas. 162. See also 30 Cr. L.J. 268 (F.B.)=114 Ind. Cas. 273 where it was held that the provisions of S. 27 Ind. Ev. Act are quite independent of this section and when this section was amended in 1923, the Legislature did not intend that it should repeal or in any way affect S. 27 of the Ind. Ev. Act. The *Patna High Court* has pronounced in the clearest terms against the admissibility of oral evidence. "The effect of the Amending Act of 1923 which is very great has not yet been fully appreciated by the Subordinate Courts. The new Act has substituted a section which prohibits any statement (now covered by S. 32 (1), Indian Evidence Act) or any record of it, whether in a police diary or otherwise or any part of such statement or record for any purpose at any inquiry or trial. The expression "for any purpose" is very important and should be given full weight. If the Legislature means merely to prohibit the use of writing as evidence there is no point in amending the section or substituting the present stringent sub-section (1). It is not merely use as evidence of the statement or the record thereof that is prohibited by sub-section (1) but use of it for any purpose unless such use comes within subsequent specific provisions of the Code. There is for all practical purposes no such provision except in the first proviso to sub-section (1) and in sub-section (2), for this section governs also S. 172 (2). Sub-section (2) excludes from the operation of the prohibition cases covered by S. 32 (1), Indian Evidence Act. The first proviso to the section makes an exception in favour of an accused but it is an exception most jealously circumscribed under the proviso itself. Any part of such statement reduced to writing may be used to contradict the witness who made it. The limitations are strict, (1) only the statement of a prosecution witness can be used; (2) only if it has been reduced to writing; (3) only a part of the statement recorded can be used; (4) such part must be duly proved; (5) it must be a contradiction of the evidence of the witness in Court; (6) it must be used as provided in S. 145 Indian Evidence Act, i.e., it can be used after the attention of the witness has been drawn to it. Such a statement which does not contradict the testimony of a witness cannot be proved in any circumstances. Unquestionably the new sub-section has greatly enhanced the difficulty of trials by excluding what was previously admissible in evidence. It is unfavourable to the prosecution and to a less but still considerable extent to the defence. Experience points to the conclusion that the Courts do apply the provisions against the prosecution but fail to do so against the defence. It is not a sufficient ground for deviating from what is intended to be a rigid rule that such deviation will favour the

accused. It is incumbent on Courts loyally to observe the prohibition of the Legislature in all cases where it is applicable. The Legislature has employed firm language palpably intended to make a clean sweep of the use at the trial any statement to police during investigation not only in evidence but for any purpose restricted to one exception. The danger of endeavouring to temper this provision in favour of the defence and to widen the exception is not warranted, 27 Cr. L.J. 362=92 Ind. Cas. 874. The Rangoon High Court in 4 Ran. 72 (F.B.) has also expressed the same view and held that the words 'any such statements' in sub section (1) apply both to oral statements and those reduced to writing. It is clear that the actual wording of the section makes no exception in respect of statements made by accused persons. The words are "no statement made by any person" and must include statements by accused persons. There is nothing in the section as worded to suggest that they ought to be read as if they were "any person other than an accused person," 4 Ran. 72 at 85 but see 29 Cr. L.J. 430 at 402=103 Ind. Cas. 422. No statement taken under this section during the police investigation should be used at the trial unless (1) the accused asks to the Court to refer to the police record, (2) the accused is furnished with a copy of the statement including portions not relevant to the trial or inexpedient or not essential to disclose to him, (3) the statements have been duly proved when they may be used to contradict the witnesses, 4 Ran. 236. See also 27 Cr. L.J. 352 at 368=92 Ind. Cas. 874; 25 Bom. L.R. 955=26 Cr. L.J. 323=83 Ind. Cas. 1007; 51 M. 967 (F.B.). For the application of this section there must be a statement which is capable of being recorded and reduced into writing and therefore if a witness says 'I did not make a statement to the police' it cannot be a statement under this section, 53 C. 931. When a witness who made a statement before a committing Magistrate and who was not cross examined by the accused dies before the Sessions trial, the police officer who recorded the statement of the witness and which was repeated before the Committing Magistrate cannot be cross-examined with regard to the particular statement as this section has no application to such a case, 31 C.W.N. 410=23 Cr. L.J. 435=101 Ind. Cas. 661. There is nothing in the language of the section which supports the view that the provisions of the section do not apply to the case of a complaint made after the police had refused to take action holding that the matter was one of a Civil nature, 23 Cr. L.J. 14=99 Ind. Cas. 48. See 50 M. 750 as to the right of the accused to get copies of the statement at the inquest and the post-mortem certificate.

No statement by any person if taken down in writing shall be signed.—The statement of "any person" refers to the one made by a person examined as a witness during police investigation and not to statements of accused persons in respect of whom such investigation is being held, 54 C. 237. followed in 33 C.W.N. 237. The statement made by an approver to the police before he was tendered the pardon is within this section and the accused is entitled to have a copy of his statement and to have cross-examination of the approver with regard to that statement, B. 172, *supra*, has no application to such a statement, 9 Lah. 389. The section prohibits the use of the statement of a witness at the trial held in respect of some offence which was under investigation except for contradicting such witness as provided by S. 145, Indian Evidence Act. An accused's statement to the police not amounting to a confession is not *ipso facto* excluded from evidence, 26 Cr. L.J. 897=86 Ind. Cas. 981; 1926 Pat. 13=27 Cr. L.J. 753=95 Ind. Cas. 273; 5 Pat. 63; 27 Cr. L.J. 456=93 Ind. Cas. 248 following 26 Cr. L.J. 778=86 Ind. Cas. 410; 4 Ran. 72; 29 Cr. L.J. 400 at 402=103 Ind. Cas. 422. Under this section the statement need not be a complete statement recording every word uttered by the witness. It is immaterial whether the statement is recorded in the actual words used by the witness. It is sufficient if the statement is recorded in the form of a Memorandum which is available to contradict the witness. The very words used by the witness are not necessary, 31 C.W.N. 940=28 Cr. L.J. 805=104 Ind. Cas. 243. Reading S. 161 and this section it is clear that the main object of the Legislature is to prohibit the use of

Evidence Act must be considered repealed. Such a contingency cannot have been the

intention of the Legislature. It is important for the Court to know the defence set up by the accused at the earliest moment. If this section is given the meaning which is sought to be given, accused persons would be most seriously prejudiced and the only object of S. 163, *infra*, would be to enable the police to get clues for the purpose of investigating the charge. If that were the case the Court would be deprived of much valuable material for testing the truth of the defence. To shut out corroborative evidence such as statements made by defence witnesses during investigation is prejudicial enough but unless compelled to do so, we should not add to the prejudice by shutting exculpatory statements by accused and if the new amendment does not operate to exclude such statements then S. 27 of the Evidence Act remains unrepealed. This section applies to the statements of witnesses examined by the police in the course of the investigation and not to the statement of the accused person and it does not override or modify S. 27 of the Indian Evidence Act, 7 Lah. 83 at 87; 5 Pat. 63. It is contrary to the policy of this section to prosecute a person for denying his signature to a statement made before the Police as the law expressly prohibits the writing being signed by the deponent, 14 Cr. L.J. 302=19 Ind. Cas. 958. It was apparently considered unsafe to assume that a police-officer making an investigation would correctly record statements made to him. It is therefore provided that the statements should not be signed by the witness and should not be admissible in evidence. At the same time it was regarded as proper to make the police-officer's record of such statements available to the accused for the purpose of cross-examining any witness called for the prosecution, 38 M. 337 at 540. The mere fact that the statements are signed contrary to the provisions of this section will not make them admissible under S. 154, *supra*, 23 Cr. L.J. 401=77 Ind. Cas. 481.

In the course of a police investigation.—Investigation here means some action taken by the Police to collect evidence. When the police examines a person going to the place from which a telegram informing them of the commission of a cognizable offence to verify the fact that it was really sent as it purports to have been sent and the person confirms the fact of sending it and gave other details of the alleged offence, it can not be said that the police were investigating into the offence and collecting evidence. Their purpose was not to collect evidence but to see that the suspicion that an offence had been committed was justified. Any statement then made cannot be said to be statement taken in the course of the investigation, 55 M.L.J. 231=28 L.W. 187=29 Cr. L.J. 717=110 Ind. Cas. 461 following 1914 M.W.N. 382=1 L.W. 355=15 Cr. L.J. 622=25 Ind. Cas. 630, see also 62 C. 499; 1 Pat. 401; 2 Pat. 417. The wording of the section does not prohibit the use of the statements made to the police in the course of their investigation in proceedings under S. 476, *infra*, in cases where the alleged offence which is under consideration in S. 476 proceedings was not under investigation at the time when the said statements were made, 28 Cr. L.J. 433 at 437=101 Ind. Cas. 463. Statements recorded in a confidential inquiry into a charge of corruption against a Magistrate by a police officer are not statements within the meaning of this section, 23 Bom. L.R. 996.

Sub-section (1).—Two different constructions are possible of this sub-section. First is that the words "nor shall any such statements" mean and refer to a statement (a) made by any person to a police officer and (b) in the course of an investigation under this Chapter. In this construction the words "if reduced into writing" only apply to the words "be signed by the person making it." The alternative construction, is that the words "nor shall any such statement" mean a statement made to a police-officer in the course of an investigation and reduced into writing. The words following however "nor shall any such statement—" seem to favour the former construction rather than the latter because if the words any such statement, were to be confined to written statement, there would seem to be no object in adding "or any record thereof"; this view taken in, 43 M. 640 at 645 accepting the second construction is unsound because in the provisions the context clearly shows that it is only statements reduced to writing that are referred to. If oral statements are to be excluded nothing would have been ampler for the Legislature to say "made by any person to a police-officer in the course of investigation under this chapter and reduced to writing." Instead of this it has used a hypothetical phrase which, in its ordinary grammatical sense might be taken only to apply and qualify the words be signed by the person making it. A

comparison of the amended sub-section with the sub-section as it stood before the amendment makes this point clear. The words "such writing" has been dropped by the Legislature now. A statement reduced to writing might be presumed to be more accurate and reliable than an oral. If written statements are to be excluded it cannot be presumed that the Legislature intended to leave the less reliable oral statements admissible without any safeguard or limitation. 3 Ran. 72 (F.B.) at 82. The Full Bench in 51 M. 967 has followed the Rangoon view and overruled, 41 M. 640. See also 26 Bom. L.R. 965=23 Cr. L.J. 223=83 Ind. Cas. 1977; 6 Lah. 21 and 171, 7 Lah. 254; 4 Pat. 234; 5 Pat. 63; 27 Cr. L.J. 362=57 Ind. Cas. 878; 42 C.L.J. 524 and 525; 56 C. 237.

Statement whether in a Police diary or otherwise.—It is quite true that an accused person is not entitled to see the police diaries, but when the statements of the prosecution witnesses made before the investigating officer have been reduced to writing whether in a police diary or otherwise, the accused is entitled under this section to have copies of statements of the witnesses, in spite of the fact that the statements are recorded in the police diary. It is clear from the language of the section that the accused is entitled to ask the Court to refer the statement whether in a police diary or otherwise and to furnish him with a copy thereof. It is obviously not in the interests of public justice that police officers who are charged with the duty of investigating crimes should be in a position to take the statements of witnesses, extract as much as they think is relevant or important for entry in their diaries and then destroy the original statement. Such a practice is illegal in so far as it deprives the accused of an important right and it may result in the destruction of valuable evidence in favour of the accused, 6 Ran. 672.

Proviso (1).—This section provides for facilities to the accused to obtain copies of the police records, 3 Pat. L.J. 533. The words in this proviso are "when any witness is called for the prosecution." The accused will not be entitled to have a copy of the statement made to the police unless the person who made the statement is called as a prosecution witness when a person is not admittedly a prosecutor witness but was summoned and examined by the Court at the suggestion of the defence the proviso is inapplicable and the statement of such a witness was rightly held to be inadmissible as one made to the police, 23 Cr. L.J. 828=104 Ind. Cas. 444. When a witness is tendered by the prosecution but was discharged without being examined or cross-examined, the accused is not entitled to a copy of the statement made by that person to the police, 7 Pat. 133. A Magistrate is not justified in referring to statements made to the police which are recorded in the police diaries unless and until the witness who had made the statements have been put in the witness-box and confronted by those statements. 27 Cr. L.J. 607=94 Ind. Cas. 271. Under the Code before the amendment in 1928, the right to obtain a copy was entirely in the discretion of the Court and it was only if the Magistrate considered it expedient in the interests of justice to grant copies of the statements made to the Police that the accused can obtain copies, 26 M.L.J. 182. The amended Code now gives an accused person a right to ask the Court to send for and peruse statements of witnesses and to have copies of statements furnished to him before the beginning of the preliminary inquiry unless the Court thinks that any part of such statement is irrelevant or opposed to public interest or not in the interests of justice, 29 Cr. L.J. 297=107 Ind. Cas. 817. See also 3 Ran. 356. If reasonable facilities for obtaining copies of the statements made under this section by a witness who is called as a prosecution witness be not given to the accused it would be a good ground for objecting to the fairness of the trial, 49 C.L.J. 197 at 200-201 and refusal to grant copies vitiates the trial, 28 Cr. L.J. 14=99 Ind. Cas. 45. See also 28 Cr. L.J. 897=102 Ind. Cas. 773. The words "if duly proved" clearly show that the record of the statement cannot be admitted in evidence straightway, but the officer before whom the statement was made should ordinarily be examined as to any alleged statement or omitted statement that is relied on by the accused for contradicting the witness and S. 67, Indian Evidence Act, applies to this case as well as to any other similar case. If a particular police-officer who recorded the statement is not available any other means of proving the statement may be availed of, e.g., evidence as to the hand writing of that officer, 26 Bom. L.R. 965=23 Cr. L.J. 223=83 Ind. Cas. 1077.

followed in 52 B. 195 at 199. It is quite true that under this section statements made by witnesses to the police can be used by the defence for contradicting prosecution witnesses, but where a witness had made some statement before a Magistrate he was asked if he did so to the police and thereafter when the sub-Inspector of police was examined he was asked whether the witness made the statement to him, neither the witness nor the sub-Inspector having been asked what statements they made and no statement being introduced into the evidence as having been made by the witness before the sub-Inspector, it was held that this section did not prevent the prosecution after the witness has made a statement from asking him simply whether he made that statement to the police or when witness has made a statement in his evidence from asking the Sub-Inspector whether in fact the witness had made that statement to him and in so doing there is no use of the statement recorded by the police during their investigation as the witnesses or the sub-Inspector are merely asked as to a certain fact 4 Pat. 204 at 209 *followed* in 5 Pat. 336 where 27 Cr. L.J. 362 = 92 Ind. Cas. 874 is *not followed*.

The decision in 30 M. 466 is no longer law after the amendment. The right to obtain copies under this section is restricted entirely within the scope of this proviso. The accused according to this proviso is to satisfy the Magistrate that the investigating police-officer has taken down in writing a statement made to him by a witness or has entered it in his diary and this could be known only after the examination of the police-officer in most cases. The proper procedure is for the accused at the time the witness, whose statement is so recorded appears before the Court to ask the Court to refer to such writing and furnish him with copies thereof. This is a practice, it is not difficult to carry out. It only requires a little adjustment of the time of the Court in cases where the diaries do not happen to be in Court or require translation, 33 C. 1023 at 1027. The amendment is in accordance with these observations. There is a divergence of opinion between the various High Courts as regards the stage at which the accused is entitled to get copies of statements of prosecution witnesses recorded by the police under this section. The Madras and Bombay High Courts, 22 L. W. 784 and 52 B. 195, restrict the right to get copies till a late stage of the trial, i.e., only after some foundation is laid in cross-examining the witnesses that there is some contradiction between the evidence given in Court and that he stated to the police. But the Calcutta High Court now and the Patna High Court, take a literal reading of the section that the accused is entitled to copies when the witness is called. See 49 C. L.J. 197 *not following*, 54 C. 507 and 7 Pat. 205. The words of the first proviso 'when any witness is called for the prosecution in such inquiry or trial' must refer to the time when an inquiry or trial in which such witness is called is in progress and excludes the possibility of an order being made either by the committing Magistrate after commitment to the Sessions, or by the Sessions Judge in anticipation. An order may only be made 'when any witness is called.' The opportunity before the Committing Magistrate had gone and that before the Judge will arrive only on that point of time being reached. As soon as a request for copies is made the Court shall refer to such writing, and do so before allowing copies to be furnished. The object of this is found in the second proviso which requires the Court first to satisfy itself whether any part of any such statement is not relevant to the inquiry or trial or its disclosure to the accused is not essential in the interest of justice or is inexpedient in the public interest. Clearly the Court to satisfy itself on a question of relevancy is the Court before which the inquiry or trial is in progress. The statement in the decision in 54 C. 307 to the effect that there must be sufficient foundation laid by way of cross-examination of the witnesses, the copy whose statement is asked for, showing the statement was required to contradict the witness is not correct. It was not the intention of the amended section that a Judge has to consider whether sufficient foundation by cross-examination had been laid. There is a certain amount of confusion between what the section says the Court shall do and what it says later on as to the object with which that

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ceedings or embarrassing the defence but such difficulties will disappear as Courts and
practitioners become accustomed to the provision of this section, 49 C.L.J. 197 at 203-204.

wherein was expressly taken away by the Legislature and hence the Court cannot refuse the granting of a copy till the accused by his cross-examination showed that there is a contradiction. It cannot be laid down as a general rule that all omissions are contradictions. It is for the Court to decide in each case whether a particular omission is a contradiction, 29 Cr. L.J. 348=108 Ind. Cas. 167. The right procedure when a witness is contradicting himself is to ask the Judge to look into the diary and decide whether the accused should have a copy of the statement and if the copy is granted, the witness's attention must be called to the same before the investigation officer is called to prove the record made by him, 26 A.L.J. 139 at 142 where 39 B. 441 is *followed*. The only way to contradict a witness by a statement made by him to the police under this section is to prove that portion of his statement to the police which contradicts his evidence and put it to him under S. 145, Ind. Ev. Act, so that the witness may have an opportunity of explaining the contradiction. Statements made to the police at their investigation cannot be used at the trial in any other way. 8 Lah. 603.

If duly proved.—The words 'if duly proved' indicate that the record of the statement cannot be admitted in evidence straightway but the officer before whom the statement was made should ordinarily be examined as to any alleged statement which is relied on by the accused for the purpose of contradicting the witness under this section must therefore, be either proved by the investigating officer or must be admitted by the witness in his cross-examination or must be proved in some other way before it is put to the witness under S. 145 of the Ind. Ev. Act, 52 B. 193 at 199 *following* 26 Bom. L.R. 965 at 967=26 Cr. L.J. 223=83 Ind. Cas. 1007.

The accused shall be furnished with a copy thereof.—The effect of the amendment is to annul the discretion of the Magistrate or Judge and to make it obligatory on him to give the accused copies of the statements subject only to the exclusion of irrelevant matters which the public interest requires should not be disclosed, 54 C. 307; 29 Cr. L.J. 297=107 Ind. Cas. 817. There is no obscurity in this section so far as the grant of copy is concerned. Two points in particular stand out, and strict adherence to them which unfortunately is rare will obviate much confusion. First the question of furnishing copies of statements recorded by the police do not at all arise until the witness is called for the prosecution, second that the accused be furnished with copies of statements unless they contain something which constitutes a contradiction to what the witnesses state in Court. These two circumstances must coexist, 6 Pat. 39; 7 Pat. 205. Under the code before the amendment there was a discretion left to the Court in the matter of granting copies and the rulings before the amendment would show that the Court could refuse to grant copies for sufficient reasons; but as the section now stands an accused person has an absolute right to get a copy of the statement of a witness that has not been refused for reasons stated in the last paragraph of sub-section (1). The Court could not therefore refuse copies because upon a perusal of the statement previously recorded it considers there is no contradiction between it and the evidence given at the trial, 30 Cr. L.J. 728 at 729=117 Ind. Cas. 213 *following* 7 Pat. 205.

Proviso (2).—This proviso is new and empowers the Court to exclude any part of the statement from the copy furnished to the accused on the ground of its being not relevant or on grounds of public policy after recording its opinion to that effect. The ruling in 26 M.L.J. 182 which held that the Magistrate when refusing copies is not bound to say that he considered it inexpedient to grant them is no longer law and the amendment is in accordance with 35 C. 560.

Sub-section (2).—S. 82, Ind. Ev. Act, deals with a statement by a person as to the cause of his death or to any of the circumstances which resulted in his death. The dying declaration of a deceased person must be taken in the presence of the accused. If not so taken the writing cannot be admitted to prove the statement made. It may however, be proved in the ordinary way by a person who heard it and the writing may, be used for refreshing the witness's memory, 8 C. 211. Where the dying declaration was recorded by the police and attested by certain witnesses and the writing was sought to be admitted in evidence, it was held that it could not be so admitted, but the statement of the deceased

might be proved by the persons who heard what was stated by the deceased, 8 C.W.N. 921; 16 Cr. L.J. 759; 36 C. 659; but to render the statement admissible under this section the accused must be on his trial for causing death, 23 B. 43. In 7 A. 355 (F.B.) it was held that signs made by the deceased in response to questions put as to the cause of his injury which resulted in his death are verbal statements within the meaning of S. 82 of the Ind. Ev. Act and therefore evidence of questions put and signs made by the deceased were admissible in evidence.

163. (1) No police-officer or other person in authority shall offer or make, or cause to be offered or made, any such inducement threat or promise as is mentioned in the Indian Evidence Act, 1872, section 24.

No inducement to be offered.

(2) But no police-officer or other person shall prevent by any caution or otherwise any person from making in the course of any investigation under this Chapter any statement which he may be disposed to make of his own free will.

No police-officer.—The term "Police-officer" should be read in its more comprehensive and popular meaning, 1 C. 207; 1 C.L.R. 21; 17 B. 435. A village headman in Madras is not a police-officer and therefore a confession made to him is not inadmissible in evidence, 7 M. 237. See the explanation to S. 26 of the Evidence Act which says that a Magistrate in that section does not include the head of a village in Madras or Burmah or elsewhere discharging magisterial functions unless such headman is a Magistrate exercising powers of a Magistrate under the Code.

Person in authority.—There is no definition of this expression in the Code or anywhere else. "The test would seem to be, has the person authority to interfere with the matter, and any concern or interest in it, would appear to be sufficient to give him authority"—per *Sergeant, C.J.*, in 9 B.H.C.R. 368 at 369. A Magistrate recording a confession, 10 C. 775; 2 A. 260, an Honorary Magistrate, 1 W.R. (Cr.) 24; a Village Magistrate, 26 M. 33; a Panchayatdar, 11 C.W.N. 904; 9 C.W.N. 474 (*contra* 4 Bom. L.R. 785; 4 A. 46) have been held to be "persons in authority," but not a medical officer, 8 Bom. L.R. 507=4 Cr. L.J. 49. The master of a vessel is person in authority, 10 B.L.R. Appx. 1.

Shall offer any inducement.—It was argued in 31 A. 594 (F.B.) that the provisions of this section were not merely *directory* but *imperative* and *prohibitive* and when there is nothing in the Code to show what will be the result of any disobedience of the law, the general rule that such illegality resulted in a nullification of all that followed or could be said to follow directly from it; but it was held that it is to the Indian Evidence Act and not to the Code of Criminal Procedure that we have to look as to whether the evidence in point is or is not admissible, the more so as the Code contains Chapter XLI entitled "*Special Rules of Evidence.*" Inducement must have reference in any charge against the accused, 4 A. 46. Mere caution, promise of secrecy, is not inducement, threat or promise within this section, 3 Bom. L.R. 404. When there was any inducement held out to the accused to confess, such confession is inadmissible in evidence against him, 10 C. 775; but the discovery of some fact in consequence of the information so obtained from the accused may make it evidence in so far as it relates to that fact, 26 M. 33. An admission obtained from the accused by persuasion or promise of immunity by the police is inadmissible in evidence, 9 W.R. (Cr.) 16.

Threat or promise.—All oppression and treachery in regard to obtaining confessions are to be avoided by the police under pain of the severest penalties and the practice of employing private individuals to worm out confessions from accused persons is strictly prohibited. Nothing so clearly shows want of defective tact, talent and resource and of patient industry in a police-officer as the resort to foul means to obtain confessions. The most

wherein was expressly taken away by the Legislature and hence the Court cannot refuse the granting of a copy till the accused by his cross-examination showed that there is a contradiction. It cannot be laid down as a general rule that all omissions are contradictions. It is for the Court to decide in each case whether a particular omission is a contradiction, 29 Cr. L.J. 349=108 Ind. Cas. 167. The right procedure when a witness is contradicting himself is to ask the Judge to look into the diary and decide whether the accused should have a copy of the statement and if the copy is granted, the witness's attention must be called to the same before the investigation officer is called to prove the record made by him, 26 A.L.J. 139 at 142 where 39 B. 441 is *followed*. The only way to contradict a witness by a statement made by him to the police under this section is to prove that portion of his statement to the police which contradicts his evidence and put it to him under S. 145, Ind. Ev. Act, so that the witness may have an opportunity of explaining the contradiction. Statements made to the police at their investigation cannot be used at the trial in any other way. 8 Lah. 605.

If duly proved.—The words 'if duly proved' indicate that the record of the statement cannot be admitted in evidence straightway but the officer before whom the statement was made should ordinarily be examined as to any alleged statement which is relied on by the accused for the purpose of contradicting the witness under this section must therefore, be either proved by the investigating officer or must be admitted by the witness in his cross-examination or must be proved in some other way before it is put to the witness under S. 145 of the Ind. Ev. Act, 52 B. 193 at 199 *following* 26 Bom. L.R. 965 at 967=26 Cr. L.J. 223=83 Ind. Cas. 1007.

The accused shall be furnished with a copy thereof.—The effect of the amendment is to annual the discretion of the Magistrate or Judge and to make it obligatory on him to give the accused copies of the statements subject only to the exclusion of irrelevant matters which the public interest requires should not be disclosed, 54 C. 307; 29 Cr. L.J. 297=107 Ind. Cas. 817. There is no obscurity in this section so far as the grant of copy is concerned. Two points in particular stand out, and strict adherence to them which unfortunately is rare will obviate much confusion. First the question of furnishing copies of statements recorded by the police do not at all arise until the witness is called for the prosecution, second that the accused be furnished with copies of statements unless they contain something which constitutes a contradiction to what the witnesses state in Court. These two circumstances must coexist, 6 Pat. 39; 7 Pat. 205. Under the code before the amendment there was a discretion left to the Court in the matter of granting copies and the rulings before the amendment would show that the Court could refuse to grant copies for sufficient reasons; but as the section now stands an accused person has an absolute right to get a copy of the statement of a witness that has not been refused for reasons stated in the last paragraph of sub-section (1). The Court could not therefore refuse copies because upon a perusal of the statement previously recorded it considers there is no contradiction between it and the evidence given at the trial, 30 Cr. L.J. 728 at 729=117 Ind. Cas. 213 *following* 7 Pat. 205.

Proviso (2).—This proviso is new and empowers the Court to exclude any part of the statement from the copy furnished to the accused on the ground of its being not relevant or on grounds of public policy after recording its opinion to that effect. The ruling in 26 M.L.J. 182 which held that the Magistrate when refusing copies is not bound to say that he considered it inexpedient to grant them is no longer law and the amendment is in accordance with 35 C. 560.

Sub-section (2).—S. 52, Ind. Ev. Act, deals with a statement by a person as to the cause of his death or to any of the circumstances which resulted in his death. The dying declaration of a deceased person must be taken in the presence of the accused. If not so taken the writing cannot be admitted to prove the statement made. It may however, be proved in the ordinary way by a person who heard it and the writing may, be used for refreshing the witness's memory, 8 C. 211. Where the dying declaration was recorded by the police and attested by certain witnesses and the writing was sought to be admitted in evidence, it was held that it could not be so admitted, but the statement of the deceased

might be proved by the persons who heard what was stated by the deceased, 8 C.W.N. 921; 16 Cr. L.J. 757; 38 C. 639; but to render the statement admissible under this section the accused must be on his trial for causing death, 23 B. 43. In 7 A. 335 (F.B.) it was held that signs made by the deceased in response to questions put as to the cause of his injury which resulted in his death are *verbal statements* within the meaning of S. 82 of the Ind. Ev. Act and therefore evidence of questions put and signs made by the deceased were admissible in evidence.

163. (1) No police-officer or other person in authority shall offer or make, or cause to be offered or made, any such inducement threat or promise as is mentioned in the Indian Evidence Act, 1872, section 24.

No inducement to be offered.

(2) But no police-officer or other person shall prevent by any caution or otherwise any person from making in the course of any investigation under this Chapter any statement which he may be disposed to make of his own free will.

No police-officer.—The term "Police-officer" should be read in its more comprehensive and popular meaning, 1 C. 207; 1 C.L.R. 21; 17 B. 453. A village headman in Madras is not a police-officer and therefore a confession made to him is not inadmissible in evidence, 7 M. 237. See the explanation to S. 26 of the Evidence Act which says that a Magistrate in that section does not include the head of a village in Madras or Burmah or elsewhere discharging magisterial functions unless such headman is a Magistrate exercising powers of a Magistrate under the Code.

Person in authority.—There is no definition of this expression in the Code or anywhere else. "The test would seem to be, has the person authority to interfere with the matter, and any concern or interest in it, would appear to be sufficient to give him authority"—per *Sergeant, C.J.*, in 9 B.H.C.R. 368 at 369. A Magistrate recording a confession, 10 C. 775; 2 A. 260, an Honorary Magistrate, 1 W.R. (Cr.) 24; a Village Magistrate, 26 M. 33; a Panchayatdar, 11 C.W.N. 904; 9 C.W.N. 474 (*contra* 4 Bom. L.R. 783; 4 A. 46) have been held to be "persons in authority," but not a medical officer, 8 Bom. L.R. 507=4 Cr. L.J. 49. The master of a vessel is person in authority, 10 B.L.R. Appx. 1.

Shall offer any inducement.—It was argued in 31 A. 592 (F.B.) that the provisions of this section were not merely *directory* but *imperative* and *prohibitive* and when there is nothing in the Code to show what will be the result of any disobedience of the law, the general rule that such illegality resulted in a nullification of all that followed or could be said to follow directly from it; but it was held that it is to the Indian Evidence Act and not to the Code of Criminal Procedure that we have to look as to whether the evidence in point is or is not admissible, the more so as the Code contains Chapter XLI entitled "*Special Rules of Evidence.*" Inducement must have reference in any charge against the accused, 4 A. 46. Mere caution, promise of secrecy, is not inducement, threat or promise within this section, 3 Bom. L.R. 404. When there was any inducement held out to the accused to confess, such confession is inadmissible in evidence against him, 10 C. 775; but the discovery of some fact in consequence of the information so obtained from the accused may make it evidence in so far as it relates to that fact, 26 M. 38. An admission obtained from the accused by persuasion or promise of immunity by the police is inadmissible in evidence, 9 W.R. (Cr.) 16.

Threat or promise.—All oppression and treachery in regard to obtaining confessions are to be avoided by the police under pain of the severest penalties and the practice of employing private individuals to worm out confessions from accused persons is strictly prohibited. Nothing so clearly shows want of defective tact, talent and resource and of patient industry in a police-officer as the resort to foul means to obtain confessions. The most

ignorant and clumsy can make out a case, if he can torture the culprit till he tells him all about it. The detective talent and sagacity manifest themselves in patient and unremitting industry in weaving round the culprit such a network of undoubted facts and damning circumstances gathered from a variety of sources that he cannot escape *Madras Police Manual, Vol. I, p. 95.* The precautions contemplated herein for the purpose of recording the confession of an accused person are mandatory and cannot be evaded by the Police. This precaution affords to the accused an opportunity to explain to the Magistrate that he was making the confession not voluntarily but under police pressure or in pursuance of a promise made to him, 29 Cr. L.J. 697-110 Ind. Cas. 329.

164. (1) Any Presidency Magistrate, any Magistrate of the first class and any Magistrate of the second class specially empowered in this behalf by the Local Government may, if he is not a police-officer, record any statement or confession made to him in the

Power to record statements and confessions.

course of an investigation under this Chapter or at any time afterwards before the commencement of the inquiry or trial.

(2) Such statements shall be recorded in such of the manners hereinafter prescribed for recording evidence as is, in his opinion, best fitted for the circumstances of the case. Such confessions shall be recorded and signed in the manner provided in section 364, and such statements or confessions shall then be forwarded to the Magistrate by whom the case is to be inquired into or tried.

(3) *A Magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence against him and no Magistrate shall record any such confession unless, upon questioning the person making it, he has reason to believe that it was made voluntarily; and, when he records any confession, he shall make a memorandum at the foot of such record to the following effect :—*

"I have explained to (name) that he is not bound to make a confession and that, if he does so, any confession he may make may be used as evidence against him and I believe that this confession was voluntarily made. It was taken in my presence and hearing, and was read over to the person making it and admitted by him to be correct, and it contains a full and true account of the statement made by him.

(Signed) A. B.,
Magistrate."

Explanation.—It is not necessary that the Magistrate receiving and recording a confession or statement should be a Magistrate having jurisdiction in the case.

Amendment.—The words in italics in sub-section (1) are new; third-class Magistrates are now not empowered to record confessions, and second-class Magistrates are to be specially empowered. In sub-section (3) the italicised words are new and are introduced to give better guarantee as to the genuineness of the confession and its voluntary character.

Scope and object of the section.—S. 162, *supra*, prohibits the written record of statements taken by the police in the course of an investigation being used as evidence, and therefore it is found necessary to have a *prima facie* correct record made by a Magistrate and which can, without danger, be admitted under S. 35 of the Evidence Act. This section may be regarded as supplementary to the preceding sections of the Code regulating the powers of the police to record statements. This section is not intended to make Magistrates the instruments of police for the purpose of recording statements at their desire. The Magistrate should abstain from recording the evidence of witnesses unless he has some assurance from the witnesses that they attend voluntarily and are making statements to him of their own accord, 7 C.W.N. 345; 4 C.W.N. 49. This section is not confined to the confession of the accused 22 Bom. L.R. 996 at 1003. This section does not apply to a confession recorded in Presidency-town in the course of a police investigation not held under the orders of a Presidency Magistrate under Ss. 155 and 156 (3) *supra*, 52 C. 67 following 15 C. 515 but see 54 C. 23 and 5 Pat. 177; where it was held distinguishing the Calcutta cases that the change in the law in 1923 was obviously made to allow a Presidency Magistrate to record a confession in the course of a police investigation, otherwise the amendment would be altogether meaningless and S. 1 of the Code bars the application of the section to the police and not to a Magistrate not being a police officer. This section is one of the exceptions to the main principle of evidence that a document recording the confession may not be given in evidence, when the witness to the statement can be produced and can prove it by oral testimony. This section is an exception to the well established rule of law and applying as it does to criminal proceedings its provisions must always be complied within the strictest possible manner. The essentials are, the Magistrate recording the confession shall, before doing so explain to the accused (1) that he is not bound to make a confession at all; (2) that if he does so it may be used as evidence against him and no Magistrate shall record a confession unless upon questioning the accused he has reason to believe the confession to be voluntary and the document when reduced to writing must contain at the foot of it a memorandum of the essentials as stated above. The provisions of this section as amended are somewhat fuller and two new provisions, *viz.*, that the person making it is to be warned that he need not make any confession at all and that if he does so it may be used as evidence against him. If the memorandum contains the proper note at the foot of it it shall be presumed that all the formalities referred to in the footnote have been complied with. Where however it is defective, under S. 483, *infra* the defect may be cured by examining the Magistrate as a witness who recorded the confession and if his evidence shows that the requirements have been complied with then the confession becomes admissible in evidence, 6 Lah. 53. Under S. 533 *infra* a defect in form is curable and a defect in substance is not. If the warning was given by the Magistrate, but he failed to embody the fact in the memorandum such a defect is curable. But if the warning had not in fact been given the defect cannot be cured, as the statement cannot be held to have been duly made, 6 Lah. 415. Punctiliousness and care in the recording of a confession are of the utmost importance and it is essential that the Magistrate should satisfy himself in every reasonable way before recording it that it is made voluntarily. The Magistrate should question the person, to find out whether he is making the statement voluntarily. Such questions must be directed to eliciting facts which will enable the Magistrate to judge of the character of the confession and not merely to repeat some formulae which the accused can scarcely appreciate, 28 Cr. L.J. 782-86 Ind. Cas. 414. The Magistrate ought to be satisfied before he proceeds to record the statement or confession that it is voluntarily made, 5 A. 253. The Magistrate cannot under this section require the attendance of any person and has no power to put questions to the witness except to make the meaning of the deponent clear. Nor can a police-officer compel a witness to go before a Magistrate to make a statement under this section, 29 C. 483; 6 C.W.N. 596. If a police-officer has reason to believe that the witnesses are likely to be gained over he should send without any delay the accused and the witnesses to the Magistrate having jurisdiction. This section was not intended to enable the police to obtain an incriminating statement from some person, and as it were to put a seal on that statement by sending in that person to a

Magistrate practically under custody, to be examined before the judicial inquiry or trial, and therefore compromised in his evidence when judicial proceedings are regularly taken, 27 C. 295 at 300; see also 29 Bom. L.R. 996 at 1003, where it was held that the very fact that the statements are recorded under this section lead to the presumption or the showing of the prosecution itself that the witnesses whose statements taken down are weak; if the police take the risk and their action is not outside the law it is difficult to see how the Courts can prevent or discourage their doing so. This section only applies to statements recorded before inquiry or trial commences, 32 C. 1085; 16 M. 421; 8 Bom. L.R. 589. Under this section the Magistrate recording a confession is bound to record every question put to the person making the confession. It is of great importance that the provision of law should be obeyed. Otherwise it would be impossible to tell how far the deponent has deposed voluntarily and how far his statement was got out of him by cross-examining him by means of questions put to him, 26 Cr. L.J. 1209=88 Ind. Cas. 729.

Any Presidency Magistrate, etc.—As to power of Presidency Magistrates to record confessions see 5 Pat. 177 *distinguishing* the cases in 52 C. 67 and 15 C. 595. See also 54 C. 23. All Magistrates are not empowered now to record confessions. Third-class Magistrates have no power to record confessions and second-class Magistrates have to be specially empowered. The explanation to this section makes it clear that neither the fact that a Magistrate has no jurisdiction to inquire into or try the case nor the fact that he will be the Magistrate who will have to try the case later on, will disentitle him from recording a statement or confession under this section. In 3 C.W.N. 387 it was held that if after recording a confession under this section the same Magistrate holds the subsequent inquiry it will not make the confession inadmissible, see also 37 C. 467. Confession to a Magistrate in England or in a foreign country say French possessions is admissible in evidence, 1929 M.W.N. 383.

If he is not a police-officer.—This expression is not defined in the Code. See S. 4 (1) (p) *supra*, which defines officer in charge of a police station as including the police-officer above the rank of a constable. In 9 M. 97, it was held that there being no definition of the term "police-officer" in the Abkari Act, the definition of the General Police Act XXIV of 1859, S. 1, must be applied. The powers are to be exercised by Magistrates who are not police officers. Even a police officer cannot be employed as a scribe to take down a confession, 9 C. L.J. 55=10 Cr. L.J. 325=3 Ind. Cas. 625. Police officers having Magisterial powers are disqualified from recording statements or confession, 1 C. 207. A village *paisi* in Bombay and village headman in Madras are not competent to record confession, 17 B. 485; *Mad. G. O. No. 2833 J. dated 17-12-1887* but see 7 M. 287. An Abkari officer who is in the conduct of an investigation of an offence punishable under that Act exercises the powers conferred by this Code upon an officer in charge of a police station for the investigation of a cognizable offence, is a police officer within S. 25 of the Ind. Ev. Act and any confession made to him in the course of his investigation under the Abkari Act or under this Code is inadmissible in evidence 51 B. 78 (F.B). So also an inculpatory statement to an Abkari peon who in relation to an Abkari Inspector is in the position of a police constable, 31 Bom. L.R. 49, *following* 51 B. 78 (F.B.)

May record any statement or confession.—The statement which this section contemplates is the statement of a witness and not of an accused. Such a statement is admissible in evidence to corroborate the statement by a witness before the Committing Magistrate and from which the witness resiles in the Sessions Court, 43 M. 768. The previous statement of a witness recorded under this section is admissible only for the purpose of impeaching the credit of the witness under Ss 144 and 145 of the Ind. Ev. Act and cannot be used as substantive evidence against the accused or for any other purpose. S. 288 *infra* does not apply to such statements as that section enacts a special provision for the admission against the accused at a Sessions trial of statements made by witnesses before the committing Magistrate after the accused had an opportunity of cross-examining the witnesses, 25 A.L.J. 993 at 993 *following* 34 Ind. App. 53, 26 M. 191. Sub section (2) of this section requires that the statement contemplated by this section should be recorded in the manner provided by S. 864 *infra* and the mode prescribed for recording evidence (Ss. 355 to 363)

can only relate to the statements of witnesses, while the manner provided by B. 264 *infra* relates to all statements of accused persons whether amounting to confession or not. If the section had intended the term "statement" as used in it to include statements of accused persons as well as those of witnesses it might have directed the former class of statements to be recorded in the manner prescribed in B. 264 *infra* instead of directing as it does, that statements within the meaning of the section are to be recorded in the manner prescribed in B. 264 *infra*. The reason is that the section relates to a stage of the case, namely, the police investigation stage, at which statements of the accused which are other than voluntary confessions and which are to be elicited by his examination are not intended to be obtained from him. Ss. 202 and 312 which are the only provisions of the Code authorising the examination of the accused clearly showing the object of the examination is not to obtain incriminating statements from the accused, but is only to enable him to explain circumstances against him in the evidence adduced, 2 C.W.N. 702 at 715-716; 2 Lah. 129. There is a very clear and important distinction drawn in this section; a statement is to be recorded in one of the modes in which evidence is to be taken; a confession in the manner required by B. 264, *infra*. The taking of a "statement" appears to presuppose a charge or a reasonable suspicion against some person other than the person making such statement, 9 M. 228 at 233; 39 M. 977 at 979; see also 2 B. 643; 2 Lah. 129 and 8 C.W.N. 22. It is not obligatory under this section on a Magistrate holding an investigation or preliminary inquiry under B. 159, *supra* to record in writing a confession made to him by an accused, and such confession may be proved by oral testimony of the Magistrate to whom the confession was made, 43 M. 230, but see 49 C. 167 where oral evidence was held inadmissible. Where an accused person makes a statement under this section before a Magistrate not being a confession but of an exculpatory character such statement is still admissible in evidence against the accused at his trial as evidence of a fact relative to the prosecution case. 4 Pat. 327 where 49 C. 167; 2 C.W.N. 702 and 7 A. 646 are referred to. See also 28 Cr. L.J. 1279=88 Ind. Cas. 1055 where it was held that the word "statement" occurring in this section is not limited to a statement by a witness but includes also one made by an accused person not amounting to a confession.

In the course of an investigation or at any time afterwards before commencement of the inquiry or trial.—A confession by an accused person may be recorded in the course of an investigation before the commencement of the magisterial inquiry or trial or during an inquiry or trial and when the accused is examined. This section applies

gation is defined in B. 4 (1), (i) *supra* as including all proceedings under the Code for the collection of evidence by the police. There is nothing to show that investigation must necessarily terminate before the inquiry or trial begins. Both may be simultaneous. The condition requiring a confession to be prior to the commencement of the inquiry is only imposed when the investigation has ceased and not when it is made in the course of the investigation, 37 C. 467 at 496. An admission or confession made by a person complained against before a Magistrate holding an inquiry under B. 202, *infra* is not a statement recorded under this section or B. 264, *infra*. It is not recorded under this section because it is not made during the course of an investigation and it is not recorded under B. 264, *infra* because the person complained against is not an accused, he being not tried for an offence. The Code does not contemplate a statement on the examination of the petitioner, being recorded in such a proceeding, and therefore such a statement is inadmissible in evidence, 32 C. 1085 at 1089. Where an accused is sent to a Magistrate by the police to have his confession recorded and before the Magistrate he makes a statement which did not amount to a confession, nevertheless the statement so recorded was held admissible in evidence as evidence of conduct, 6 Pat. 737. Rule 195 *Mad. Cr. Rules of Pr.*, prohibiting a village Magistrate from recording a confession after the commencement of the police investigation is not a rule of law but is merely a departmental rule violation of which will not render the confession so recorded inadmissible in evidence, 51 M. 167. This decision is criticised in 28 L.W. (Jour.) 58, and good reasons are given for not attaching the

same weight to confessions recorded by village Magistrates as is attached to confessions recorded by higher Magistrates and the rule contained in the *Cr. Rules of Practice* so long as it is not *ultra vires* of the power of the rule making authority is as much a rule of law as this Code and the Ind. Ev. Act.

Sub-section (2).—This sub-section deals with the manner of recording a confession. It was held in 29 M. 89, following 16 M. 421 that a Magistrate taking statements under this section is acting in discharge of duties imposed on him by law and he is empowered to administer an oath under Ss. 4 and 5 of the Oaths Act, and an investigation under Chapter XIV of the Code is a stage of a judicial proceeding, and a person making on oath a false statement in the course of such an investigation commits an offence under S 193, I.P.C.; see also 22 A 115 and 2 B. 643. But this sub section says that "*Such statement shall be recorded in such of the manners hereinafter prescribed for recording evidence,*" referring evidently to Chapter XXV of the Code which makes no reference as to putting the person on oath. Where a Magistrate records the accused's confession not in the form prescribed by law but puts down the gist of the confession in a narrative form and the only warning given was by asking the accused whether he is willing to make a confession voluntarily but did not put questions to find out the voluntary character of the confession, it was held that there was no compliance with the requirements of law, 30 C.W.N. 354=27 Cr. L.J. 621=94 Ind. Cas. 365. Reading this sub-section with Chapter XXV of the Code there is no necessity to administer an oath. Moreover, with regard to the confessions, no oath could be validly administered to the person making this confession, and the confession so taken on oath is no confession, and is inadmissible in evidence. The object of the section as pointed out already is merely to secure a formal record of statements including confessions *prima facie* accurate, before a competent authority, so that they may be admissible in evidence, and for this purpose it is not quite necessary to administer an oath; confessions are to be recorded and signed in the manner provided in S. 364, *infra*, and are to be forwarded to the Magistrate by whom the case is to be inquired into or tried. A confession duly recorded by a Magistrate in a Native State in proceedings under the provisions of the Code is admissible in evidence in a trial before a Magistrate in British India, 12 A. 593; 22 B. 233, but a confession made before a foreign Court cannot be used against an accused person unless it is sworn to, like confessions made to private individuals, Weir II. 125. A Confession made to a Magistrate in England or in a foreign country say the French Possessions is admissible in evidence 1929 M.W.N. 383.

Sub-Section (3).—The whole object and policy of putting questions to the accused before recording a Confession as suggested by Rule 186 of the *Mad. Cr. Rules of Practice* is that a Magistrate should be satisfied that there was no compulsion by the Police or ill-treatment so as to raise a suspicion as to the voluntary character of the statement and when the spirit of the rule is satisfied it is undesirable that the question should be put in the form showing a total want of trust in the Police. The questions to be put as given in this rule seem to be leading questions suggesting torture or other ill-treatment by the Police and it seems undesirable to put such questions in the form mentioned in the rule 51 M 167. The question of torture or ill-treatment by the police may be omitted to meet this objection. The provisions of this section read with S. 361, *infra* are imperative and S 559, *infra* will not render a confession admissible when no attempt has been made to conform to its provisions, 9 M. 224; 39 M. 977; 17 C 862; 18 Cr. L. J. 623=39 Ind. Cas. 991; 18 Cr. L.J. 721=49 Ind. Cas. 721. Failure to give the necessary warning to the accused that if he does make a confession it might be used as evidence against him would render the confession recorded inadmissible in evidence against the accused. 6 Lah 183. Where the certificate appended to the record of the confession did not comply with the provisions of this sub-section, the defect can be cured by examining the Magistrate who had recorded the confession and then it becomes admissible in evidence, 6 Lah. 58; 26 Cr. L.J. 1458=89 Ind. Cas. 1026. The questioning mentioned herein refers only to questioning the accused in order to find out whether the confession is made voluntarily or not, 1 Bom. L. R. 357. Where a Magistrate

instead of asking the accused as to the voluntary character of the confession made in the beginning, asked him after the confession was recorded, it was held that the defect was merely one of form and not altering the character of the confession, 40 C. 873. This has no reference to the questioning of the accused as to the subject-matter of his confession, and nothing in the nature of cross-examination of the accused is permissible; questions tending to make a person incriminate himself are highly improper, Weir II, 136; 45 A. 166; 23 B. 221, but where the confession was recorded not in the shape of questions and answers as required by S. 304, *infra*, but in a simple narrative form and there was nothing to show that the accused was prejudiced thereby, the error will not affect the admissibility of the confession, 8 C. 618; 14 C. 539; 3 A. 233 at 238; 45 A. 166; 23 B. 221. The exact words of the warning which under the provisions of this section must be given to a person making a confession are not very material, provided the Magistrate explains and the person making the statement clearly understands that he need not make the confession, 26 Cr. L.J. 1433=89 Ind. Cas. 1026. When a confession is taken down in a narrative form it is only an irregularity which could be cured by the examination of the Magistrate under S. 533 *infra*, 9 C.L.J. 55=10 Cr. L.J. 325=3 Ind. Cas. 625. In 13 C.W.N. 861=9 C.L.J. 663=10 Cr. L.J. 125=2 Ind. Cas. 691, it was held that there was no warrant or justification for the intervention of a third party as a questioner, directly or indirectly, of a confessing prisoner. To say the least, the practice is objectionable; nor can the police record a confession and give the same to the Magistrate to enable him to question the accused, 7 C.W.N. 220. It would be going too far to say that a Magistrate recording a confession should not put any question to the person making the confession. But it is equally certain that his position when recording such statement or confession is merely that of a recording Magistrate and that he is in no sense inquiring into the case and that he is in no sense an investigating officer, 23 A.L.J. 719=26 Cr. L.J. 1209=83 Ind. Cas. 729. Under this section the Magistrate should make a serious attempt to satisfy himself that the confession he is to record is voluntary. The expression used is "*has reason to believe*" Unless the Magistrate is affirmatively satisfied as to the voluntary nature of the confession he ought not to record one, or give the certificate, 25 B. 168. "If a confession proceeds from remorse or a desire to make reparation for the crime, it is admissible; if it flows from hope or fear exacted by a person in authority it is inadmissible."

"In the case of a confession before a Magistrate or before any other person, unless it be shown affirmatively on the part of the prosecution that it was made without the defendant's being induced to make it by any promise of favour or by menaces, or undue terror, it shall not be received in evidence against him" *Arch. Cr. Pl. Ev. and Pra.* p. 375.

The provisions of this section require that a Magistrate shall not record a confession unless upon questioning the person making it he has reason to believe that he has confessed voluntarily. The duty imposed upon a Magistrate before whom a person is brought to make a confession is plain. He must question the prisoner to discover the voluntary nature of the confession and this questioning must be in pursuance of a real endeavour to find out the object of it, the requirement not being satisfied by a few formal questions. In fact the wording of the sub-section contemplates that the Magistrate shall hear the confession first without making a record that he shall then put questions to ascertain its voluntary character and if he has reason to believe that it is voluntary he may record the confession writing out in full every question put by him and every answer given and following the provisions of S. 364 *infra* the questioning of the person before recording a confession is a matter of substance and not of mere form and the omission cannot be cured by any evidence under S. 533 *infra*. In view of the propensity of the police to induce prisoners to confess, the Legislature has imposed on Magistrates the duty of making a substantial inquiry for themselves as to the voluntary nature of a confession and unless such inquiry is made, a confession made even before a Magistrate is not admissible in evidence, 3 L.B.R. 173=4 Cr. L.J. 198. Asking the accused about the voluntary nature of the confession at the end of the statement instead of at the beginning is only a defect in form and does not alter the character of the confession. The whole confession should not be rejected merely because it is partly bad, 40 C. 873. Care and circumspection is to be exercised in recording a confession. Questions put to the accused to ascertain the volun.

tary nature of the confession should be recorded. An accused should be warned of the consequences if he falsely implicates himself in the hope of release and should be asked if the police or any other subjected him to ill-treatment. It is not sufficient for a Magistrate to put one comprehensive question as to the nature of the confession. The Magistrate should consciously satisfy himself that the man is a free agent and his confession is voluntary, 15 Cr. L.J. 633=25 Ind. Cas. 833. Where the committing Magistrate who recorded a confession did not sign the certificate as required by this section and did not ask the accused whether the statement which he was going to make, was voluntary, but merely put the question whether he made the statement out of his free will, it was held that the evidence of the recording Magistrate saying that he had observed all the provisions of this section was sufficient to make the confession admissible and the question put by him whether the confession was made out of accused's free will was equivalent to asking him whether he made the confession voluntarily, 3 Pat. 872; 24 Cr. L.J. 618=73 Ind. Cas. 506.

Where the confession is made to a Magistrate during the course of a police investigation, there is a duty cast on the Magistrate to question the accused to satisfy himself, that the statement was made voluntarily and when such confession is subsequently retracted, the Court before admitting it in evidence must come to a definite conclusion as to its voluntary character, 25 Cr. L.J. 116=76 Ind. Cas. 180. The Magistrate should be particularly careful when the accused is produced before him from police custody. The first question which a Magistrate should put in such a case is how long has the accused been in police custody, 25 B. 543, and this fact and the length of time during which the police custody continued are to be considered as very material in judging whether a confession is voluntary or not, 13 C.W.N. 861=9 C.L.J. 663=10 Cr. L.J. 125=2 Ind. Cas. 681; 7 C.W.N. 457; 22 M. 15. A confession should be recorded in the actual words used by the accused, 4 A 46. The memorandum under this section is quite distinct from the memorandum required under S. 364 (2) *infra*. An English memorandum is not required in the case of a confession recorded under this section, 14 C. 539. The memorandum to be valid need not be written on the same day the confession is recorded, 6 B. 283, but a confession does not become inadmissible merely because the memorandum has not been written in the exact form prescribed, 3 A. 338; 22 M. 15. The memorandum need not be in the Magistrate's handwriting, 8 W.R. (Cr.) 53, but it must appear at the foot of record and signed by him, 3 C.W.N. 381. When there is no memorandum at all the Court refused to admit the confession, in evidence, 2 C.W.N. 702; but oral evidence as to the confession may be taken when the Magistrate had not properly recorded a confession under this section, 2 B.H.C.R. 397. When a Magistrate inadvertently omits to certify the voluntary nature of a confession recorded by him under this section, the defect may be cured by the evidence of the Magistrate as a witness, 12 Cr. L.J. 15=9 Ind. Cas. 143. See also S. 533 *infra* which cures defects of this sort; when a Magistrate who recorded a confession appended to it a certificate that he believed the confession was not voluntary, held that the confessional statement was inadmissible for want of a certificate under sub-section (3) of the section, 7 Cr. L. Rev. 38. See also 9 Cr. L.J. 297=1 Ind. Cas. 444. Where the certificate required by the section is duly recorded under this sub-section and appended to the record of the confession the presumption is that the precaution described in the section was duly taken. The law does not anywhere state what questions the Magistrate who is asked to record a confession must put in order to satisfy himself as to the direction contained in the section, 28 Cr. L.J. 107=104 Ind. Cas. 247. There is nothing in this or any other section in the Code which prohibits the Magistrate from recording a statement if the accused chooses to make one before he is placed on his trial. Such a statement if proved to be voluntary is not only admissible, but is of the greatest value as a fact relevant to the probability or improbability of his guilt, 24 Cr. L.J. 723=73 Ind. Cas. 863. The previous statement of a witness recorded under this section can be used as provided by Ss. 145 and 155 Ind. Ev. Act but it cannot be used as substantive evidence of the defects contained therein, 50 A. 242.

Explanation.—The explanation to this section was added in the Code of 1893 to meet the divergent views which existed in the Allahabad and Madras High Courts. Where a third-class Magistrate not empowered to commit for trial records a statement under this

section in a case triable exclusively by a Court of Session the statement is not evidence in a stage of judicial proceeding within Fs. 191 and 193, I.P.C., and when such a statement is subsequently retracted before a Magistrate having jurisdiction, that will not furnish a basis for an alternative charge of giving false evidence in a judicial proceeding. 14 Bom. L.R. 753=13 Cr. L.J. 707=16 Ind. Cas. 517.

165. (1) Whenever an officer in charge of a police-station, or a police-officer making an investigation *has reasonable grounds for believing that anything necessary for the purposes of an investigation into any offence which he is authorised to investigate may be found in any place within the limits of the police-station of which he is in charge, or to which he is attached, and that such thing cannot in his opinion be otherwise obtained without undue delay, such officer may, after recording in writing the grounds of his belief and specifying in such writing, so far as possible, the thing for which search is to be made, search, or cause search to be made, for such thing, in any place within the limits of such station.*

(2) *A police-officer proceeding under sub-section (1) shall, if practicable, conduct the search in person.*

(3) *If he is unable to conduct the search in person, and there is no other person competent to make the search present at the time, he may, after recording in writing his reasons for so doing require any officer subordinate to him to make the search, and he shall deliver to such subordinate officer an order in writing specifying the place to be searched and, so far as possible, the thing for which search is to be made; and such subordinate officer may thereupon search for such thing in such place.*

(4) *The provisions of this Code as to search-warrants and the general provisions as to searches contained in section 102 and section 103 shall, so far as may be, apply to a search made under this section.*

(5) *Copies of any record made under sub-section (1) or sub-section (3) shall forthwith be sent to the nearest Magistrate empowered to take cognizance of the offence and the owner or occupier of the place searched shall on application be furnished with a copy of the same by the Magistrate:*

Provided that he shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost.

Amendment.—Sub-sections (1) and (2) of this section which deal with searches by police-officers have been redrafted in order to obviate the difficulties arising from the decisions of the Calcutta High Court in 12 C.W.N. 1016 and 13 C.W.N. 343. The amendment in sub-section (3) is only verbal and sub-section (4) applies to provisions of Fs. 102 and 103 as to searches made under a warrant to searches made under this section.—*Statement of Objects and Reasons.* Sub-section (5) is new.

Scope of the section.—The power of search given under this section is incidental to the conduct of investigation into an offence which the police-officer is authorized by law to investigate, Ss. 155 and 156 *supra*. Therefore if he makes an investigation into a non-cognizable offence without the order of a Magistrate, he has no right to enter into a house to make a search under this section, 24 C. 691. The provisions of this section are so strict that before entering a house an investigating officer has to specify in writing the thing for which search is to be made and also the grounds of his belief that such a thing would be found in the house which he desired to enter. A promiscuous entry into a house is not permitted to an investigating officer simply to satisfy himself as to the truth of an allegation made by a complainant or an accused person or a witness and by such a promiscuous entry the police-officer cannot be said to be acting in the discharge of his duty as a public officer, 26 A.L.J. 410. Before the amendment the section authorized a search for a specific document or thing but now the power to search is very much wider. The section seems to authorize a general search but at the same time the object seems to be to discourage a general search by requiring as far as possible to specify the thing for which the search is to be made. Search warrants are a species of process exceedingly arbitrary in character and inasmuch as they are resorted to only for very urgent and satisfactory reasons, the rules of law which pertain to them are of more than ordinary strictness. In the first place, it is common learning that they are only to be granted in the cases expressly authorized by law and not generally in such cases until it has been shown before a responsible officer on oath that a crime has been committed and the officer has reason to believe that the offender or the property which is the subject or the instrument of crime is concealed in some specified house or place. The law clearly intends that evidence shall be given of such facts as shall satisfy the officer issuing the warrant that there is reason to believe that a house or room or place contains property which is the subject of the offence. Search warrants are always open to very serious objection and very great particularity is justly required by law in cases, where they are authorized before the privacy of man's premises is allowed to be invaded by the minister of the law, 53 C. 718. But the section requires two safeguards that a police-officer is to record in writing the grounds of his belief and give his reasons as required by this section and the thing to be searched should be specified as far as possible, see 23 A.L.J. 1037. This section requires, before it can be brought into operation, that there must be an offence which the police-officer is authorized to investigate. As soon as the police-officer suspected that a person is not producing the real thing, and there was in his opinion an offence committed, he could act under this section, but the suspicion that there is an offence committed and therefore a search is to be made, must be formed honestly, 27 B. 590 at 593. This section now authorizes a general search on the chance that something may be found, differing from the view expressed in 35 C. 304; 16 C.W.N. 1078; 38 A. 14. In the Joint Committee's report we find that the amendment was made to counteract the effect of the Calcutta decisions only in 38 C. 304 and 12 C.W.N. 1016, which had created unnecessary difficulties, 13 A.L.J. 691. It was held in 41 C. 261 that this section authorises the search of the house of an accused person for specific documents and things necessary to the conduct of an investigation into an offence but now the words 'anything necessary for the purpose of an investigation into an offence' give much wider power of search. See 23 A.L.J. 1037= 27 Cr. L.J. 11=91 Ind. Cas. 43.

Anything necessary for the purposes of an investigation.—A promiscuous entry into houses is not permitted simply to satisfy as to the truth of the allegations made by a complainant or an accused person or a witness but before entry the officer has to specify in writing the thing for which a search is to be made and the ground of his belief that such a thing necessary for the purpose of his investigation will be found in the house he desired to enter, 26 A.L.J. 410. A general search means a search not in respect of specific documents or things which the officer considered were necessary or desirable for the purpose of the investigation in hand but a roving commission for the purpose of discovering documents or things which might involve persons in criminal liability. If for instance to go and search the house of a well-known *budmash* with the hope of finding stolen property in his house, not the property involved in a case which the police might have been

investigating or for any specific article that would be described as a general search for stolen property; in other words where the police search a house for stolen articles generally and not for specific articles mentioned by a complainant as having been stolen, 27 Cr. L.J. 1195 at 1197=97 Ind. Cas. 933 where 35 C. 354 *dissent*. This section does not empower a police officer to search for the purpose of discovering arms generally. The things searched for, must be necessary for the purposes of the investigation into any offence which he is authorized to investigate, 8 C.L.J. 75. Search is to be conducted only as a step in the investigation of a completed crime which he is authorized to investigate.

Sub-section (2).—This sub-section does not mean that the investigating officer personally conducting the search must himself make the search, e.g., ransack boxes, examine the roof, dig the floor, or otherwise seek for the property, nor is it necessary that these must take place under his very eyes. The meaning of the sub-section is that the officer should be present on the spot and should exercise a general supervision and in case he is unable to be present at the search, he is to depute in writing one of his subordinates to search in his stead under sub-section (3), 23 M.L.J. 445=(1912) M.W.N. 1111=13 Cr. L.J. 763=17 Ind. Cas. 75.

Sub-section (3).—The object is to discourage general search by insisting that the officer should specify as far as possible the thing for which search is to be made. Where the S. H. O. or the officer conducting the investigation is unable to conduct the search in person, he may depute a subordinate officer by a written order to conduct the search, 17 M.L.J. 323=6 Cr. L.J. 103, 23 M.L.J. 445=13 Cr. L.J. 763=17 Ind. Cas. 75. An order in writing specifying the document or thing for which search is to be made should be delivered to the subordinate officer and a search conducted without such written order is illegal and any resistance is no offence, 38 A. 14; 13 A.L.J. 691; 6 C.L.J. 753, 7 N.W.P.H.C.R. 209, 7 B.H.C.R. (Cr. Cas.) 50; 16 Cr. L.J. 753=31 Ind. Cas. 353. When an Inspector of Police acting under this section sent a constable to search the house, himself sitting outside, the accused asked for a list of articles he had come to search for and the list was not produced, whereupon the accused objected to the search and pushed the constable out held that no offence was committed by the accused as the Inspector should have himself conducted the search and was not justified in sitting outside and asking the constable to search without giving him a written order specifying the articles to be searched for, 17 M.L.J. 323=6 Cr. L.J. 103. If a constable searches without a written order he does not exercise the power of a public servant under this sub-section and S. 99, I.P.O., has no application to such a case, 6 C.L.J. 753; see also 38 C. 433, where it was held that a public functionary authorized by statute to make a search must in exercising that authority act within the limits of the statute itself.

Sub-section (4).—Before the amendment it was held in 23 M.L.J. 445=1912 M.W.N. 1111=13 Cr. L.J. 736=17 Ind. Cas. 75, that the provisions of S. 103 *supra*, did not apply to a search under this section but now the provisions of Ss. 102 and 101 *supra* are made applicable. See Ss. 96, 98, 100, 105 and 151 as to search-warrants. For powers to search under Special laws see the Arms Act XI of 1878, Excise Act, Opium Act, Gambling Act, etc., which contain special provisions regarding searches. See also S. 153, *supra*, as to inspection of weights and measures.

Sub-section (5).—This is a new provision introduced in the Code by the Amending Act 1923 and it is obviously intended as an extra safeguard to protect individuals against general or roving searches. To hold that an omission to comply with the provisions of this sub-section did not affect the powers of search given to police officers under the Code would have the effect of rendering this sub-section in many cases a dead letter. It is essential that a police officer conducting a search under this and S. 166, *infra*, should send forthwith to the nearest Magistrate copies of the record that he has prepared before conducting the search and when this is not done a conviction for resisting the police and deterring them from discharging their duty to search a suspected person's house cannot be sustained, 43 C.L.J. 164=27 Cr. L.J. 542 (1)=93 Ind. Cas. 1038 (1). The right to apply for copies is now embodied in this sub-section. The order directing it to be filed by the Magistrate is tantamount to a refusal to grant copies applied for. Such order cannot be treated as an extra judicial

or executive order when a statutory duty is cast upon the Magistrate to grant the application and the order which is actually in disregard to the specific provisions of law is therefore illegal. The powers of the High Court under S. 435, *infra*, are very comprehensive and such an order comes within the purview of that section, 26 A.L.J. 703=29 Cr. L.J. 663=110 Ind. Cas. 215.

166. (1) An officer in charge of a police-station or a police-officer *not being below the rank of Sub-Inspector making*

When officer in charge of police station may require another to issue search-warrant,

an investigation may require an officer in charge of another police-station, whether in the same or a different district, to cause a search to be made in

any case, in which the former officer might cause such search to be made, within the limits of his own station.

(2) Such officer, on being so required, shall proceed according to the provisions of section 165, and shall forward the thing found, if any, to the officer at whose request the search was made.

(3) Whenever there is reason to believe that the delay occasioned by requiring an officer in charge of another police-station to cause a search to be made under sub-section (1) might result in evidence of the commission of an offence being concealed or destroyed, it shall be lawful for an officer in charge of police-station or a police-officer making an investigation under this Chapter to search, or cause to be searched, any place in the limits of another police-station, in accordance with the provisions of section 165, as if such place were within the limits of his own station.

(4) Any officer conducting a search under sub-section (3) shall forthwith send notice of the search to the officer in charge of the police-station within the limits of which such place is situate, and shall also send with such notice a copy of the list (if any) prepared under section 103, and shall also send to the nearest Magistrate empowered to take cognizance of the offence, copies of the records referred to in section 165, sub-sections (1) and (3).

(5) The owner or occupier of the place searched shall, on application, be furnished with a copy of any record sent to the Magistrate under sub-section (4):

Provided that he shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost.

Amendment.—Sub-sections (3), (4) and (5) are new, and added in certain circumstances to empower an S. H. O. to search or direct a search of places within the limits of another station.

Under this section if a theft is committed within the limits of a police-station and if the property is concealed within the limits of another station, the officer in charge of the station where the theft was committed can requisition the aid of the officer in charge of the station where the thief had secreted the property to cause a search to be made, 42 M. 446 at 449.

167. (1) Whenever any person is arrested and detained in custody, and it appears that the investigation cannot be completed within the period of twenty-four hours fixed by section 61, and there are grounds for believing that the accusation or information is well founded, the officer in charge of the police-station or the police officer making the investigation if he is not below the rank of Sub-Inspector shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary hereinafter prescribed relating to the case, and shall at the same time forward the accused to such Magistrate.

(2) The Magistrate to whom an accused person, is forwarded under this section may, whether he has or has not jurisdiction to try the case, from time to time authorise the detention of the accused in such custody as such Magistrate thinks fit, for a term not exceeding fifteen days in the whole. If he has not jurisdiction to try the case or commit it for trial, and considers further detention unnecessary, he may order the accused to be forwarded to a Magistrate having such jurisdiction :

Provided that no Magistrate of the third class, and no Magistrate of the second class not especially empowered in this behalf by the Local Government shall authorise detention in the custody of the police.

(3) A Magistrate authorising under this section detention in the custody of the police shall record his reasons for so doing.

(4) If such order is given by a Magistrate other than the District Magistrate or Sub-divisional Magistrate, he shall forward a copy of his order, with his reasons for making it, to the Magistrate to whom he is immediately subordinate.

Amendment.—The italicised words in sub-section (1) and the proviso to sub-section (2) are new. By the new amendment Third Class Magistrates are deprived of the power of ordering detention in police custody under this section and Second Class Magistrates are to be specially authorised by Local Government for ordering detention in police custody,

Scope of the section.—This section applies only to proceedings under Chapter XIV of the Code and not to those under S 110 *supra*, where the Magistrate has no power to remand an accused person to custody, 39 M. 928. S 344 contains a similar provision to remand but it refers to cases in which inquiry or trial has already begun by a Magistrate or is about to begin, 51 C. 402 ; 23 B. 32 ; 54 C. 218 at 230. Under the section the accused is not before a Magistrate for inquiry or trial and the police are to complete, if possible their investigation and place the accused before the Magistrate for an authorisation to detain the accused in their custody, see 11 M. 93.

Any investigation under this Chapter.—This section in terms applies only to investigation under Chapter XIV of the Code and gives no power to a Magistrate to remand an accused person in custody under Chapter VII of the Code, 39 M. 928 ; 5 Bom. L.R. 27 ; 8 C.W.N. 779.

Shall forthwith transmit to the nearest Magistrate a copy of the entries in the diary. It is only when the investigation cannot be completed within the twenty-four hours prescribed by S. 61, *supra* that the police-officer is to transmit a report under this

section. The nearest Magistrate may be one having jurisdiction or not. It is upon these entries in the special diary that the Magistrate is to decide and to form his opinion as to whether or not the accused is to be detained in custody. This must contain at least a summary of the statements made by the persons who had been examined under S. 161, *supra*, by the police-officer making the investigation, 19 A. 330 at 404. The Magistrate may, on a perusal of the entries in the diary relating to the case to which the accused has no access, from time to time, authorize the detention of the accused in custody for a term not exceeding 15 days on the whole, 36 C. 166.

In the Diary hereinafter prescribed.—i. e., under S. 172, *infra*.

Shall at the same time forward the accused to such Magistrate.—The accused should be brought promptly before the Magistrate. No detention longer than is necessary of the accused is permitted by law. For the words "*accused if any*" the words "*accused if in custody*" have been substituted in consequence of the amendment in S. 157, *supra*.

May authorize the detention of the accused in such custody.—*Detention* in police custody is different from *remand*. The detention contemplated herein is practically time granted to the police to complete their investigation and decide either to release the accused on his own bond for appearance in Court or to send up a charge sheet under S. 170, *infra*, for inquiry before a Court, 50 B. 741. S. 344, *infra* contemplates a remand to custody in inquiries or trials. The remand is to Magisterial lock-up or to jail and not to police custody. This section contemplates custody during police investigation, whereas S. 344 refers to cases already on the file of the Magistrate in which the inquiry or trial has begun or is about to begin. The investigating police-officer may apply immediately to the nearest Magistrate for an order authorising detention of the accused in police custody. The Magistrate must be satisfied that there are substantial grounds for suspecting that the accused has committed a definite offence and his remaining in the custody of the police is really necessary, 7 C.W.N. 457; 11 C.W.N. 554.

For a term not exceeding fifteen days on the whole.—The words "on the whole" were introduced in the 1898 Code. The sum total of the periods of detention in custody must not exceed 15 days, 41 M. 98; 23 B. 32; 51 C. 402 and the term must be limited as much as possible, 11 C.W.N. 554. The intention of the Legislature is that an accused person should be brought before the Magistrate competent to try or commit for trial with as little delay as possible, 51 C. 402; 6 M. 63. The law as laid down in the section of the Code *vis.*, S. 61, this section, S. 169 and S. 170 seems to be this, that after the expiration of the maximum period of 15 days' detention of an accused person and the additional time necessary to bring him before the Magistrate allowed under S. 61 and this section, an accused person must either be released by the police under S. 169 *infra*, security for his appearance, if and when so required being taken, or the Magistrate empowered in that behalf must either take cognizance if he has before him a police report (which ordinarily be a report in the form laid down in S. 173, and which he thinks makes out a *prima facie* case) or he must release him, 28 C.W.N. 490 at 492=26 Cr.L.J. 68=83 Ind. Cas 628. The power to remand given under this section, is to detain the accused person in custody while the police make their investigation and in a proper case to commence the inquiry. But the period of detention is limited to 15 days on the whole, the custody contemplated by S. 344 *infra* is quite different and is intended for under-trial prisoners. Detention after a police report that there was no evidence against the accused is illegal unless there is a re-arrest of the accused under S. 55 *supra*, 43 A. 186; 41 A. 483.

Proviso.—This proviso is new. Third class Magistrates and Second class Magistrates, unless specially empowered, are not entitled to authorize detention in police custody now.

Shall record his Reasons.—The section requires that before a Magistrate remands an accused person to custody, the accused must first be produced before the Magistrate and he must also record his reasons for so remanding, 16 C.W.N. 445=13 Cr. L.J. 65=13 Ind. Cas. 721. Whenever a Magistrate remands an accused person to police custody under this

section he should record his reasons for his order G O. No. 918 Jud. dated 16-9-10, *Rule 52 Mad. Cr. Ruls of Pr.* and under *Rules 53*, copies of orders of remand to be sent by Subordinate Magistrates to the superior Magistrates within 24 hours.

168. When any subordinate police-officer has made any investigation under this chapter, he shall report the result of such investigation to the officer in charge of the police-station.

Report of investigation by subordinate police-officer.

This section directs that a subordinate police-officer who has made any investigation shall report the result of such investigation to the officer in charge of a police-station. The report of the result of an investigation cannot be said to be an act or record of an act of a public servant, 20 M. 139 (F.B.) at 193. The report made under this section is not a public document within the meaning of S. 74 of the Evidence Act and consequently an accused person is not entitled before trial to have copies of such report, 20 M. 189 (F.B.) See S 173 (4) which enacts that the accused is entitled to such copies before the commencement of the trial.

169. If, upon an investigation under this Chapter, it appears to the officer in charge of the police-station or to the police-officer making the investigation that there is not sufficient evidence or reasonable ground of suspicion to justify the forwarding of the accused to a Magistrate, such officer shall, if such person is in custody, release him on his executing a bond, with or without sureties, as such officer may direct, to appear, if and when so required, before a Magistrate empowered to take cognizance of the offence on a police-report and to try the accused or commit him for trial.

Release of accused when evidence deficient.

Amendment.—The words "to the officer making the investigation" have been newly added and this gives power to such an officer to release an accused person on bail if there is not sufficient evidence against him. This is in accordance with paragraph 156 of the *Report of the Police Commission*.

Release accused on Executing bond.—The power of a police-officer to admit to bail is only provisional, and when the Magistrate determines that there is a *prima facie* case of non-bailable offence, the accused should be re-arrested and forwarded to the Magistrate. *Ratanlal 121*. But a police officer cannot entertain an application for withdrawal of the complaint or for compounding the offence, which is a judicial act, the exercise of which is for the Magistrate under Ss 248 and 245, *infra*. The power under this section may be exercised by a superior police-officer under S. 559, *infra* although such superior officer may not have made the investigation himself. The liability of a surety is strictly conditioned by the terms of his bond and if he binds to produce the accused at a particular time and place and does so, his liability is discharged, and he cannot be held liable for subsequent non-appearance of the accused, 23 Cr. L.J. 68=65 Ind. Cas. 420, For form of bond see form No. 25 of Sch. V.

If and when so required.—The use of the word 'if' is significant as in most cases the Magistrate will not require the appearance of the person released under this section. Where, however, his appearance is required an order fixing a day for appearance is to be made as in the next section, without which there cannot be any forfeiture of the bond for any failure to comply with its terms.

170. (1) If, upon an investigation under this Chapter, it appears to the officer in charge of the police-station that there is sufficient evidence or reasonable ground as aforesaid, such officer shall forward the accused under custody to a Magistrate empowered to take cognizance of the offence upon a police-report and to try the accused or commit him for trial or, if the offence is bailable and the accused is able to give security, shall take security from him for his appearance before such Magistrate on a day fixed and for his attendance from day to day before such Magistrate until otherwise directed.

Case to be sent to Magistrate when evidence is sufficient.

(2) When the officer in charge of a police-station forwards an accused person to a Magistrate or takes security for his appearance before such Magistrate under this section, he shall send to such Magistrate any weapon or other article which it may be necessary to produce before him, and shall require the complainant (if any) and so many of the persons who appear to such officer to be acquainted with the circumstances of the case as he may think necessary, to execute a bond to appear before the Magistrate as thereby directed and prosecute or give evidence (as the case may be) in the matter of the charge against the accused.

(3) If the Court of the District Magistrate or Sub-divisional Magistrate is mentioned in the bond, such Court shall be held to include any Court to which such Magistrate may refer the case for inquiry or trial, provided reasonable notice of such reference is given to such complainant or persons.

(4) *Repealed by Act II of 1926, Section 2.*

(5) The officer in whose presence the bond is executed shall deliver a copy thereof to one of the persons who executed it, and shall then send to the Magistrate the original with his report.

Shall forward the accused under custody, etc.—When the police investigation discloses a *prima facie* case against the accused he should at once be sent in custody to the Magistrate having jurisdiction, 5 W.R. (Cr.) 6 if the offence is bailable and if the accused is able to furnish security then the police-officer shall take security for his appearance before the Magistrate on a particular day.

Shall take security.—This is the only section which empowers a police-officer to take security for the appearance before a Magistrate, but for exercising this power the investigation must be complete and a substantial case is to be made out against the accused.

For form of bond, see Sch. V form No. 25.

Empowered to take cognizance of the offence upon police report.—Having regard to these words, it was contended that S. 170 (1) (b) *infra* can only refer to non-cognizable offences and not to cognizable offences, and that in the case of cognizable offences by the clear words of this section a Magistrate can only take cognizance upon a police report as contemplated by S. 173, *infra* and upon no other report. But the contention was overruled

and it was held the Magistrate is empowered by S. 100 (1) (b) to take cognizance of both cognizable and non-cognizable offences upon a police report 28 C.W.N. 490. See in this connection the Full Bench ruling in 49 M. 525 followed in 28 Cr. L.J. 821—104 Ind. Cas. 437; 51 B. 493; 9 Lah 230.

Appearance before such Magistrate on a day fixed.—A recognizance taken from an accused person binding him to appear in Court should specify the particular day he is to appear in Court.

Sub-section (2).—This sub-section and S. 173, *infra* refer only to witnesses for the complainant and cannot refer to the witnesses of the accused. The day fixed for the attendance of witnesses should as a rule be the same day fixed for the appearance of the accused or the probable date of his reaching the Magistrate's Court. S. 171 expressly refers to complainant's witnesses who can be detained in custody under special circumstances. Further Ss. 121, 124 and 247 assume that when the case is heard by the Magistrate, witnesses for the accused will not generally be present.

For form of bond, see Sch. V form No. 25.

Sub-section (5).—The report referred to herein is the report contemplated by S. 173, *infra*.

Complainants and witnesses not to be required to accompany police-officer.

171. No complainant or witness on his way to the Court of the Magistrate shall be required to accompany a police-officer,

Complainants and witnesses not to be subjected to restraint.

or shall be subjected to unnecessary restraint or inconvenience, or required to give any security for his appearance other than his own bond :

Provided that, if any complainant or witness refuses to attend or to execute a bond as directed in section 170, the officer in charge of the police-station may forward him in custody to the Magistrate, who may detain him in custody until he executes such bond, or until the hearing of the case is completed.

Recusant complainant or witness may be forwarded in custody.

Scope of the Section.—This section refers to the sending up of the complainant and his witnesses under S. 170 (2) for recording their evidence in the inquiry or trial and does not justify taking a bond or sending up in custody a witness, whose statement the police wish to have recorded under S. 164, *supra*. In 4 C.W.N. 49 at 54. *Prinsep and Hill, JJ.*, observed "there is no warrant for the police to subject a witness to any unnecessary restraint whatsoever. The law enables the police to send a witness, who shows an indication of unwillingness to attend the Court, to custody but beyond that they have no power over such persons. The control admittedly exercised over Koshila was, in our opinion, an unnecessary restraint or inconvenience in direct disregard of S. 171 and certainly not justified under the explanation given by the police and accepted by the Sessions Judge. It is impossible to accept the evidence so obtained as that of a witness speaking voluntarily, and if it be said that the witness did not speak voluntarily before the Magistrate, but under the influence of the police, it is impossible to say how far any of the statements can be accepted as true. It would be impossible to convict the appellants solely on such evidence." There is however nothing in the section preventing the complainant and the witnesses from going with the police-officer, especially when they have to go through wild and uninhabited tract, to the Court, and the escort of the police and their protection will be quite welcome to them. The words 'shall be required' leave an option to the complainant and the witnesses,

172. (1) Every police-officer making an investigation under this Chapter shall day by day enter his proceedings in the investigation in a diary, setting forth the time at which the information reached him, the time at which he began and closed his investigation the place or places visited by him, and a statement of the circumstances ascertained through his investigation.

(2) Any Criminal Court may send for the police-diaries of a case under inquiry or trial in such Court, and may use such diaries, not as evidence in the case, but to aid it in such inquiry or trial. Neither the accused nor his agents shall be entitled to call for such diaries, nor shall he or they be entitled to see them merely because they are referred to by the Court; but, if they are used by the police-officer who made them, to refresh his memory, or if the Court uses them for the purpose of contradicting such police-officer, the provisions of the Indian Evidence Act, 1872, section 161 or section 145, as the case may be, shall apply.

Scope and object of the section.—This section does not deal with the recording of statements made by witnesses and in this section no mention whatever is made as to the recording of statements of witnesses. Ss. 161 and 162 *supra* deal with different portions of the investigation. What is intended to be recorded under this section is what investigating officer did, the places where he went, the people he visited and what he saw etc. So the statement recorded under this section is a privileged one. But there is no distinction between statements recorded under S. 162 *supra* and a statement recorded under this section. If a police officer purports to record a statement, the amended new S. 162 *supra* comes into play and the police can no longer claim any privilege in respect of that statement on the ground that was not recorded under S. 162 *supra* but under this section. It is quite immaterial whether the statement is labelled as recorded under this section 31 C.W.N. 940=45 C.L.J. 561 at 563=28 Cr. L.J. 803=104 Ind. Cas. 245. This section does not provide for recording statements and statements recorded in whatever form the defence has a right to ask for copies of such statements and use them to contradict the prosecution witnesses 32 C.W.N. 280=26 Cr. L.J. 531=109 Ind. Cas. 355. The object of case diaries under this section is that as the early stages of the investigation which follows the commission of a crime must necessarily in the vast majority of cases be left to the police until the honesty, the capacity, the discretion and judgment of the police can be thoroughly trusted, it is necessary for the protection of the public against criminals, for the vindication of the law and for the protection of those who are charged with having committed a criminal offence that the Magistrate or Judge before whom the case is for investigation or for trial should have the means of ascertaining whether the information was true, false or misleading which was obtained from day to-day by the police-officer investigating the case and what were the lines of investigation upon which the police acted. 16 C.W.N. 145 at p. 179=13 Cr. L.J. 65=13 Ind. Cas. 721, *relying on* 19 A. 390 at 397.

Shall day by day enter his proceedings in a diary.—The diary kept under this section is generally known as the *special or case diary* in which the police officer is required to enter his proceedings day by day, and it does not, in the list of matters to be entered therein, appear to allow any oral statement of witnesses to be recorded. It is strictly privileged and may only be used by the Court, not as evidence in the case but to aid it in the inquiry or trial, neither the accused nor his agents shall be entitled to call for such diaries, nor shall they be entitled to see them merely because they are referred to by the Court; but

If they are used by the police-officer who made them to refresh his memory, or if the Court uses them for the purpose of contradicting such police-officer, the provisions of S. 161 or S. 145 of the Indian Evidence Act shall apply, 33 C. 1023 at 1026; 19 A. 390 (F.B.); 44 C. 876 (P.C.); 10 C.W.N. 600=3 Cr. L.J. 408; 27 C. 293; 23 C. 361; 9 C. 455; 21 A. 159; 1908 A.W.N. 22, but whether the statements of witnesses should be entered in the special diary or not, there is a conflict of opinion. Diaries prepared prior to the commencement of the investigation into an offence are not part of the special diary and the provisions of this section do not apply to them, 14 C.W.N. 1114. See the observations of Edgo, C.J., in 19 A. 390 at 397-89 as to the object of the case diaries: "*any one of the public may be the victim of a crime or may be unjustly charged with the commission of a crime. The early stages of the investigation which follows on the commission of a crime must necessarily in the vast majority of cases be left to the police, and until the honesty, the capacity, the discretion and judgment of the police, can be thoroughly trusted, it is necessary for the protection of the public against criminals, for the vindication of the law, and for the protection of those who are charged with having committed a criminal offence that the Magistrate or Judge before whom the case is for investigation or for trial, should have the means of ascertaining what was the information, true, false, or misleading, which was obtained from day to day by the police officer who was investigating the case, and what were the lines of investigation upon which such police-officer acted. A properly kept special diary would afford such information, and such information would enable the Magistrate or Judge to determine whether persons referred to in the special diary, but not sent up as witnesses by the police, should be summoned to give evidence in the interest of the prosecution or of the accused. It must also be remembered that it is the duty of the Magistrate or of the Judge before whom a criminal case is, to ascertain if possible on which side the truth is, and to decide accordingly. It must happen that a police officer, who is investigating a criminal case, receives some true information, some false information, some misleading information and it must happen that such police-officer forms no doubt sometimes prematurely, a theory about the case to which having committed himself, he probably adheres. An ordinary knowledge of the infirmities of human nature and a knowledge of what does in fact take place in some cases teaches that in many cases the inclination of a police-officer, who in his early investigation of a criminal case has committed himself honestly or dishonestly to a theory as to the case, is to work the case so as to support the theory whether the vindication of justice is to be the result or not. It is consequently essential that the Magistrate or Judge who has to hold the scales of justice evenly between the Crown and the accused, should have some means of ascertaining what was the information obtained by the police-officer each day in the course of the investigation and what were the lines upon which the investigation proceeded". It is repugnant to all principles of criminal law to compel a person to give evidence in the very matter in which he is accused or liable to be accused and then base a charge on such evidence and use such evidence at the trial to prove his guilt, 50 B. 56 at 61. Entries in police diaries ought not to be referred to by the court as corroboration of the prosecution evidence 15 Cr. L.J. 256=23 Ind. Cas. 208.*

Setting forth the time, place and a statement of circumstances.—This section does not contain an exhaustive list of the matters which may with propriety be entered in the diary. There is much which may tend to the furtherance of the objects for which the diary has been instituted which would not fall within the language of the section but which may with great advantage be entered in the diary and when so entered be protected from disclosure for reasons of public policy, 19 A. 390 at 414.

Sub section (2).—This sub-section lays down very distinctly that the Court may not use such diaries as evidence in the case but only to aid it in the inquiry or trial. The aid which a Court can receive from the entries in such a diary is usually confined to utilising the information contained therein as foundation for questions to be put to the witness and in using the diary the Court should always employ very great caution. The comments of *Sir John Edgo* (19 A. 390) are as valuable to-day as when they were made, although the law on the subject has been slightly modified since the decision. Even when it is permissible to utilise the record of statements made by a Police Officer in the course of an investigation

and entered in the diary, the Courts should remember the principles laid down that such statements are recorded by the Police in a most haphazard manner, in which the investigating officers not unnaturally record what seems to be their opinion material to the case at that stage and omit many matters equally material and may be of supreme importance as the case develops. Police officers, are not experts as to what is and what is not evidence and statements are often recorded hurriedly in the midst of crowd and confusion subject to frequent interruptions and suggestions by bye-standers 23 Cr. L.J. 134 at 136=99 Ind. Cas. 332. The police diaries cannot be used to discredit the defence version on the ground that it is now here mentioned in them and thereby strengthening the prosecution story, 27 Cr. L.J. 572=94 Ind. Cas. 140. It is the duty of the Court to bring on record by evidence any material facts that may come within its knowledge and it is for that purpose the Court is empowered to use the police diaries, 29 Cr. L.J. 26 at 29=106 Ind. Cas. 442. The privilege of using the diary to contradict a police officer belongs exclusively to the Court, 8 C. 153. The Court may send for the special diary and may use the same to assist it in the inquiry or trial by suggesting means of further elucidating points which need clearing up and which are material for the purpose of doing justice between the Crown and the accused, 23 Cr. L.J. 251. A Judge could refer to the diaries even after the verdict because the trial does not end with the verdict of the jury for the Judge still has to decide whether he will accept the verdict or refer the case to the High Court and if referred, the trial continues in the High Court, 56 C. 150 at 153. Entries in the special diary cannot by themselves be taken as evidence of any date, fact or statement contained therein. The Court cannot make a general order for the production of police diaries in all cases coming before it, as the law nowhere empowers the Court to issue such a general order, but it has power only to call for the diaries when used as required in each particular case, 1894 A.W.N. 81. The special diary may also be used by the Court for the purpose of contradicting the police-officer who made it, and it may be used by the police-officer who made it for refreshing his memory, but no other witness is entitled to use the same for that purpose. The accused cannot insist that a police officer should refresh his memory and thus obtain access to the diary in an indirect manner, 8 C. 154. Ordinarily the accused is not entitled to see the contents or to have a copy, but if the diary is used by the police-officer for refreshing his memory or by the Court to contradict his evidence, then the accused shall be entitled to be furnished with a copy unless the Court thinks it inexpedient in the ends of justice. The accused may look at the particular entry before or at the time the witness tries to refresh his memory 8 C. 739. See 19 A. 390 (F.B.) The facts stated in the diary must be proved by oral evidence, *Wells II*, 142 and 143; 1893 A.W.N. 143; 27 C. 295; 15 C.W.N. xivii. See also 10 C.W.N. 600=3 Cr. L.J. 423 where it was held that facts and statements appearing in the diary cannot be used as materials to help the Court in a criminal trial to come to a finding on the evidence in the case, and what the Court should do, is to call for necessary evidence to have the matter legally proved when some matter of importance bearing upon the case is discovered from a perusal of the diary, but notes of seditious speeches made by a police-officer may be allowed to become part of the record in a trial under S. 134A, I.P.C., 32 M 3; 25 Cr. L.J. 409=77 Ind. Cas. 489. When a confession is made to the police and recorded in the police diary, the diary cannot be used by the Court for any purpose other than to assist it in the inquiry or trial, or to enable the defence under certain circumstances to contradict the witnesses for the prosecution, 29 Cr. L.J. 26 at 29=106 Ind. Cas. 442. Police diaries cannot be placed before the Jury. As provided by this section they are useful not as evidence but to aid the court in the trial so as to enable it to make a thorough inquiry on all material points and to elicit in the examination of the witnesses and especially police witnesses the real facts of the case 27 C. 295

173. (1) Every investigation under this Chapter shall be completed without unnecessary delay, and, as soon as it is completed, the officer in charge of the police-station shall—

Report of police-officer.

(a) forward to a Magistrate empowered to take cognizance of the offence on a police-report a report, in the form prescribed by the Local Government, setting forth the names of the parties, the nature of the information and the names of the persons who appear to be acquainted with the circumstances of the case, and stating whether the accused (if arrested) has been forwarded in custody, or has been released on his bond, and, if so, whether with or without sureties, and

(b) *communicate in such manner as may be prescribed by the Local Government, the action taken by him to the person, if any, by whom the information relating to the commission of the offence was first given.*

(2) Where a superior officer of police has been appointed under section 158, the report shall, in any cases in which the Local Government by general or special order so directs, be submitted through that officer, and he may, pending the orders of the Magistrate, direct the officer in charge of the police-station to make further investigation.

(3) Whenever it appears from a report forwarded under this section that the accused has been released on his bond, the Magistrate shall make such order for the discharge of such bond or otherwise as he thinks fit.

(4) *A copy of any report forwarded under this section shall, on application, be furnished to the accused before the commencement of the inquiry or trial :*

Provided that the same shall be paid for unless the Magistrate for some special reason thinks fit to furnish it free of cost.

Amendment.—Sub section (1) has been redrafted and the principal change effected is to prescribe that the police shall communicate the result of their investigation to the person by whom the first information was given. Sub-section (4) is new and provides for a copy of the report or charge-sheet being furnished to the accused before the commencement of the inquiry or trial.

Scope of the section.—There are three sections in the Code relating to final reports viz., S. 169, S. 170 and this section. S. 169 *supra* relates to cases in which no person is sent up for trial. S. 170 *supra* relates to cases in which some person is sent up and this section relates to general direction relating to both. The three sections must be read together. 7 Cr. L.J. 414 at 415 = 1 L.B.R. 137. The final report under this section by the Police after the completion of their investigation is known as the 'charge-sheet.' The other reports dealt with in this chapter are (1) occurrence report under S. 157 *supra*, (2) report under S. 166 for extending remand of accused by transmitting the case diary, if investigation cannot be completed, (3) report under S. 168 *supra* stating the result of the investigation held. The final report under this section is to be made after full investigation and if in the opinion of the investigating officer reasonable grounds exist for initiating proceedings against the person reported against before a Magistrate.

Empowered to take Cognizance of the offence upon a Police report.—These words refer to 199 (1) (b) *infra* which empowers a District Magistrate, Sub-divisional

Sub-section (4).—This sub-section is new; it was held by the Full Bench decision in 20 M. 189, that an accused person is not entitled to have a copy of the charge-sheet before the commencement of the inquiry or trial as the charge-sheet was held to be not a public document within the meaning of S. 70, Indian Evidence Act. This worked as a great hardship to accused persons but this new sub-section specially provided for a copy of the charge-sheet being furnished to the accused on his application before the commencement of the inquiry or trial free of cost at the discretion of the Magistrate.

174. (1) The officer in charge of a police-station, or some other police-officer specially empowered by the Local Government in that behalf, on receiving information that a person—

Police to inquire
and report on sul-
cide, etc.

- (a) has committed suicide, or
- (b) has been killed by another, or by an animal, or by machinery, or by an accident, or
- (c) has died under circumstances raising a reasonable suspicion that some other person has committed an offence,

shall immediately give intimation thereof to the nearest Magistrate empowered to hold inquests, and, unless otherwise directed by any rule prescribed by the Local Government, or by any general or special order of the District or Sub-divisional Magistrate, shall proceed to the place where the body of such deceased person is, and there, in the presence of two or more respectable inhabitants of the neighbourhood, shall make an investigation, and draw up a report of the apparent cause of death, describing such wounds, fractures, bruises and other marks of injury as may be found on the body, and stating in what manner, or by what weapon or instrument (if any) such marks appear to have been inflicted.

(2) The report shall be signed by such police-officer and other persons, or by so many of them as concur therein, and shall be forthwith forwarded to the District Magistrate or the Sub-divisional Magistrate.

(3) When there is any doubt regarding the cause of death, or when for any other reason the police-officer considers it expedient so to do, he shall, subject to such rules as the Local Government may prescribe in this behalf, forward the body, with a view to its being examined, to the nearest Civil Surgeon, or other qualified medical man appointed in this behalf by the Local Government, if the state of the weather and the distance admit of its being so forwarded without risk of such putrefaction on the road as would render such examination useless.

(4) In the Presidencies of Fort St. George and Bombay, investigations under this section may be made by the head of the village who

shall then report the result to the nearest Magistrate authorized to hold inquests.

(5) The following Magistrates are empowered to hold inquests, namely, any District Magistrate, Sub-divisional Magistrate or *Magistrates of the first class*, and any Magistrate especially empowered in this behalf by the Local Government or the District Magistrate.

Amendment.—The addition of the words “or Magistrate of the first class” in sub-section (5) empowers all Magistrates of the first class to hold inquests.

Some other police-officer specially empowered.—Local Governments are empowered to appoint special police-officers to hold inquests. Officers in charge of police-stations often find it difficult to hold inquests in consequence of other pressing work or from local considerations. Hence the necessity to appoint special police-officers for this purpose.

Unless otherwise directed by general or special order of District Magistrate, etc.—This section gives a discretion to the District or Sub-divisional Magistrate who may order the police-officer to dispense with a formal investigation in any particular case or classes of cases chiefly for the purpose of saving time.

In the presence of two or more respectable inhabitants.—These persons are generally called *inquest panchayatdars* and their attendance may be enforced when necessary under S. 175, *infra*; the persons so summoned are bound to attend and answer truly all questions put to them.

Shall make an investigation.—The investigation under this section is made by a police-officer and the statements taken down are therefore statements made to the police in the course of an investigation under S. 162, *supra*. The fact that the investigation is held in the presence of two or more respectable inhabitants does not render the statements taken any-the-less statements made to a police-officer. Such statements are not therefore public documents of which the accused is entitled to a copy and the procedure governing grant of such copies of statements under S. 162 *supra* governs also the grant of copies of inquest statements 50 M. 750 where 22 L.W. 784=27 Cr. L.J. 100=97 Ind. Cas. 532 is referred to, see also 54 C. 370 and 28 Cr. L.J. 14=99 Ind. Cas. 46. The provisions of the Code apply, unless there is anything in any enactment for the time being in force regulating the manner of investigation of offences connected with a Railway accident, to the contrary, 52 B. 238. Proceedings taken under this section should be kept distinct from the proceedings had under S. 202, *supra*, on a complaint made to the Court, 28 Cr. L.J. 26=99 Ind. Cas. 58.

Draw up a report.—An inquest report is generally written up and completed at the spot where the inquest is held in the presence of the *inquest panchayatdars* and invariably handed over to the constable who takes the corpse for *post mortem* examination to be handed over to the Magistrate. It contains the injuries noted on the corpse at the inquest, the statements of blood relations of the deceased and the other witnesses who speak to the cause of death, the names of the persons who are suspected and the apparent cause of death the opinion of the *panchayatdars* etc. The inquest report must be confined to the points specified in this section. There is nothing in the Code to prevent statement of witnesses being recorded in full. A *verbatim* report of such statements may be of great help to the Court in testing the value of the evidence subsequently given in Court, 9 M.L.T. 321=(1911) 1 M.W.N. 138=12 Cr. L.J. 124=9 Ind. Cas. 730. An accused person on a charge of murder is entitled to a copy of the statement made by the witnesses at the inquest inquiry under this section. If the report was not in Court the Magistrate has power under S. 94, *supra* to call upon the police to produce the same and then grant a certified copy to the accused, 20 L.W. 745=26 Cr. L.J. 426 (1)=85 Ind. Cas. 42 (1). But see 50 M. 750 which places inquest reports on the same category as statements made under S. 162, *supra*,

Sub-section (3).—This sub-section enables the police officer in case of doubt as to the cause of death to send the body for *post mortem* to the nearest civil surgeon. It also enables the Local Government to appoint a qualified medical officer not in Government employment for the purpose of holding a *post mortem* in special cases. In India it is very rare to find a dead body free from traces of putrefaction for more than 24 hours after death, 28 Cr. L.J. 185=99 Ind. Cas. 857.

Sub-section (4) permits that the investigation under this section may be made by the heads of villages in the Presidencies of Fort St. George and Bombay. S. 18 of Madras Regulation, XI of 1816 lays down the procedure to be followed by the heads of villages on discovery of dead bodies, and procedure to be followed by them when the nearest police-officer fails to appear to conduct the inquiry after due notice given to him of the discovery of the dead body. If the police-officer arrives in time he must resign the superintendence of the inquiry into his hands. If he does not arrive in time, the head of the village must cause the *Kurnam* to take down in writing, the evidence of the persons who may be examined and record the necessary particulars as to the appearance of the body and frame a report of the procedure which must be signed by the village headman and two or more inhabitants present at the investigation and by the *Kurnam* also. The entire records are to be submitted to the police-officer of the district. The village headman has the powers of a police-officer under S. 175, *infra*, 8 M.L.T. 193=11 Cr. L.J. 500=7 Ind. Cas. 557. See also S. 11 of Bombay Village Police Act VIII of 1867 which authorizes police *Patels* to hold inquests in cases of sudden or unnatural death.

175. (1) A police-officer proceeding under section 174 may, by order in writing, summon two or more persons as aforesaid for the purpose of the said investigation, and any other person who appears to be acquainted with the facts of the case. Every person so summoned shall be bound to attend and to answer truly all questions other than questions the answers to which would have a tendency to expose him to a criminal charge, or to a penalty or forfeiture.

(2) If the facts do not disclose a cognizable offence to which section 170 applies, such persons shall not be required by the police-officer to attend a Magistrate's Court.

The word "truly" has been retained in this section but omitted in S. 161, *supra*. See notes at p. 280. A person not summoned but voluntarily comes forward to give evidence is not bound to answer truly, 23 Cr. L.J. 82=65 Ind. Cas. 434.

Scope of the section—This section is not applicable to the town of Madras where the office of the Coroner was abolished by Act V of 1839. S. 4 of the said Act enacted with certain modifications, Ss. 174, 175 and 176 of the Code. The information under S. 174 is to be given to the *Commissioner of Police* and the investigation is to be made in the presence of five or more respectable inhabitants and the report is to be forwarded to the *Commissioner of Police*. Special rules are made when the deceased person is an European or East Indian to the effect that the Commissioner himself may discharge the functions of an S.H.O., or depute an officer not lower than the rank of an Inspector of Police who is himself a European or East Indian. See *Notification No. 187 Fort. St. George Gaz. 1839, Pt. I, p. 336*. It is repugnant to all principles of criminal law to compel a person to give evidence in the very matter in which he is accused or liable to be accused and then base a charge on such evidence and use such evidence at the trial to prove his guilt. The spirit of the Coroner's Act is that all persons acquainted with the circumstances and cause of death of a person excepting persons directly implicated should be examined on oath by the Coroner.

But if by an inadvertence a person accused of an offence is examined on oath the moment the mistake is found out, it should be struck off the record, 50 B. 56. But statements made voluntarily and after due warning, by persons suspected of the crime and in Police custody are admissible in evidence at the subsequent trial. The Coroner's Act distinctly contemplated that such a person might make a statement and S. 20 provided that the Coroner should be deemed to be a Magistrate for the purposes of S. 26 of the Indian Evidence Act, and when the statement is entirely voluntary it is admissible either as a confession under S. 26 of the Indian Evidence Act or the statement of a party to a proceeding under Ss. 18 and 21 of the same Act, 50 B. 111. See 30 Bom. L.R. 84=29 Cr. L.J. 234=107 Ind. Cas. 272 where 50 B. 56 and 511 are referred to. The finding at a Coroner's inquest is equivalent to a finding of Grand Jury and a defendant may be prosecuted for murder or manslaughter upon such an inquisition, which is the record of the "finding of a jury sworn to inquire concerning the death of the deceased *super visum corporis*. Such an inquisition amounts to an indictment," *Arch. Cr. Pl. Ev. and Pr.* p. 137. An inquisition under the Coroner's Act cannot be quashed by the High Court on the ground that the findings of the jury are opposed to the evidence in the case. The High Court may interfere with an inquisition upon a reference made by the Coroner but upon an application by a party affected by the inquisition and the High Court can also amend the inquisition in cases of technical defects, 51 B. 300. See the Coroner's Act IV of 1871 as amended by Act V of 1889. It is a fatal irregularity for a Coroner to be present with a jury in their retiring room while they are considering their verdict and in such a case the inquisition was quashed, [1928] 1 K.B. 302.

By order in writing.—The words also occur in S. 160, *supra*, empowering a police-officer to enforce attendance of witnesses at the investigation. Issuing a summons or a warrant for enforcing attendance of witnesses is a prerogative of the Court or Magistrate only.

Shall be bound to attend.—S. 174, I.P.C., makes disobedience of the order issued under this section punishable with simple imprisonment for one month or fine of Rs. 500, or both. But refusal to sign at the inquest is not an offence, 8 M.L.T. 198=11 Cr. L.J. 500=7 Ind. Cas. 557.

To answer truly all questions.—S. 179, I.P.C., makes punishable, a refusal to answer questions put by a police-officer under this section with simple imprisonment for 6 months or fine of Rs. 1,000 or both. The word "truly" is retained in this section although it is omitted in S. 161, *supra*, which refers to an investigation under this chapter, *viz.*, Chapter XIV of the Code which includes this section also and there is no special reason for omitting the word in S. 161, *supra*, and retaining it in this section. The Legislature could not have intended to make any distinction between an investigation under this section and one under S. 161, *supra*. The use of the word "under this Chapter" in S. 161, *supra*, negatives any such distinction being present in the mind of the Legislature when retaining the word "truly" in this section. In 2 Cr. L.J. 590, a nice distinction is drawn between S. 161, *supra*, and this section. It is this. S. 161 *supra*, refers to investigations into offences whereas this section applies only to investigation in the nature of inquests, investigations as to the apparent cause of death, and in such cases the witnesses are bound to speak truly. Such an investigation ceases where the cause of death is ascertained, *i.e.*, when it is determined whether death is natural, suicidal, homicidal or accidental. In the case of homicidal death investigation, as to the guilt of the person concerned, becomes an investigation under S. 161, *supra*. The statements of the witnesses examined at the inquest may be recorded in full; *verbatim* reports of such statements will be of great help to the Court in testing the evidence subsequently given, (1911) 1 M.W.N. 139=12 Cr. L.J. 124=9 Ind. Cas. 730.

Sub-section (2).—S. 170, *supra* refers to investigation into a cognizable offence by a police-officer and his report upon completing the investigation to a Magistrate. If the facts did not disclose a cognizable offence the witnesses shall not be required to attend the Magistrate's Court. This sub-section refers only to those witnesses who have been examined at the inquest and not to witnesses who may be examined long after in connection with the investigation into the offence by the police.

176. (1) When any person dies while in the custody of the police, the nearest Magistrate empowered to hold inquests shall, and, in any other case mentioned in section 174, clauses (a), (b) and (c) of sub-section (1), any Magistrate so empowered may hold an inquiry into the cause of death, either instead of, or in addition to, the investigation held by the police-officer, and, if he does so, he shall have all the powers in conducting it which he would have in holding an inquiry into an offence. The Magistrate holding such an inquiry shall record the evidence taken by him in connection therewith in any of the manners hereinafter prescribed according to the circumstances of the case.

(2) Whenever such Magistrate considers it expedient to make an examination of the dead body of any person who has been already interred, in order to discover the cause of his death, the Magistrate may cause the body to be disinterred and examined.

Scope of the section.—This section proceeds upon the basis that inquiry into a suspicious death should not depend upon the opinion the police may form, but that there should be a further check by enabling a local Magistrate to hold an independent inquiry and sub-section (2) empowers him to exhume the body and examine witnesses in connection with the matter, 30 Bom. L.R. 1050 at 1054=29 Cr. L.J. 1063=112 Ind. Cas. 567.

Whenever any person dies while in the custody of the Police.—When a person dies in police custody the inquiry as to cause of death is imperative but in other cases mentioned in S. 175 (1) (a), (b) and (c) it is discretionary with the Magistrate to enquire. The evidence is to be recorded by the Magistrate under Chapter XXV but there is nothing in the section which makes it imperative on the Magistrate to make a report or to come to a definite finding on the evidence recorded by him. See 3 C. 742.

This section is not applicable to the town of Madras. See S. 4 of Act V of 1889 which enacts that inquiry is to be held by the Chief Presidency Magistrate or such Presidency Magistrate as he deposes in this behalf and power to disinter bodies is given to the Commissioner of Police or a Presidency Magistrate. A Magistrate not empowered by law to hold an inquest under this section does so his proceedings are not void, S. 529 (c), *infra*.

Revision.—The language of the section makes it clear that the proceedings under this section are judicial. The Magistrate is empowered to hold an inquiry as to the cause of death either instead of or in addition to the investigation held by the police and if he does so, he is invested with all the powers of conducting it which he would have in holding an inquiry into an offence. This would bring the proceeding within an inquiry as defined in S. 4 (1), *supra*, and a judicial proceeding as defined in S. 4 (1) (m) *supra*, Sub-section (3) of S. 435, *infra*, which expressly excluded the revisional powers of the High Court of proceedings under the section has now been repealed and there is nothing now to debar the High Court from exercising its jurisdiction under Ss. 435 and 439, *infra*, in matters falling under this section. Apart from that S. 561A, *infra*, gives inherent power to the High Court to make such orders as may be necessary to secure the ends of justice and the High Court revised the order of the Collector and District Magistrate who interfered with the judicial inquiry of a Magistrate under this section and virtually stopped it as illegal, 30 Bom. L.R. 1050=29 Cr. L.J. 1063=112 Ind. Cas. 567. The decisions in Ratanlal 843 and 3 C. 742, which negatives the power of revision are no longer law after the amendment of the Code. See 51 B. 300, where the High Court interfered in revision with inquest proceedings.

PART VI.

PROCEEDINGS IN PROSECUTIONS.

CHAPTER XV.

OF THE JURISDICTION OF THE CRIMINAL COURTS IN INQUIRIES AND TRIALS.

A.—Place of Inquiry or Trial.

Venue.—In general the offence must on the face of the indictment appear to have been committed within the jurisdiction of the Court before which the prisoner is tried and if it appears by the evidence that the venue of the offence, i.e., the place where it was committed, is not the same as that mentioned in the indictment the variance unamended would be fatal only two objections are now of much importance with respect to the venue, (1) that on the face of the record it appears that the Court has no jurisdiction (2) that the evidence shows that the Court has no jurisdiction. And even the first of these objections may sometimes be overcome by an exercise of the power of amendment, *Roscoe Cr. Ev. and Pr.*, p. 210.

177. Every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed.

Ordinary place of inquiry and trial.

Scope of the section.—The jurisdiction conferred by the provisions of the Code do not affect any special jurisdiction conferred by any law in force at the time when the Code came into force, 10 B. 181. This section lays down that every offence shall *ordinarily* be inquired into or tried where it was committed. The use of the word "*ordinarily*" indicates that this rule is subject to any special provisions of law which may qualify it, and the rule is relaxed or modified in several succeeding provisions of the Code. This section lays down the general law and which again has been repeated in and made part of the special provisions in S. 181 (2) *infra*, which applies to a case of criminal breach of trust and not S. 179, *supra* 26 Cr. L.J. 725=86 Ind. Cas. 213; 23 Cr. L.J. 490=68 Ind. Cas. 26. The special provision contained in S. 197 (2) of the Code, viz., the power of Government to determine the person by whom and to specify the Court before which the trial of public servants is to be held overrides the general rule contained in this section 8 Cr. L.J. 70=4 L.B.R. 265. The provisions of this section are subject also to the power of the High Court to transfer cases under S. 526 *infra*. The fact that the place where an offence was committed by an Indian British subject was transferred to a native state will not deprive the Sessions Court of the place where the offence was committed of its jurisdiction to try the offence especially when the offender, an Indian British subject resided in British India, 34 A. 451. The High Court has also power to direct that a trial should take place in one or the other district, 25 Cr. L.J. 81=76 Ind. Cas. 17.

Every offence shall ordinarily be tried.—For definition of the word "offence" see S. 4 (1) (c) *supra* and S. 40, I.P.C. The word 'ordinarily' must be taken to mean except in the cases provided hereafter to the contrary, 30 Bom. L.R. 337=29 Cr. L.J. 533; 109 Ind. Cas. 339, following 3 Pat. 417. The use of the word 'ordinarily' indicates that the rule contained in the section is to be read subject to any special provisions of law which may modify it and the rule is relaxed or modified in several of the succeeding sections, of the Code e.g. 197 (2) *Infra* which overrides the general rule contained in this section, 8 Cr. L.J. 70=4 L.B.R. 265. When two offences are committed in the course of the same transaction, they should be tried by a Magistrate having jurisdiction to try both the offences and not by different Magistrates. *Weir II, 144*.

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177. Every offence shall ordinarily be inquired into and tried by a Court within the local limits of whose jurisdiction it was committed.

Scope of the section.—The jurisdiction conferred by the provisions of the Code do not affect any special jurisdiction conferred by any law in force at the time when the Code came into force, 10 B. 181. This section lays down that every offence shall ordinarily be inquired into or tried where it was committed. The use of the word "ordinarily" indicates that this rule is subject to any special provisions of law which may qualify it, and the rule is relaxed or modified in several succeeding provisions of the Code. This section lays down the general law and which again has been repeated in and made part of the special provisions in S. 181 (2) *infra*, which applies to a case of criminal breach of trust and not S. 179, *supra* 26 Cr. L.J. 723=86 Ind. Cas. 213; 23 Cr. L.J. 490=68 Ind. Cas. 26. The special provision contained is S. 197 (2) of the Code, *viz.*, the power of Government to determine the person by whom and to specify the Court before which the trial of public servants is to be held overrides the general rule contained in this section 8 Cr. L.J. 70=4 L.B.R. 265. The provisions of this section are subject also to the power of the High Court to transfer cases under S. 526 *infra*. The fact that the place where an offence was committed by an Indian British subject was transferred to a native state will not deprive the Sessions Court of the place where the offence was committed of its jurisdiction to try the offence especially when the offender, an Indian British subject resided in British India, 34 A. 431. The High Court has also power to direct that a trial should take place in one or the other district, 25 Cr. L.J. 81=76 Ind. Cas. 17.

Every offence shall ordinarily be tried.—For definition of the word "offence" see S. 4 (1) (c) *supra* and S. 40, I.P.C. The word 'ordinarily' must be taken to mean except in the cases provided hereafter to the contrary, 30 Bom. L.R. 387=29 Cr. L.J. 533; 109 Ind. Cas. 359, *following* 3 Pat 417. The use of the word 'ordinarily' indicates that the rule contained in the section is to be read subject to any special provisions of law which may modify it and the rule is relaxed or modified in several of the succeeding sections, of the Code *e.g.* 197 (2) *infra* which overrides the general rule contained in this section, 8 Cr. L.J. 70=4 L.B.R. 265. When two offences are committed in the course of the same transaction, they should be tried by a Magistrate having jurisdiction to try both the offences and not by different Magistrates. *Weir II*, 144.

Within the local limits of whose jurisdiction it was committed.—All crime is local and the jurisdiction over the crime belongs to the country where the crime is committed. The Legislature has no power over any person except its own subjects, that is persons who are natural born subjects or residents or whilst they are within the limits of the kingdom.—*per Lord Halsbury, L.C.* in [1891] A.C. 435 at 458, followed in 29 Cr. L.J. 1089=112 Ind. Cas. 673. Crimes in the nature are local and the jurisdiction of crimes is local, 2 William Blackstone p. 1058. The accused is to be tried according to the law of the place where the crime was committed and not according to his nationality, 1894 A.C. 670. The fundamental principle laid down in this section is to the effect that the competency of a *forum* to take cognizance of an inquiry into, and trial of an offence as defined in S. 4, *supra*, is determined by the place in which the offence is committed, 9 B. 40 at 48. The ordinary rule as to jurisdiction is that it is the area within which the offence is committed and not the place where the offender may be found that determines the Court which has jurisdiction to try the offence, 43 M. 14 at 18. The provisions of the Code are also applicable as *lex fori*, 17 B. 369 at 371. Though the commitment of an accused by a wrong Court may be an irregularity a commitment made to a wrong Court is illegal and liable to be quashed, 36 M. 337. But if the trial is proceeded with and a decision arrived at, the defect is cured, 42 M. 791. See notes under S. 531 *infra*. The accused a recruit induced a person at Cawnpore to go to Fiji to work, but on the way, at Arrah where they stopped the accused induced him to proceed to Sylhet and sent him there with another man in contravention of S. 104 of the Assam Labour and Emigration Act, *held*, that the accused was rightly tried at Arrah and no offence under the Act was committed at Cawnpore, 37 C. 27, but where an accused is charged with kidnapping a girl at Bombay and with having abetted rape on her at Ahmedabad, a commitment to the Bombay High Court on both the charges is illegal as the second offence cannot be tried at Bombay, 30 Bom. L.R. 1253=30 Cr. L.J. 191 (1)=113 Ind. Cas. 617 (1). It is the Court which has territorial jurisdiction at the place where a bigamy was committed that can try the offence under S. 494, I.P.C. The offence of abetment of bigamy can be tried by the Court within whose territorial jurisdiction the abetment takes place, 3 Pat. 417. Similarly a charge of misappropriation under S. 403, I.P.C., can be tried only at the place where the sum was misappropriated by the accused, 25 Cr. L.J. 377=77 Ind. Cas. 425. A Magistrate has no jurisdiction to try an accused for an offence committed outside his jurisdiction, 30 Bom. L.R. 387. 'Jurisdiction' may be defined as the power of a Court to hear and determine a cause, to adjudicate or exercise any judicial power in relation to it, such jurisdiction naturally divides itself into three broad heads with reference to (1) the subject matter, (2) the parties (3) particular question which calls for decision 5 C.L.J. 611.

See S. 531, *infra*, which validates proceedings had in a wrong local area. No finding, sentence or order regularly passed by a Court in the case of an offence committed outside its local area can be set aside, when no failure of justice has taken place, 30 M. 94; 42 M. 791. Ss. 177, 179, 180, 181 and 183 must be read together with S. 531, *infra*. As a rule the plea of want of jurisdiction must be taken before the trial Court, but want of jurisdiction may be taken in the High Court for the first time, 16 W.R. (Cr.) 79; but see 4 B.H.C.R. (Cr. Ca.) 33. An objection, to want of jurisdiction can be taken for the first time in the appellate court and the court cannot decline to consider the objection on the ground that it was never taken in the lower court. 28 Cr. L.J. 452=101 Ind. Cas. 484, objection as to jurisdiction might also be raised at a re-trial ordered although it was not taken originally at the trial or in the court of appeal, 33 C. 22.

Various special Acts make express provision for place of trial of offences created by those Acts, e.g., Act IX of 1890 (Railway), S. 134; Act X of 1889, (Indian Posts), S. 60 (1) Act II of 1899 (Stamp), S. 72; Act XIV of 1895 (Pilgrim Ships); Act XIV of 1887 (Indian Marine), Ss. 44 and 48. See also S. 549, *infra*, as to delivery of military offenders to be tried by Court-martial.

Power to order case to be tried in different sessions divisions.

178. Notwithstanding anything contained in section 177, the Local Government may direct that any cases or class of cases committed for trial in any district may be tried in any sessions division:

Provided that such direction is not repugnant to any direction previously issued by the High Court under section 15 of the Indian High Courts Act, 1861, or section 107 of the Government of India Act, 1915, or under this Code, section 526.

Scope of the section.—Under this section the Local Government is empowered to direct that any case or classes of cases committed for trial in any district, shall be tried in a specified sessions division but it cannot direct that a case should be tried by a particular Court as such a direction is beyond the scope of this section. It was held in 10 C. 543 that the Local Government has no power to transfer for trial to a Court of Commissioner a case duly committed for trial to the Court of the Recorder of Rangoon who exercises all the powers of a Court of Session to the Sessions division of Pegu, S. 267 *infra* lays down that in all criminal cases transferred to a High Court under this Code, or under the Letters Patent of any High Court, established under the Indian High Courts Act, 1861, trial may, if the High Court so directs, be by jury. See S. 537, *infra*, which empowers the Governor-General in Council to transfer criminal cases and appeals from one High Court to another, or from any Criminal Court subordinate to one High Court to any other Criminal Court of equal or superior jurisdiction subordinate to another High Court for the ends of justice or for general convenience of parties.

Proviso.—The proviso to the section was relied on in 28 C. 709 at 717, 718 for transferring proceedings under S. 145, *supra*, as clearly indicating that the High Court has power to make an order of transfer either under S. 526 of the Code or under S. 15 of the Charter Act.

179. When a person is accused of the commission of any offence by reason of anything which has been done, and of any consequence which has ensued, such offence may be inquired into or tried by a Court within the local limits of whose jurisdiction any such thing has been done, or any such consequence has ensued.

Accused triable in district where act is done or where consequence ensues.

Illustrations.

(a) A is wounded within the local limits of the jurisdiction of Court X, and dies within the local limits of the jurisdiction of Court Z. The offence of the culpable homicide of A may be inquired into or tried by X or Z.

(b) A is wounded within the local limits of the jurisdiction of Court X, and is during ten days within the local limits of the jurisdiction of Court Y, and during ten days more within the local limits of the jurisdiction of Court Z, unable in the local limits of the jurisdiction of either Court Y or Court Z to follow his ordinary pursuits. The offence of causing grievous hurt to A may be inquired into or tried by X, Y or Z.

(c) A is put in fear of injury within the local limits of the jurisdiction of Court X, and is thereby induced, within the local limits of the jurisdiction of Court Y, to deliver property to the person who put him in fear. The offence of extortion committed on A may be inquired into or tried either by X or Y.

(d) A is wounded in the Native State of Baroda, and dies of his wound in Poona. The offence of causing A's death may be inquired into and tried in Poona.

Scope of the section.—This section is controlled in respect of certain offences by S. 181, *infra* 25 Cr. L.J. 923. But see 27 Cr. L.J. 992=96 Ind. Cas. 636, where it was held that this section is in no way modified by the provisions of S. 181 (2) *infra*. This section does not apply to questions of jurisdiction of Courts to try the offence of criminal breach of trust, 26 Cr. L.J. 136=83 Ind. Cas. 696; 25 Cr. L.J. 410=77 Ind. Cas. 490; 16 Cr. L.J. 775=31 Ind. Cas. 375; 41 C.L.J. 80=26 Cr. L.J. 725=86 Ind. Cas. 213. This section will not in terms apply to the case of an offence which does not depend on the consequences which has ensued but only on the act which has been done 44 C. 912.

Commission of offence by reason of anything done.—The word "act" will include illegal omission also, see S. 4 (2) *supra*. The act must be one constituting an offence. This section only applies when a person is accused of the commission of any offence by reason of anything which he has done. In a case of falsification of accounts under S. 477A, I.P.O., the offence is complete when accounts are falsified with intent to defraud, and it is not apparent how a person accused of falsification of accounts can be said to be accused by reason of any consequence which has ensued within the meaning of the section, 4 M.L.T. 481; 41 C. 305; 33 A. 29. Where a petition under the Income-tax Act, S. 21 was verified at a place in Tanjore District but presented in Ramnad District and on a complaint for an offence under S. 177, I.P.O., and S. 40 of the said Act, was filed in Ramnad, *held*, as the offence was committed in Tanjore District, the Ramnad Magistrate had no jurisdiction to entertain the complaint 43 M.L.J. 475=16 L.W. 333. A, carrying on business at Gaya gave a cheque to B, which was dishonoured at Calcutta and on further correspondence the crucial letter which disclosed that B was cheated, was received at Buxar by B who filed his complaint of cheating at Buxar; it was held that the Buxar court had jurisdiction to entertain the complaint. 23 Cr. L.J. 81=76 Ind. Cas. 17. The words 'anything which has been done' mean some act constituting the offence. See 6 Agra 136 and 46.

Any consequence which has ensued.—The words "*and of any consequence which has ensued*" in this section embrace only such consequences as modify or complete the act alleged to be an offence, 1909 A.W.N. 115=5 A.L.J. 333=7 Cr. L.J. 394; 1901 P.R. (Cr. J) 7. The word "consequence" means a consequence which forms a part and parcel of the offence and not a consequence which is not such a direct result of the act of the offender as to form no part of that offence, 34 A 487. Upon the wording of the section and the authorities dealing with it there cannot be little doubt that the consequence referred to herein must be one of the facts to be proved to establish the offence. The consequence must form an integral part of the offence and need not, only be a consequence arising from it. The words of the section embrace only such consequences as modify or complete the act alleged to be an offence. The offence of infringing copyright in a book of which the complainant is the author is complete as soon as the book is printed without permission and the loss to the complainant is not an essential ingredient of the offence though loss undoubtedly arises by the commission of the offence, 18 Cr. L.J. 353=38 Ind. Cas. 737. See also 21 Cr. L.J. 139=54 Ind. Cas. 677. The word 'consequence' has however been held to be not restricted to mean consequence which is a necessary ingredient of an offence under S. 409, I. P. O. and ought to have its usual meaning, 29 Cr. L.J. 1033=112 Ind. Cas. 361 *relying on* 46 B. 641 and (1905) 2 K. B. 67 and *distinguishing*, 38 M. 639; 39 M. 576; 34 A. 437; 44 C. 912; 51 B. 101. The words 'any consequence' used in this section must be given a wide grammatical meaning; it is not restricted in its meaning to any consequence which is a necessary ingredient of the offence 30 Cr. L.J. 249=114 Ind. Cas. 99 *following* 46 B. 641. The words "any consequence" mean a consequence which must be one of the facts to be proved to establish the offence and will not include remote consequences arising from the offence having been previously committed and not forming an integral part of the offence, 10 Cr. L.J. 86=2 Ind. Cas. 545. See also 21 Cr. L.J. 149=54 Ind. Cas. 677. Where a remarriage and adultery against the accused took place at B. a trial of the accused held by the Sessions Judge of S. is invalid, where the consequence of the offence of remarriage and adultery ensued at the place S. i.e., the complainant being kept deprived of his wife from the time she went into the keeping of the accused, 24 A.L.J. 155 at 160=27 Cr. L.J. 101=91 Ind. Cas. 533. This section can be applied only to cases in

which the consequence necessary to constitute the offence ensues, in some place other than that in which the accused's act is done, 39 M. 576 at 578, but where a value payable parcel was sent by accused from Madras to Hyderabad and the complainant took delivery of the parcel at Hyderabad after making the payment and found that the parcel contained only saw dust instead of tea, a complaint of cheating at Madras cannot be entertained as the cheating was complete when the amount was paid at Hyderabad post office and subsequent payment by the post office at Madras is no ingredient of the offence so as to give jurisdiction to the Madras Court, 52 M.L.J. 511=1927 M.W.N. 221=28 Cr. L.J. 452 (2)= 101 Ind. Cas. 484 (2) *distinguishing* 39 M. 576. When the act constituting the offence was complete outside British India and no ingredient of the offence had ensued within British India as a consequence of anything done outside British India, the accused could not be tried in British India. In the illustration (d) to this section it will be seen that until A died in Poona of the injuries received at Baroda, the offence was not complete till his death. Causing grievous hurt was complete outside before the complainant came to British India for treatment, 8 Bom. L.R. 513 at 516. Where the accused on false representation induced complainant to part with money at Meerut, and the complainant on discovering the fraud practised on him at Agra charged the accused at Agra for offences under Ss. 420 and 265, I.P.O. *held*, that the Magistrate at Agra had no jurisdiction, as both the offences were committed at Meerut and the section did not apply inasmuch as the discovery of the fraud after delivery of the article was not a consequence which had ensued within the meaning of this section, 13 A.L.J. 1067. But in the next case the accused, a trader in Salem, in the Madras Presidency, deceived a trader in Dhulia in Bombay Presidency by leading him to believe that he was buying clean ground-nut oil when as a matter of fact he was buying a mixture of ground-nut oil with rock oil, and the Dhulia trader was induced by the deceit to pay the price agreed upon on the understanding that it was pure oil, *held*, that the complainant was deceived in Dhulia and the Courts at Dhulia had jurisdiction to hear the case, 17 Bom. L.R. 389. See also 46 B. 641 which *dissented* from 38 M. 639 and *followed* 33 A. 29; 41 C. 305; 44 C 912; 23 Cr. L.J. 743=69 Ind. Cas. 631. This section must be read with the definition of breach of trust in S. 405, I.P.O.; it would appear clear that breach of trust is complete by reason of misappropriation of the money and not because of the consequent loss of money. The gist of the offence is the dishonest misappropriation, conversion or disposal of the property and loss which is a consequence is not an integral part of it. The consequence must be part and parcel of the offence. It does not mean a consequence which is not a direct result of the act of the offender as to form no part of the offence, 21 Cr. L.J. 443=54 Ind. Cas. 677 where 33 A. 487; 38 M. 639 are *followed* and 19 A. 111 is *distinguished*.

The offence of criminal breach of trust is completed by the misappropriation or conversion of the property dishonestly. It is the intention which is essential, and whether wrongful gain or loss actually results is immaterial. It is a consequence but not an essential part of the offence, and a person is not accused of the offence by reason of it. Where the accused who were brothers living in Bombay were charged with criminal breach of trust at Erode in respect of certain Hundi's sent from there for encashment by the complainants, and the Hundi's were cashed in Bombay and the proceeds misappropriated at Bombay, it was *held* that this section did not give the Erode Magistrate jurisdiction to try the case, 38 M. 639; 44 C. 912; 23 Cr. L.J. 743=69 Ind. Cas. 631; 1 Ran. 56. But see 46 B. 641 where it was *held* that "consequence" bears its ordinary grammatical meaning not restricted to a consequence which is the necessary ingredient of the offence. Where the accused who was the Agent of the complainants' firm at Nandyal for sale of oil, sold goods and failed to account for the sale proceeds and absconded, a complaint was preferred to the Presidency Magistrate of criminal misappropriation and breach of trust, *held*, that the Madras Court had no jurisdiction to try the case, the conversion and loss having occurred at Nandyal, the offence of breach of trust is constituted by dishonest conversion and loss which ensues as its consequence, and the loss ensues immediately on the conversion, 39 M. 576. See 52 M.L.J. 511=1927 M.W.N. 221 decided by a single Judge. But in 39 M. 576 their Lordships *dissented* from the view *held* in 38 M. 639 that the existence of the dishonest intention and not the ensuing loss that was the essential element of the offence of breach of trust and that there

was no question of consequence or of the application of this section. See also, on this question, 35 A. 29; 34 A. 487; 32 A. 397; 28 C. 746; 1 Ran. 56. A charge of breach of trust against an agent can be tried by the Court within whose jurisdiction the principal resides and the agent has to render account. It is not necessary to have the accused tried by the Court within whose jurisdiction the property misappropriated was actually received or retained by the agent. Great inconvenience would result to firms which employ agents in up country if they go from place to place and misappropriate property belonging to the firm. In such a case it would be difficult for the firm to establish where any property belonging to the firm was actually received or retained by the agent or where the actual offence was committed unless the words "consequence has ensued" are applied in the wider sense 30 Cr. L.J. 249 = 114 Ind. Cas. 99 following 45 B. 641. It was held in 38 M. 779 that when offence of criminal breach of trust was committed outside British India by a British subject, the entrustment having taken place in British India, and the consequent loss ensues in British India the accused could be tried in British India and no certificate of the Political Agent was necessary under S. 188 *infra*. Where the complainant authorized the accused to withdraw money belonging to him at Rangoon and remit the same to him at Maymyo and the accused after drawing the money failed to do so and was charged with misappropriation it was held that the Rangoon Court had jurisdiction to try him as the money had been received and misappropriated at Rangoon, 21 Cr. L.J. 149 = 54 Ind. Cas. 677. See also 21 Cr. L.J. 519 = 56 Ind. Cas. 775. Falsification of accounts is an offence complete when accounts are falsified, with intent to defraud and the person cannot be said "by reason of any consequence which has ensued" within the meaning of this section. Therefore only that Court within whose jurisdiction the accounts are falsified is competent to try, 4 M.L.T. 431 = 9 Cr. L.J. 92 = 1 Ind. Cas. 796; 18 M.L.T. 23. Where a defamatory letter was posted in Madras addressed to Tinnevely, it was held that the offence could be tried either in Madras or in Tinnevely, 44 M.L.J. 643 = 32 M.L.T. 164.

Illustration.—The illustration to a section cannot justifiably be held to control the wide language of the section, 29 Cr. L.J. 545 = 109 Ind. Cas. 481. The illustrations are not exhaustive and to hold that the consequences prescribed in the section as conferring jurisdiction are *ejusdem generis* with the consequences specified in the illustrations is not warranted by the language of the section, 8 Cr. L.J. 75. Illustrations to section do not strictly form part of the Act, 1 A. 34 at 36; they are not to be construed as limiting the right given by the section, 23 M. 57. They furnish some indication as to intentions of Legislature, 15 B. 491 at 496; 43 C. 388. The weight to be attached to apparent statements of law in illustrations used in the Act has been the subject of consideration in many cases (see *Woodroffe and Ameer Ali's Ind. Ed. Act*, p. 98. 6th Ed.) The general consensus of opinion is that they cannot be taken as laying down substantive law, and they merely go to show the intention of the framers of law, and in that and other respects they may be useful provided they are correct. Substantive law can only be made by express enactment in an Act, 17 Cr. L.J. 49 at 50 (F.B.) = 32 Ind. Cas. 641. In 21 Bom. L.R. 558 (P.C.) it was held that illustrations are to be taken as part of the statute. When the Court is called upon to interpret an enactment which comprises both the substantive provision and an illustration of the same, the Court is not justified in rejecting the illustration as a guide in the interpretation of the substantive provision. Illustrations do not stand on the same footing as marginal notes which may not be notes enacted by the Legislature and they cannot be referred to for the purpose of construing the enactment. On the other hand, illustrations are part and parcel of the enactment, 3 Luck. 244.

180. When an act is an offence by reason of its relation to any other act which is also an offence or which would be an offence if the doer were capable of committing an offence, a charge of the first-mentioned offence may be inquired into or tried by a Court within the local limits of whose jurisdiction either act was done.

Place of trial where act is offence by reason of relation to other offence.

Illustrations.

(a) A charge of abetment may be inquired into or tried either by the Court within the local limits of whose jurisdiction the abetment was committed, or by the Court within the local limits of whose jurisdiction the offence abetted was committed.

(b) A charge of receiving or retaining stolen goods may be inquired into or tried either by the Court within the local limits of whose jurisdiction the goods were stolen, or by any Court within the local limits of whose jurisdiction any of them were at any time dishonestly received or retained.

(c) A charge of wrongfully concealing a person known to have been kidnapped may be inquired into or tried by the Court within the local limits of whose jurisdiction the wrongful concealing, or by the Court within the local limits of whose jurisdiction the kidnapping, took place.

Scope of the section.—This section is subject to the provisions of S. 188, *infra*, 8 M.L.T. 54 = (1910) M.W.N. 143 = 11 Cr. L.J. 376 = 6 Ind. Cas. 308 but see 18 C.W.N. 1178 where a different view is taken. It provides for place of trial where act is an offence by reason of its relation to any other act which is also an offence. This section provides for an alternative jurisdiction in regard to related offences such as abetment in relation to a principal offence or offences like receiving or retaining stolen property in relation to theft or concealing persons in relation to kidnapping etc. The words of the section clearly exclude from its scope cases where the offences constituted by abetment of a contemplated act which if done would have been an offence but which was not in fact done.

Illustration (a).—When a foreign subject resident in foreign territory instigated the commission of an offence which in consequence was committed in British territory, it was held that the instigation not having taken place in any district created by the Code, he could not be tried in British India, 10 B.H.C.R. 358; 1880 P.R. (Cr.) 35; 1878 P.R. (Cr.) 20, but where a foreigner in foreign territory initiates an offence which is completed in British territory, he is liable to be tried by the British Court within whose jurisdiction the offence was completed, 14 Bom. L.R. 147; *Weir I*, 153. When a person instigates another to commit an offence by means of a communication sent through post, the offence of abetment is complete as soon as the contents of the letter become known to the addressee, and such offence may be tried at the place where the communication is received, 16 A. 339.

Illustration (b).—Where the accused was found in possession of stolen property at a place outside British India, the theft having taken place in British India, and he was placed on his trial before the Court in British India where the theft took place, it was held that British Courts had no jurisdiction to try him for an offence under S. 411, I.P.C., committed at a place beyond British territory with regard to stolen properties, 18 C.W.N. 1178, but see 8 M.L.T. 54; where theft took place in a Native State a trial of the accused whether a British subject or otherwise could be had for retaining stolen property in British India, as the definition of stolen property in S. 410 includes property stolen outside British India, 6 C. 307; 10 B. 186; 23 A. 372; 1 B. 50; 26 M.L.J. 235. The decisions in 1 M. 171; 5 B. 333; *Weir II*, 143 are no longer law.

Illustration (c).—Persons who committed an offence under S. 368, I.P.C. (concealing a kidnapped person) in Saharanpur sessions division could be tried in the Moradabad sessions division where the primary offence under S. 366 (kidnapping) was committed, 18 A. 230.

181. (1) The offence of being a thug, of being a thug and committing murder, of dacoity, of dacoity with murder, of having belonged to a gang of dacoits, or of having escaped from custody, may be inquired into or tried by a Court within the local limits of whose jurisdiction the person charged is.

Being a thug or belonging to a gang of dacoits, escape from custody, etc.

(2) The offence of criminal misappropriation or of criminal breach of trust may be inquired into or tried by a Court within the local limits of whose jurisdiction any part of the property which is the subject of the offence was received or retained by the accused person, or the offence was committed.

Criminal misappropriation and criminal breach of trust.

(3) *The offence of theft, or any offence which includes theft or the possession of stolen property*, may be inquired into or tried by a Court within the local limits of whose jurisdiction such *offence was committed or the property stolen* was possessed by the thief or by any person who received or retained the same knowing or having reason to believe it to be stolen.

Theft.

(4) The offence of kidnapping or abduction may be inquired into or tried by a Court within the local limits of whose jurisdiction the person kidnapped or abducted was kidnapped or abducted or was conveyed or concealed or detained.

Kidnapping and abduction.

Amendment.—The amendment in sub-section (3) is of a verbal character eliminating "stealing" and substituting the word "theft."

This section provides for the place of trial of offences of being a thug, belonging to a gang of dacoits, criminal misappropriation, breach of trust, theft and kidnapping and abduction.

Scope of the section.—This section is intended to regulate the jurisdiction of Courts in British India in respect of offences committed in British India and cannot vary or abrogate the ordinary rule that no foreign subject can be tried in British India for an offence committed outside British India, 28 A. 372; 2 Bom. L.R. 337. Ordinarily the provisions of this section should receive effect unqualified by the provisions of S. 179 *supra*.

Sub-section (1).—See S. 310, I.P.C., as to the definition of a thug. Being a thug is punishable under S. 311, I.P.C. Gangs of persons habitually associated for the purpose of decoying and murdering travellers to take their property, etc., are designated as thugs. Escape from custody is punishable under S. 224, I.P.C. A convict escaping from custody should be tried for the offence under S. 224, I.P.C., in the district in which he escaped and a Magistrate of another district has no jurisdiction to try him, 1 B.H.C.R. 138. The word "is" after the word "charged" occurring in this sub-section gives the Magistrate jurisdiction whether the accused has come within his jurisdiction, of his own accord or has been brought there by force, 12 Cr. L.J. 113=9 Ind. Cas. 677 where 25 C. 20; 6 B. 622 are referred to; see also 26 M. 124; 35 B. 223; 29 Cr. L.J. 1089=112 Ind. Cas. 673. A foreigner who is not a servant of the Queen within S. 188 *infra* cannot be tried in British territory for having committed dacoity in a Native State, but he could be convicted for retaining stolen property in British territory under S. 412, I.P.C., 1 B. 50; 6 C. 307; 10 B. 186; 28 A. 372.

Sub-section (2).—For place of trial in cases of criminal breach of trust and misappropriation, see note under S. 179, *supra*. This sub-section does not in any way modify the provisions of S. 179; *supra*. Under this sub-section an offence of criminal misappropriation or breach of trust may be inquired into where the offence was committed but where the breach of trust was committed in the Native State of Bhopal and in consequence money was taken out of the pocket of a British subject in British India, the offence can be said to have been committed in both the places and the accused can be tried in either place. There

is no divergence as there cannot be in such an excellent Code as the Cr. P.C., between Ss. 179 and 181 (2), 27 Cr. L.J. 932=96 Ind. Cas. 656. It is not essential under this sub-section that at the time the property is said to have been received or retained by the accused, he must have a dishonest intention to misappropriate or to commit criminal breach of trust with reference to it. It is enough for the purposes of this sub-section if the property which is the subject of the offence was received or retained by the accused at a particular place to try the case. Even if the property was received quite properly and innocently at one place and was subsequently dealt with at another place dishonestly so as to constitute misappropriation or breach of trust, he would be triable at the place where he received or retained it, 51 B. 101 relying on 38 M. 779 and 46 B. 641. Where goods were entrusted to a carrier at Mysore to be delivered at Mangalore, where on delivery it was found that the contents of certain bags were abstracted and tailings of no value had been substituted, it was held that the Mangalore Magistrate had jurisdiction to inquire into the complaint under S. 407 I.P.C. as *prima facie* the violation of the contract to deliver the goods intact was in Mangalore and it was for the accused to prove that the contract was violated elsewhere than at Mangalore, 55 M.L.J. 499=1928 M.W.N. 791=28 L.W. 843. A Railway receipt for goods entrusted with instructions to take delivery of them at their destination in another district cannot be held to be 'any part of the property which is the subject of the offence' within the meaning of this sub-section. The property which is the subject of the offence when the accused is charged under S. 406, I.P.C. is the money which he recovered by sale of the goods which he took delivery by means of the Railway receipt and therefore the Magistrate at P where the receipt was handed over to the accused had no jurisdiction to try the offence but only the Magistrate at the place where the goods were sold and the sale proceeds misappropriated, 18 Cr. L.J. 633=43 Ind. Cas. 233. Where the accused, employed by the complainant on a monthly salary at Rangoon was entrusted with certain promissory notes and hundies with instructions to collect the amounts from various firms in different places collected and remitted a portion of the amount collected to the complainant at Rangoon but misappropriated the balance collected, he can be prosecuted for breach of trust at Rangoon and the Rangoon Court had jurisdiction to try the offence, 6 Rau. 333. An offence under S. 409, I.P.C. can be tried by a Magistrate within whose jurisdiction the property was received or retained, 4 M.L.T. 481=9 Cr. L.J. 92=1 Ind. Cas. 796; 21 Cr. L.J. 149=54 Ind. Cas. 677; 21 Cr. L.J. 319=56 Ind. Cas. 775. A firm doing business in Calcutta employed an agent in Singapore, and prosecuted him at Calcutta for breach of trust committed at Singapore, but accountable for the moneys at Calcutta. Held, that the Court in Calcutta had jurisdiction to entertain the complaint, 26 C.W.N. 175 where 26 C. 746 and 44 C. 912 are referred to; see also 1 Rau 56. This sub-section only applies as between Courts of different local areas whose jurisdiction has been limited by S. 12, *supra*, and to which the Code applies. A British Magistrate cannot take cognizance of a breach of trust committed in a Native State merely because part of the property is retained within his jurisdiction, 21 M.L.J. 441; 13 Cr. L.J. 530=15 Ind. Cas. 802 but see 38 M. 779. The jurisdiction of a Court to try an offence of criminal misappropriation or breach of trust is governed by this sub-section and not by S. 179, *supra*. The resulting loss, though a normal result in such cases is not an ingredient of those offences and cannot therefore be described as a consequence within S. 179, *supra*, 25 Cr. L.J. 410=77 Ind. Cas. 490. When the accused is under a liability to render accounts at a particular place and fails to do so by reason of having committed criminal breach of trust which is alleged against him, the Court within the local limits of whose jurisdiction that place is situate may inquire into and try the offence under this sub-section and S. 179, *supra*, has no application to the case, 41 C.L.J. 80=29 C.W.N. 432=26 Cr. L.J. 725=86 Ind. Cas. 213, followed in 27 Cr. L.J. 900=95 Ind. Cas. 212=following 29 C.W.N. 432; 41 C.L.J. 80; 26 Cr. L.J. 725=86 Ind. Cas. 213.

Sub-section (3)—A British Magistrate has no jurisdiction to try a person who is the subject of a Native State and not a subject of the Crown for the offence of theft committed in that State, 2 Bom. L.R. 337. See 7 Cr. L.J. 184=12 M.C.O.R. 54, which is a converse case and it was held there that the trial and conviction of an accused in Mysore Territory by a Magistrate for theft of a bullock in British India and arrest in Mysore Territory while

attempting to sell it there was without jurisdiction; the case should have been tried in the Mysore Territory if the British Government had waived their right to demand the surrender of the accused and the District Magistrate was directed to take the necessary steps to ascertain this from the British Government. This sub-section as amended means that the offence of being in possession of stolen property may be inquired into either in the district where it was stolen or where it was found to be dishonestly possessed. This, indeed, is expressly stated in Illustration (b) to S. 160, *supra*. It must be conceded that the language of this sub-section as amended is open to objection. The context requires that the words "such offence" in this section should mean the offence of theft whereas grammatically they should mean any offence of possession. An accused can be tried for retention of a stolen bullock at Algarh when the theft took place at Muttra, 24 A.L.J. 143=27 Cr.L.J. 21=91 Ind. Cas. 53.

Sub-section (4).—This was introduced in the Code of 1893 and was intended to provide for the case of an offender proceeding from one local jurisdiction to another in British territory. The decisions in 18 A. 350; 27 C. 1041; 2 C.W.N. 81 and 1883 A.W.N. 164 are no longer law. A person charged with having committed the offence of kidnapping in a Native State cannot be tried by a Court in British India within the local limits of which the person kidnapped may be conveyed or concealed or detained. The operation of the Code cannot be extended beyond British territory and allow a case to be tried within British dominion for an offence committed in a State beyond British India, 20 C.W.N. 62; 18 C.W.N. 1178=20 Ind. Cas. 599. It is to be noted that the offences of kidnapping and abduction are not continuing offences, and become complete the moment the person is removed from the keeping of the lawful guardian or enticed away. See 5 Pat 536; 33 A. 664; 12 A.L.J. 91; 26 M. 434; 2 C.W.N. 81; 27 C. 1041 (F.B.); 6 Pat. 471.

182. When it is uncertain in which of several local areas an

Place of inquiry or trial where scene of offence is uncertain or not in one district only; or where offence is continuing or consists of several acts

offence was committed, or where an offence is committed partly in one local area and partly in another, or where an offence is a continuing one, and continues to be committed in more local areas than one, or where it consists of several acts done in different local areas, it may be inquired into or tried by a

Court having jurisdiction over any of such local areas.

Scope of the section.—This section in reality intends to provide for the difficulty which would arise where there is a conflict between different areas in order to prevent an accused person getting off entirely, because there may be some doubt as to what particular Magistrate has jurisdiction to try the case. See 45 C. 490. Each portion of the section refers to this conflict, 16 C. 667 at 676. The provisions of this section go to show that the policy of the law is to authorize more Courts than one to try offences in case of uncertainty, 2 C.W.N. 450 at 452, but certainly the balance of convenience should be taken into consideration. This section relates to cases of offences only, that is, acts which are punishable by law and a case under S. 145, *supra*, is not a case relating to an offence, 3 C.W.N. 143 at 150.

Local Area.—The expression "local area" in this section means a local area over which this Code has application. It does not include a local area in foreign country or a portion of the British Empire to which this Code has no application, 16 C. 667. S. 532, *infra*, clearly shows that a sessions division, district or sub-division is within the meaning of the Act, and is intended to be included in the term local area, 23 C. 838; 12 A.L.J. 1022. If a conspiracy is entered into in District A and acts are committed in pursuance of that conspiracy in District B the Magistrate of District A can try offence of conspiracy, but cannot try the accused in the same trial for offences committed outside his district, 28 C.W.N. 975. See 24 Cr. L.J. 309=72 Ind. Cas. 69, as to defamatory letter sent by post.

183. An offence committed whilst the offender is in the course of performing a journey or voyage may be inquired into or tried by a Court through or into the local limits of whose jurisdiction the offender, or the person against whom, or the thing in respect of which, the offence was committed, passed in the course of that journey or voyage.

Offence committed on a journey.

Whilst the offender is in the course of performing a journey or voyage.— This section applies to offences committed while the offender is in the course of performing a journey or voyage, but it is not necessary that the person injured or the subject-matter of the offence should be on a voyage or journey. The words *journey or voyage* referred to herein do not include a voyage on the high seas or in a foreign territory, but are confined in their meaning to a journey or voyage within the territories of British India as down the Ganges or Buckingham Canal 5 M. 23; 24 Cr. L.J. 579=73 Ind. Cas. 323. The section only applies where the offence is alleged to have committed in British India. It will not give jurisdiction to a Court in British India merely because the offence is committed in a voyage or journey unless the place is in British India, 53 M. L.J. 499=1923 M.W.N. 791=30 Cr. L.J. 245=115 Ind. Cas. 238. The words "on a journey or a voyage" must, we think, be read as if the provision had been, whilst a journey or voyage or any part of it is being performed by a ship or carriage without particular reference to the terminus; and so, read together with the language of the rest of the section, the proper construction and effect of the enactment is, that if a person is accused of an offence committed whilst a journey or voyage is going on he may be tried if any of that part of the journey or voyage during which the offence of which the person is accused is alleged to have been committed is within the local limits of the Court's jurisdiction. 1 M.H.C.R. 193 at 196. Where a box containing money was misused during a halt at S. in T district from a boat which was on its way to O. district the question arose whether the charge of theft due to the loss of the box could be tried in T or O district, held the journey was not broken by the halt at S. and that under this section the case could be tried in O district, the place of destination, 25 W.R. (Cr.) 43. Where the complainant and accused travelled in a boat from Bombay to Honawar, and during the journey the accused threw overboard a box of the complainant within 9 miles of Janjira State and reaching Honawar the complainant charged the accused before the Honawar Magistrate of having committed mischief it was held that the Magistrate at Honawar, through whose jurisdiction the accused passed on his journey had jurisdiction to try the offence, Ratanlal 181. The journey spoken of is a continuous journey from one terminus to another regard being had for the purpose of estimating the continuity to all the ordinary incidents affecting journeys of the particular kind which may be under consideration, 13 B.L.R. Appx. 4=21 W.R. (Cr.) 68; 23 W.R. (Cr.) 43. The journey referred to is the journey which the offender is performing and the words "*that journey*" at the end of the section refer to the same journey. Where therefore a Sarang was charged for rashly navigating under S 280, I.P.C., the only Courts which have jurisdiction to try him are the Courts through or into the local limits of whose jurisdiction, he in the course of the journey passed, 1 C.L.J. 334. See also 24 Cr. L.J. 253=74 Ind. Cas. 787 as to the trial of an offence committed on a railway journey in which it was held that it was immaterial at what point the offence was committed in the course of a journey. See 7 Geo. IV, Ch. 6, S. 12 which deals with offences committed during a journey or voyage and the Fugitive Offenders Act 44 and 45 Vict. Ch. 69 (1851).

184. All offences against the provisions of any law for the time being in force relating to Railways, Telegraphs, the Post Office or Arms and Ammunition may be inquired into or tried in a presidency-town, whether the offence is stated to have been committed within such town or not :

Offences against Railway, Telegraph, Post-office and Arms Acts

Provided that the offender and all the witnesses necessary for his prosecution are to be found within such town.

This section applies to the trial of offences against Railways, Telegraph, Post Office and Arms Acts in the presidency-town, irrespective of the place where the offence was committed. See Railways Act IX of 1890, Telegraph Act XIII of 1885 as amended by Act XI of 1888, Post Office Act VI of 1898, Arms and Ammunition Act of 1878.

High Court to decide, in case of doubt district where inquiry or trial takes place.

185. (1) *Whenever a question arises as to which of two or more Courts subordinate to the same High Court ought to inquire into or try any offence, it shall be decided by that High Court.*

(2) Where two or more Courts not subordinate to the same High Court have taken cognizance of the same offence, the High Court within the local limits of whose appellate criminal jurisdiction the proceedings were first commenced may direct the trial of such offender to be held in any Court subordinate to it, and if it so decides all other proceedings against such person in respect of such offence shall be discontinued. If such High Court, upon the matter having been brought to its notice, does not so decide, any other High Court, within the local limits of whose appellate criminal jurisdiction such proceedings are pending may give a like direction, and upon its so doing all other such proceedings shall be discontinued.

Amendment.—This section is redrafted and the conflict of decisions in 40 M. 835 and 44 C. 595 is set at rest. The Madras view is accepted as correct, and it is now made clear that one High Court cannot by implication or otherwise transfer a case to itself from a Court subordinate to another High Court, and *vice versa* or decide which of two High Courts or Courts subordinate thereto should try a case. A High Court could give directions only to a Court subordinate to it.

Whenever a question arises.—This section is not restricted to a case in which there is a doubt as to whether one Court or other has jurisdiction, which is dealt with by S. 182 *supra*. The section will include the case of a choice on the ground of public convenience, 9 Cr. L.J. 581=2 Ind. Cas. 361. See also 17 C.W.N. 761=14 Cr. L.J. 398=20 Ind. Cas. 222; 44 C. 595. The doubt contemplated by this section is only as to the Court by which an offence is to be inquired into or tried and may be founded on a question of law or of fact. The doubt cannot, for example, refer to the competency of a Magistrate to commit the accused for trial to a Court of Session. This section has absolutely nothing to do with transfer, or High Courts' power of transfer, 40 M. 835. This section refers to those cases only where some offence is being inquired into or tried. The term "offence" is defined in S. 4 (1) (c) *supra*. Proceedings under Chapter XII of the Code are not proceedings relating to any offence, and this section has therefore no application, 12 A.L.J. 390=15 Cr. L.J. 520=24 Ind. Cas. 608.

This section does not warrant interference by the High Court merely upon the ground of convenience. The decision of the High Court within the local limits of whose appellate jurisdiction the offender actually is, can only be sought when a doubt arises as to the Court by which an offence should be inquired into or tried, 9 Cr. L.J. 581=2 Ind. Cas. 361; 44 C. 595. When two Courts are equally competent to exercise jurisdiction in a matter there is no doubtful question to decide for the High Court, 41 C. 305 at 308; 21 C.W.N. 320 (F.B.); 25 Cr. L.J. 929=75 Ind. Cas. 253 and 40 M. 835.

186. (1) When a Presidency Magistrate, a District Magistrate, a Sub-divisional Magistrate, or if he is specially empowered in this behalf by the Local Government, a Magistrate of the first class, sees reason to believe that any person within the local limits of his jurisdiction has committed without such limits (whether

Power to issue summons or warrant for offence committed beyond local jurisdiction.

within or without British India) an offence which cannot, under the provisions of sections 177 to 184 (both inclusive), or any other law for the time-being in force, be inquired into or tried within such local limits, but is under some law for the time being in force triable in British India, such Magistrate may inquire into the offence as if it had been committed within such local limits, and compel such person in manner hereinbefore provided to appear before him, and send such person to the Magistrate having jurisdiction to inquire into or try such offence, or, if such offence is bailable, take a bond with or without sureties for his appearance before such Magistrate.

Magistrate's procedure on arrest.

(2) When there are more Magistrates than one having such jurisdiction and the Magistrate acting under this section cannot satisfy himself as to the Magistrate to or before whom such person should be sent or bound to appear, the case shall be reported for the orders of the High Court.

Object of the Section.—The object of the inquiry by the Magistrate contemplated by this section is only to satisfy himself that there are *prima facie* grounds for sending a person believed to have committed the offence to a Magistrate having jurisdiction to inquire or try the same, Ratanlal 849. Such inquiry is to be conducted in accordance with Chapter XVIII of the Code.

Specially empowered in this behalf.—When a Magistrate finds he has no power to act under this section, he can decline to exercise jurisdiction, Ratanlal 849. If a Magistrate not empowered by law to issue process under this section for the apprehension of a person, erroneously in good faith does so, his proceedings shall not be set aside merely on the ground of his being not so empowered, S. 529 (d) *infra*.

May inquire into the offence.—The inquiry contemplated herein is for the purpose of satisfying that there are *prima facie* grounds for believing the person accused of having committed an offence for sending him to a Magistrate having jurisdiction and such inquiry is to be conducted in the manner prescribed by Chapter XVII, *infra*.

Compel such person in manner hereinbefore provided to appear before him—See Chapter VI, *supra* relating to process to compel appearance. It is not necessary for the validity of the process issued that the Magistrate issuing the same should be at the time of issuing it, within his local jurisdiction. 1 B. 340.

Sub section (2).—Where an application is made to the High Court by the complainant under S. 20 of the Letters Patent for a direction that the case against the accused should be investigated by the Presidency Magistrate and committed to the High Court Sessions for trial, it was held that where special provision is made in certain circumstances namely under this section, the procedure must be governed by the special provision and not by the general provision contained in S. 21 of the Letters Patent, which must be

resorted to in cases of an extremely exceptional character. The High Court dismissed the application remarking that it will be for the Magistrate to proceed under this section, Weir II, 146.

187. (1) If the person has been arrested under a warrant issued under section 186 by a Magistrate other than a Presidency Magistrate or District Magistrate, such Magistrate shall send the person arrested to the District or Sub-divisional Magistrate to whom he is subordinate, unless the Magistrate having jurisdiction to inquire into or try such offence issues his warrant for the arrest of such person, in which case the person arrested shall be delivered to the police-officer executing such warrant or shall be sent to the Magistrate by whom such warrant was issued.

Procedure where
warrant issued by Sub-
ordinate Magistrate.

(2) If the offence which the person arrested is alleged or suspected to have committed is one which may be inquired into or tried by any Criminal Court in the same district other than that of the Magistrate acting under section 186, such Magistrate shall send such person to such Court.

188. When a Native Indian subject of Her Majesty commits an offence at any place without and beyond the limits of British India, or

Liability of British
subjects for offences
committed out of
British India

when any British subject commits an offence in the territories of any Native Prince or Chief in India, or

when a servant of the Queen (whether a British subject or not) commits an offence in the territories of any Native Prince or Chief in India,

he may be dealt with in respect of such offence as if it had been committed at any place within British India at which he may be found :

Provided that *notwithstanding anything in any of the preceding sections of this Chapter* no charge as to any such

Political Agents to
certify fitness of in-
quiry into charge.

offence shall be inquired into in British India unless the Political Agent, if there is one, for the territory

in which the offence is alleged to have been committed, certifies that, in his opinion, the charge ought to be inquired into in British India; and, where there is no Political Agent, the sanction of the Local Government shall be required :

Provided, also, that any proceedings taken against any person under this section which would be a bar to subsequent proceedings against such person for the same offence if such offence had been

committed in British India shall be a bar to further proceedings against him under the *Indian Extradition Act, 1903*, in respect of the same offence in any territory beyond the limits of British India.

Amendment.—The opening words of the first proviso "provided that notwithstanding anything in any of the preceding sections of this Chapter" have been added as certain decisions seem to make it doubtful whether this section was subject to the provisions of Ss. 179 to 181. 'For the foreign Jurisdiction and Extradition Act, 1879' the words the Indian Extradition Act, 1903 have been substituted by the Repealing and Amending Act X of 1927.

Scope of the section.—This section has been amended in 1898 so as to conform exactly with the statutes empowering the Indian Legislature. The first paragraph corresponds to the Indian Councils Act, 1869, the second paragraph with the Government of India Act, 1965, and the third paragraph with the Indian Councils Act, 1861. Exactly similar amendments were made in S 4 of the Indian Penal Code by Act IV of 1898. Again the Foreign Jurisdiction and Extradition Act of 1879 has been repealed. Its legislative enactments have been produced in the Indian Extradition Act XV of 1903, while the extra-territorial powers of the Governor-General in Council are now more appropriately declared by the Indian Foreign Jurisdiction Order in Council. The amendment of the proviso to S. 168 seems to have been made with a view to the judgment in 13 B. 147 and in order to avoid a conflict of jurisdiction with the Courts of Foreign Sovereigns and the Courts established by the King by an Order in Council under Ss. 58 and 64 Victoria, Chapter 37, 14 Cr. L.J. 293=19 Ind. Cas. 934. This section does not mention the word 'certificate' at all and there is no direction for the signing of a certificate by any particular person, 7 Lah. 468. No certificate is necessary for offences committed in the High Seas which is not part of the territory of any State. This section refers only to territories of any native Prince or Chief in India, 12 Cr. L.J. 193=10 Ind. Cas. 703.

Commits an offence.—The term offence as used in this section means an offence under the I.P.C. A complaint of offences under Ss. 182, 193 and 211 I.P.C. committed against the Police or in Court of a Native State cannot be entertained in British India as the acts alleged having been committed in or in relation to Courts and authorities outside British India do not constitute offences under the I.P.C. There is no provision in the I.P.C. which constitutes it an offence to lodge a false complaint in a foreign Court or to give false evidence before such courts where the oath is not administered under the provisions of law in British India but under the law of that State; no offence under S. 182, I.P.C. is committed as it was not given to a public servant as defined in the I.P.C., S. 211, I.P.C. contemplates criminal proceedings and false charges instituted and made according to the provisions of the criminal law in force in British India, 47 B. 907 at 912.

Native Indian subject.—The expression means 'native subject *de jure* and not *de facto* and occasional residence in British territory cannot be taken to render a person who is not *de jure* a subject, for the purpose of criminal jurisdiction being exercised over him for an act committed by him in foreign territory which if committed within British territory would have been an offence cognizable by Municipal Courts, 1835 P.R. (Cr. J.) 1. The mere fact of non residence will not divest a person of his nationality, 2 A. 218 (P.B.); 6 B. 622.

Any British subject.—The expression is by no means synonymous with the expression "European British subject" as defined in S 4 (1) (i) *supra*. Its ordinary meaning is that of a person who owes allegiance to the British Crown as opposed to a foreigner. In the Code the expression "British subject" is used evidently in a limited sense in antithesis to a "Native Indian subject."

Where a servant of the queen, etc.—This clause was introduced for the first time in the 1898 Code to meet the decision in 16 B. 178 which held that a native accused who was not an *Indian subject* even though he was a servant of the Queen was not within the section as it stood before the amendment. Corresponding change was made in S. 4, I.P.O. also.

At any place at which he may be found.—The words "in any place" include high seas within its ambit, 41 B. 667. The words "at which he may be found" must be taken to mean not where the person was discovered but where he is actually present, 6 B. 622; 13 B. 147; 2 A. 218; 12 Cr.L.J. 113-9 Ind. Cas. 677. "Where a man is in the country and is charged before a Magistrate with an offence under the Penal Code it will not avail him to say that he was brought there illegally from a foreign country. This appears very clearly from Lord Chief Justice Cockburn's charge to the Grand Jury in *The Queen v. Nelson and Brand*. The principle upon which the English cases are based underlies also S. 188 of the Code," 33 B. 225. See also 17 B. 369; 31 C. 537; 1906 (P.R. Cr.J.) 17. The Court which tries an accused has nothing to do with the mode by which he has been brought before the Court, 26 M. 124.

First proviso.—The opening words "notwithstanding anything in any of the preceding section of the Chapter" have been added as certain decisions, especially in 38 M. 779, seem to make it doubtful whether this section is subject to the provisions of S. 179 to S. 188 *supra*, and, to clear this up, the words were added. This proviso is universal in its application and is not restricted to Native States in India and was intended to avoid a conflict of jurisdiction with the Courts of Foreign Sovereigns and the other Courts established by the King by an Order in Council under Ss. 53 and 54 *Victoria, Chapter 37*, 14 Cr. L.J. 298=19 Ind. Cas. 954.

No charge shall be inquired into unless political agent certifies.—For meaning of the term "Political Agent" see S. 3 (40), General Clauses Act X of 1897. The obtaining of a certificate is a preliminary requisite to the holding of the inquiry. The want of a certificate is an absolute bar to the trial, of the accused for an alleged offence committed outside British India, 41 A. 452, following 19 A. 109; 42 A. 89. The defect cannot be cured by S. 537 *infra*, 24 A. 256; 19 A. 109; 13 M. 423; 24 B. 247; see 5 Lah. 416, and the defect cannot be cured by producing a certificate subsequently but it was held in 12 Bom. L.R. 667 that there is nothing in the language of the proviso making illegal the obtaining of the certificate after the complaint has been filed and before the inquiry has begun; see 8 Bom. L.R. 507 where it was held that a commitment made was good where the certificate was obtained after examining some of the prosecution witnesses. See also 7 Lah. 468 where 24 A. 256 is distinguished. When certificate has once been granted at the request of the accused who wanted to be tried in British India it cannot be subsequently cancelled by the Political Agent on the ground that the Chief wanted the case to be tried in his own Court, 14 Bom. L.R. 377=13 Cr. L.J. 537=15 Ind. Cas. 809. The certificate granted under this section in respect of a certain set of facts will cover every charge which the facts disclosed in the proceedings will suffice to sustain. The certificate is granted on the allegation of certain facts which constitute the charge against the accused and the Magistrate is not restricted to the section which is mentioned in the certificate but at the utmost to the facts, 33 A. 514 at 516. A commitment of the accused on a charge not specified in the certificate of the Political Agent granted for the trial of the accused in British India of the offence charged is good and valid, 8 M.L.T. 203=11 Cr. L.J. 531=7 Ind. Cas. 802.

Sanction of the Local Government.—Where there is no Political Agent the sanction of the Local Government must be obtained before proceedings are taken against the accused. Where the accused, a native Indian subject of the King, was charged with an offence of criminal breach of trust committed at *Las Palmas* in Spain and objection was taken that he could not be tried in British India without the sanction of the Local Government, S. 537 *infra* could not be applied at an intermediate stage of the case so as to allow

committed in British India shall be a bar to further proceedings against him under the *Indian Extradition Act, 1903*, in respect of the same offence in any territory beyond the limits of British India.

Amendment.—The opening words of the first proviso "provided that notwithstanding anything in any of the preceding sections of this Chapter" have been added as certain decisions seem to make it doubtful whether this section was subject to the provisions of Ss. 179 to 181. 'For the foreign Jurisdiction and Extradition Act, 1879' the words the Indian Extradition Act, 1903 have been substituted by the Repealing and Amending Act X of 1927.

Scope of the section.—This section has been amended in 1898 so as to conform exactly with the statutes empowering the Indian Legislature. The first paragraph corresponds to the Indian Councils Act, 1869, the second paragraph with the Government of India Act, 1865, and the third paragraph with the Indian Councils Act, 1861. Exactly similar amendments were made in S. 4 of the Indian Penal Code by Act IV of 1898. Again the Foreign Jurisdiction and Extradition Act of 1879 has been repealed. Its legislative enactments have been produced in the Indian Extradition Act XV of 1903, while the extra-territorial powers of the Governor-General in Council are now more appropriately declared by the Indian Foreign Jurisdiction Order in Council. The amendment of the proviso to S. 188 seems to have been made with a view to the judgment in 13 B 157 and in order to avoid a conflict of jurisdiction with the Courts of Foreign Sovereigns and the Courts established by the King by an Order in Council under Ss. 53 and 54 Victoria, Chapter 87, 14 Cr. L.J. 298=19 Ind. Cas. 934. This section does not mention the word 'certificate' at all and there is no direction for the signing of a certificate by any particular person, 7 Lah. 368. No certificate is necessary for offences committed in the High Seas which is not part of the territory of any State. This section refers only to territories of any native Prince or Chief in India, 12 Cr. L.J. 198=10 Ind. Cas. 705.

Commits an offence—The term offence as used in this section means an offence under the I.P.C. A complaint of offences under Ss. 182, 193 and 211 I.P.C. committed against the Police or in Court of a Native State cannot be entertained in British India as the acts alleged having been committed in or in relation to Courts and authorities outside British India do not constitute offences under the I.P.C. There is no provision in the I.P.C. which constitutes it an offence to lodge a false complaint in a foreign Court or to give false evidence before such courts where the oath is not administered under the provisions of law in British India but under the law of that State; no offence under S. 182, I.P.C. is committed as it was not given to a public servant as defined in the I.P.C., S. 211, I.P.C. contemplates criminal proceedings and false charges instituted and made according to the provisions of the criminal law in force in British India, 47 B. 907 at 912.

Native Indian subject.—The expression means 'native subject *de jure* and not *de facto* and occasional residence in British territory cannot be taken to render a person who is not *de jure* a subject, for the purpose of criminal jurisdiction being exercised over him for an act committed by him in foreign territory which if committed within British territory would have been an offence cognizable by Municipal Courts, 1855 P.R. (Cr. J.) 1. The mere fact of non-residence will not divest a person of his nationality, 2 A. 218 (F.B.); 6 B. 622.

Any British subject—The expression is by no means synonymous with the expression "European British subject" as defined in S. 4 (1) (i) *supra*. Its ordinary meaning is that of a person who owes allegiance to the British Crown as opposed to a foreigner. In the Code the expression "British subject" is used evidently in a limited sense in antithesis to a "Native Indian subject."

† Substituted by Act X of 1927 (Rep. & Amend. Act.)

only of a cognizable case but also in a non-cognizable one at any rate where the police-officer had no authority to investigate it under S. 155 *supra*. The wording of this section is quite general and would include even a non-cognizable offence being taken cognizance of by a Magistrate even upon a police report 51 B. 403; See also 49 M 525 (F.B.); 9 Lah. 280. See also 51 A. 332. This section deals with the ordinary ways in which a Magistrate may "take cognizance" of an offence. This section only says "may take cognizance" and it was held by the Allahabad High Court in 1893 A.W.N. 201. that when the matter comes to his notice under sub-section (1) (c) of this section by a communication received through post a Magistrate is not bound to act judicially. The use of the term "may take cognizance of any offence" does not make it optional with a Magistrate to hear the complainant. It refers to the action of the Magistrate in taking cognizance of an offence in either of three specified courses in which the facts constituting an offence may be brought to his notice. It is not competent for him to refuse to take cognizance of an offence on receipt of a complaint of facts constituting an offence but he is rather bound to examine the complainant, 13 C. 334. When a case comes by transfer from one Magistrate to another no question of taking cognizance ever arises as the case must have been taken cognizance of by a Magistrate before it could be transferred to the file of another Magistrate. The object of the Code is that before proceedings are started against an accused, such as would bring him to a Court of Justice, a Magistrate must have before him knowledge independent of his own knowledge based either upon a complaint or upon a police report, 11 A.L.J. 331. The provisions of this section do not apply to proceedings taken under S. 110 *supra* by a Magistrate when he receives information from any person other than a police officer, 27 Cr. L.J. 1280—98 Ind. Cas. 128; 27 A. 172.

Except hereinafter provided.—See Ss. 195, 198, 476, 480, 485, 561 etc. An offence under S. 211, I.P.C. is a non-cognizable one and the police are not empowered to investigate into it of their own accord and to prefer a charge in respect of it. 26 Cr. L.J. 1550—90 Ind. Cas. 398. If a Court can take cognizance of an offence only with the previous sanction of the Local Government, then till such sanction is received, no Court can take cognizance under this section, 51 A. 377.

Magistrate specially empowered in this behalf.—See S. 201, *infra* for procedure where the Magistrate to whom a complaint is made is not competent to take cognizance of the case. In such cases the Magistrate shall return the complaint for presentation to the proper Court with an endorsement to that effect. Sch. IV shows that provincial Magistrates are to be empowered to take cognizance of offence under the three clauses of sub-section (1) of this section and S. 529 (c) *infra* says that if any Magistrate not empowered to take cognizance of an offence under sub-section (1), clause (a) or (b) erroneously in good faith does anything, his proceedings shall not be set aside merely on the ground of his being not so empowered. S. 530 (k) *infra* says that if any Magistrate not empowered by law takes cognizance under S. 190, sub-section (1), clause (c) of an offence, his proceedings shall be void.

May take cognizance of any offence.—The word "may" is used purposely. A Magistrate is not bound to act judicially whenever any information is given to him. See also S. 200 *infra* which enacts that if cognizance is taken he shall at once examine the complainant on oath. The terms of the section show that the Magistrate has to take cognizance before he examines the complainant under S. 200 *infra*, 19 L.W. 461. Taking cognizance is not a judicial act, 30 C.W.N. 276. The expression any offence occurring in this section includes cognizable as well as non-cognizable offences and even a non-cognizable offence can be taken cognizance of by a Magistrate on the report of a police officer, 49 M. 525 (F.B.) followed in 28 Cr. L.J. 821—104 Ind. Cas. 437; 51 B. 498; 9 Lah 280; 51 A. 332. The use of these words does not make it optional with a Magistrate to hear the complainant. They refer to the action of the Magistrate in taking cognizance of an offence in either of the three specified courses in which the facts constituting an offence may be brought to his notice, 13 C. 334 at 336. A Magistrate cannot decline to take cognizance of an offence when a complaint is presented to him if he is competent to take cognizance 12 B. 161. There is no provision in the Code preventing a Magistrate from taking cognizance of an offence because another Magistrate

the error to remain uncorrected, 13 Cr. L.J. 298=19 Ind. Cas. 935. It is to be noted that the certificate required under this section is not mentioned in S. 537, *infra* and that section cannot apply to a case under this section and want of such certificate renders the trial void.

For the territory in which the offence is committed.—The words "territory" used in the first proviso to this section refer only to territories of any Native Prince or Chief in India, and they cannot include the high seas since they are no part of the territories of any State, 12 Cr. L.J. 198=10 Ind. Cas. 705.

189. Whenever any such offence as is referred to in section 188

Power to direct
copies of depositions
and exhibits to be
received in evidence.

is being inquired into or tried, the Local Government may, if it thinks fit, direct that copies of depositions made or exhibits produced before the Political Agent or a Judicial Officer in or for the territory in which such offence is alleged to have been committed shall be received as evidence by the Court holding such inquiry or trial in any case in which such Court might issue a commission for taking evidence as to the matters to which such depositions or exhibits relate.

Court might issue a commission for taking evidence.—See Ss. 503 to 508 *infra* as to issue of commissions for examination of witnesses.

B.—Conditions requisite for Initiation of Proceedings.

190. (1) Except as hereinafter provided, any Presidency Magis-

Cognizance of offen-
ces by Magistrate.

trate, District Magistrate or Sub-Divisional Magistrate and any other Magistrate specially empowered in this behalf, may take cognizance of any offence—

- (a) upon receiving a complaint of facts which constitute such offence;
- (b) upon a report in writing of such facts made by any police officer;
- (c) upon information received from any person other than a police-officer, or upon his own knowledge or suspicion, that such offence has been committed.

(2) The Local Government, or the District Magistrate subject to the general or special orders of the local Government, may empower any Magistrate to take cognizance under sub-section (1), clause (a) or clause (b), of offences for which he may try or commit for trial.

(3) The Local Government may empower any Magistrate of the first or second class to take cognizance under sub-section (1), clause (c) of offences for which he may try or commit for trial.

Scope of the section.—The amendment of 1923 does not show very clearly that in fact there was an intention to make sub-section (1) (b) of this section cover a report not

only of a cognizable case but also in a non-cognizable one at any rate where the police-officer had no authority to investigate it under S. 155 *supra*. The wording of this section is quite general and would include even a non-cognizable offence being taken cognizance of by a Magistrate even upon a police report 51 B. 403; See also 49 M 525 (F.B.); 9 Lah. 280. See also 51 A. 332. This section deals with the ordinary ways in which a Magistrate may "take cognizance" of an offence. This section only says "may take cognizance" and it was held by the Allahabad High Court in 1899 A.W.N. 201. that when the matter comes to his notice under sub-section (1) (c) of this section by a communication received through post a Magistrate is not bound to act *judicially*. The use of the term "may take cognizance of any offence" does not make it optional with a Magistrate to hear the complainant. It refers to the action of the Magistrate in taking cognizance of an offence in either of three specified courses in which the facts constituting an offence may be brought to his notice. It is not competent for him to refuse to take cognizance of an offence on receipt of a complaint of facts constituting an offence but he is rather bound to examine the complainant, 13 C. 334. When a case comes by transfer from one Magistrate to another no question of taking cognizance ever arises as the case must have been taken cognizance of by a Magistrate before it could be transferred to the file of another Magistrate. The object of the Code is that before proceedings are started against an accused, such as would bring him to a Court of Justice, a Magistrate must have before him knowledge independent of his own knowledge based either upon a complaint or upon a police report, 11 A.L.J. 331. The provisions of this section do not apply to proceedings taken under S. 110 *supra* by a Magistrate when he receives information from any person other than a police-officer, 27 Cr. L.J. 1280—93 Ind. Cas. 128; 27 A. 172.

Except hereinafter provided.—See Ss. 195, 198, 476, 480, 485, 561 etc. An offence under S. 211, I.P.C. is a non-cognizable one and the police are not empowered to investigate into it of their own accord and to prefer a charge in respect of it. 26 Cr. L.J. 1530—90 Ind. Cas. 398. If a Court can take cognizance of an offence only with the previous sanction of the Local Government, then till such sanction is received, no Court can take cognizance under this section, 51 A. 377.

Magistrate specially empowered in this behalf.—See S. 201, *infra* for procedure where the Magistrate to whom a complaint is made is not competent to take cognizance of the case. In such cases the Magistrate shall return the complaint for presentation to the proper Court with an endorsement to that effect. Sch. IV shows that provincial Magistrates are to be empowered to take cognizance of offence under the three clauses of sub-section (1) of this section and S. 579 (c) *infra* says that if any Magistrate not empowered to take cognizance of an offence under sub-section (1), clause (a) or (b) erroneously in good faith does anything, his proceedings shall not be set aside merely on the ground of his being not so empowered. S. 530 (k) *infra* says that if any Magistrate not empowered by law takes cognizance under S. 190, sub-section (1), clause (c) of an offence, his proceedings shall be void.

May take cognizance of any offence.—The word "may" is used purposely. A Magistrate is not bound to act judicially whenever any information is given to him. See also S. 200 *infra* which enacts that if cognizance is taken he shall at once examine the complainant on oath. The terms of the section show that the Magistrate has to take cognizance before he examines the complainant under S. 200 *infra*, 19 L.W. 461. Taking cognizance is not a judicial act, 30 C.W.N. 276. The expression any offence occurring in this section includes cognizable as well as non-cognizable offences and even a non-cognizable offence can be taken cognizance of by a Magistrate on the report of a police officer, 49 M. 525 (F.B.) followed in 23 Cr. L.J. 821—104 Ind. Cas. 437; 51 B. 498; 9 Lah 280; 51 A. 332. The use of these words does not make it optional with a Magistrate to hear the complainant. They refer to the action of the Magistrate in taking cognizance of an offence in either of the three specified courses in which the facts constituting an offence may be brought to his notice, 13 C. 334 at 336. A Magistrate cannot decline to take cognizance of an offence when a complaint is presented to him if he is competent to take cognizance 12 B. 161. There is no provision in the Code preventing a Magistrate from taking cognizance of an offence because another Magistrate

had previously taken cognizance. This only prevents a person being tried twice for the same offence. But there is no provision that if cognizance is taken by two different Magistrates at different times, the trial can be before one of them only. Multiplicity of trials can always be prevented by acting under the sections of the Code providing for transfer of cases, 50 C. 482 at 436. Where a Magistrate refused to take cognizance on the ground that the accused had been improperly arrested and brought before him. It was held that he was bound to take cognizance of the offence as the question of the legality of the arrest did not affect the question whether the accused were guilty or not of the offences charged, 26 M. 124; 35 B. 223; 29 Cr. L.J. 1089=112 Ind. Cas. 673. For a Magistrate to take cognizance of an offence, the complaint made to him must contain distinct allegations of any specific offence, Weir I, 720, II, 149. The expression "*to take cognizance*" has not been defined in the Code and it is difficult to ascertain at what precise stage of a case cognizance is said to be taken, 17 C.W.N. 793; 41 M. 213; 19 B. 51. The word 'cognizance' latin '*cognitio*' means knowing or acknowledging. The words 'taking cognizance' mean taking legal notice of a matter. The expression occurs constantly in the Code. See for example Ss. 191, 193, 194, 195, 196, 196A, 197, 193 and 199 *infra*. Power to "take cognizance" is distinct "from to inquire or to try" S 201, *infra* lays down that a Magistrate who has power to "take cognizance" may issue process for the appearance of the accused but if he has no jurisdiction to "inquire or try" he must order the appearance of the accused before a Magistrate having jurisdiction to inquire or try, and S. 201 *infra* deals with the case where the Magistrates are not empowered to take cognizance at all. Again cases are conceivable where a Magistrate who is not ordinarily taking cognizance of an offence, say a third-class Magistrate, gets jurisdiction to inquire or try of a case duly transferred to him. "Taking cognizance does not involve any formal action or indeed action of any kind but occurs as soon as a Magistrate, as such, applies his mind to the suspected commission of an offence," 37 C. 412 at 416. See also 39 C. 119, 41 M. 213; 19 B. 51; 27 C. 798 and 4 C.W.N. 825. Once a Magistrate takes cognizance of an offence upon complaint it is competent for him to take cognizance of any offence that is disclosed by the evidence before him, 27 Cr. L.J. 663=94 Ind. Cas. 717. The expression is not equivalent to cognizance of any offender, for the definition of complaint under S 4 (1) (A), *supra*, includes a complaint that some person unknown has committed an offence, 13 Cr. L.J. 389=23 Ind. Cas. 737; 12 Cr. L.J. 399=11 Ind. Cas. 583; 21 C.W.N. 930=18 Cr. L.J. 901=32 Ind. Cas. 133.

Sub-section (1) (a): Complaint.—The term "complaint" has been defined in S. 4 (1) (A), *supra*. The definition expressly excludes the report of a police-officer which is dealt with in cl. (b) of this sub-section; complaint is distinct from information which is dealt with in cl. (c) of this sub-section. The requisites of a valid complaint are—(1) the facts alleged should *prima facie* constitute an offence; (2) the facts should be brought to the notice of a Magistrate with a view of taking action, 15 C 707; 6 C.W.N. 925; 15 Cr. L.J. 368=23 Ind. Cas. 737; 43 M. 523 (F.B.) where 22 L.W. 209=(1923) M.W.N. 317 is overruled and 46 C. 807; 11 A.L.J. 331; 8 M.L.T. 239 and 236; 26 B. 115 are referred to. See also 51 B. 498. An order by a District Judge to a Subordinate Magistrate to try an accused could not be held to be a complaint, 23 Cr. L.J. 737=53 Ind. Cas. 431. The mere fact that the Magistrate who happened to be in the village before receiving a written complaint of facts heard orally the story given by the complainant and even visited the scene of occurrence does not bring the case under sub-section (1) (c) but under this clause, 27 Cr. L.J. 1405=93 Ind. Cas. 718. If a Magistrate takes cognizance upon his own information the accused can claim a transfer or commitment under the next section. Where a police-officer files a complaint in a non-cognizable case regarding an offence which it is not his duty to report, such complaint comes within S. 4 (1) (A), *supra*, and is not a police-report, 32 M. 3; 26 B. 150 (F.B.). The complaint must disclose facts constituting the offence. There is no authority for the proposition that a complainant himself should be witness of the facts. Every member of the public has a right to set the law in motion by a complaint, 13 B. 600; 13 Cr. L.J. 369=23 Ind. Cas. 737; 15 Cr. L.J. 636=23 Ind. Cas. 848; 18 A. 455; 10 Cr. L.J. 18=2 Ind. Cas. 433; 11 C.W.N. 170; 21 Cr. L.J. 318=51 Ind. Cas. 692. If the complaint did not contain any allegation of any specific offence as defined in S. 4 (1) (c) *supra* having been

committed, a Magistrate has no jurisdiction to take cognizance and proceed with the case, Weir I, 720, II, 149. When a complaint presented is not a complaint of facts as contemplated by this sub-section and no objection having been taken at the earliest stage and no prejudice being shown to the appellant, it was held that the appellant could not have the benefit of the objection taken for the first time in appeal, 16 C.W.N. 1103. A complaint is not defective because it did not set out speeches or alleged seditious words which form the subject-matter of the subsequent charge and even if such omission is a defect, it is an irregularity which will be cured by S. 537 (a) *infra* unless it has occasioned a failure of justice, 32 M. 3 where 22 B. 112 at 150 is *distinguished*. Where in the course of a trial of S. for the theft of a pony the evidence disclosed that A who was present in custody in Court on another charge, was also involved in the theft the Magistrate was justified in putting A in the dock along with S. and proceeding with the trial against both after re-examining the witnesses. The Magistrate in such a case takes cognizance under this clause and not under cl. (c), 11 Cr. L.J. 439=7 Ind. Cas. 461, see also 14 Cr. L.J. 290=19 Ind. Cas. 636. Where a person is charged with several offences some of which are not triable by any Magistrate for want of a complaint of Court or one by a public servant, there is no objection to the Magistrate proceeding with the trial of such offences as may be separately charged and in respect of which no complaint of Court was necessary even though he may not be competent to try all the offences if a complaint had been made in respect of other offences, 17 M.L.J. 559=7 Cr. L.J. 6 But see the observations in 1929 M.W.N. 196=23 L.W. 687=30 Cr. L.J. 322=114 Ind. Cas. 360, to the contrary. This decision has been doubted on more than one occasion.

Clause (b) : Police report.—The provisions of this section extend to any offence and notwithstanding the use of the word "police report" in S. 173, *supra*, this section cannot be restricted merely to non-cognizable offences and a Magistrate is empowered by this section to take cognizance both in cognizable and non-cognizable offences upon a report such as is contemplated in this section, 28 C.W.N. 437=26 Cr. L.J. 68=83 Ind. Cas. 628. See also 49 M. 525 (F.B.) under this section, as amended, a Magistrate can take cognizance of an offence upon a report made by any police-officer, but the report must state facts which constitute the offence. A mere assertion that an offence has been committed is not sufficient, 51 C 402; 26 Cr. L.J. 441=85 Ind. Cas. 57. The term "*police report*" in this clause is not limited to a report mentioned in S. 170, *supra*, and the preceding section of the Code, *viz*, Ss. 155, 157, 169, 11 A.L.J. 331=14 Cr. L.J. 218=19 Ind. Cas. 314. The report of an excise Inspector is a report for the purposes of this section, 54 C. 371. In order that a police-report may be acted upon it must set forth the nature of the information against an accused person, 37 C. 49. The Madras Abkari Act is not a self-contained Act in the matter of procedure in the investigation of offences under S. 55. In such a case the procedure laid down in this Code in S. 5 (2), *supra*, is to be followed, the offence having been committed in the accused's shop would fall under S. 31 and not under S. 84 of the Abkari Act, and the police would have authority to send the accused direct before a Magistrate. It is therefore a case in which the section will apply and the Magistrate has jurisdiction to dispose of the case, 43 M.L.J. 605; 22 L.W. 98=25 Cr. L.J. 1556=90 Ind. Cas. 436. Report of a Sanitary Inspector of Municipality is not a police-report, 18 Cr. L.J. 641=40 Ind. Cas. 289. It includes any information given by a police-officer to a Magistrate, oral information sent by police officer through a private messenger amounts to a police-report within the meaning of this section, 29 C 417, but a report by a police-officer, in a non-cognizable case was held to be a complaint within S. 4 (1) (h) *supra* falling under cl. (a) and not a police-report within this clause, 26 B. 150 (F.B.); 46 C. 807; 32 M. 3. Police-report in this section includes report made by the police in non-cognizable offences. The section speaks of "any offence" so, to limit the application of the section to one particular class of offences is not warranted by the language used. This section authorises certain Magistrates to take cognizance of any offence upon a report in writing of facts which constitute such offence, made by any police-officer and S. 200 (a) *infra* provides that where a public servant acting or purporting to act in the discharge of his official duties makes a complaint of any offence nothing shall require the Magistrate to examine him before taking cognizance of the offences, 49 M. 525 (F.B.) where (1925) M.W.N. 317=22 L.W. 209; (1925) M.W.N. 317=26 Cr. L.J. 1550=90 Ind. Cas. 398, is overruled and 46 C. 807, 11 A.L.J. 331;

6 M.L.T. 259 and 26 B. 150 followed, see also 51 B. 493; 28 Cr.L.J. 821=104 Ind. Cas. 437; 29 Cr.L.J. 65=106 Ind. Cas. 577 See also 29 Cr. L.J. 938=111 Ind. Cas. 858 where the Full Bench decision in 49 M. 525 is followed. The Magistrates mentioned in this section are entitled to take cognizance of non-cognizable offences upon a report made in writing by a police-officer on oath under S. 200 *supra*, 9 Lah. 280 following 49 M. 525 (F.B.) and 6 Lah. L.J. 608 and 26 B. 150 (F.B.) When an appellate Magistrate reverses the finding and sentence under appeal and makes up his mind to try the offender himself, the offence being ordinarily triable by him, he takes cognizance of the offence under this clause as he has before him the police charge-sheet stating all the facts, and not under cl. (c), 30 M. 228. A case is not legally instituted upon a police-report if the report under S. 173, *supra*, did not set forth the nature of the information and where the first information under S. 154, *supra*, was also defective, 37 C. 49. A District Magistrate once having taken cognizance cannot refer the complaint to the police under S. 202, *supra*, with necessary instructions to submit a charge-sheet if necessary, to the Magistrate concerned on the police charge-sheet and the latter Magistrate cannot take cognizance on the police charge-sheet even though he had jurisdiction to try, 54 C. 303.

Clause (c), information.—The provisions of this clause apply to a case in which a Magistrate while trying one person finds occasion to formulate a charge against some one else, 29 Bom. L.R. 813 at 818 (F.C.)=28 Cr. L.J. 239=100 Ind. Cas. 227. This is a provision of law for enabling a public official to take care that justice may be vindicated notwithstanding that the persons individually aggrieved are unwilling or unable to prosecute, 3 B.L.R. 274. This clause deals with cases where there has been neither a formal complaint nor a police-report and independently of these, the Magistrate takes the initiative upon information received from any person other than a police-officer, or upon his own knowledge or suspicion, 41 C. 1013 at 1020. Information on which a Magistrate takes cognizance under this sub-section must be recorded and the Magistrate is bound to disclose to the accused the information on which he acts and issues warrant, 10 C.W.N. 775=3 Cr. L.J. 473 followed in 33 C. 1076 at 1082 and 37 C. 221. There is no provision in the Code empowering a Magistrate to take cognizance of an offence under this clause or refer it for preliminary inquiry on his own information. He cannot record statement on oath and S. 202 applies only to cases where the Magistrate takes cognizance 14 Cr. L.J. 600=21 Ind. Cas. 472. "It is nowhere laid down and it is probably impossible to state in general terms how much the accused is entitled to have recorded in such cases". Where a Magistrate is given wide powers to take cognizance of an offence on suspicion, it would be disregarding the express language of the Legislature to say that he cannot act if the suspicion or knowledge is based on facts which come within his cognizance or in another capacity, viz., the President of a Local Board. The exercise of such power may in some cases work considerable hardship, but, when the language of the section is clear, the Court has no business to lay down limitations which are unwarranted, 43 M. 709. It is obviously most desirable that a Magistrate should when taking cognizance under this section place on record the ground on which he is taking action, and this, not only in fairness to the person against whom action is so taken and who is entitled to know for what reason he is being arrested but also for his own protection, but omission to do so does not necessarily vitiate the proceedings, 27 Cr. L.J. 413=91 Ind. Cas. 77. Where a Magistrate acting on the facts disclosed in the prosecution evidence recorded by him adds a charge in respect of an act alleged to have been done in pursuance of an alleged conspiracy contained in a complaint presented to him it cannot be said that he is acting on his own knowledge or suspicion within this sub-section. Action taken by the Magistrate is on the original complaint made to him and justified by the provisions of S. 233, *infra*, 27 Cr. L.J. 669=94 Ind. Cas. 717 where 49 C. 873 is referred to. A communication received through post is an information coming within this clause and may be acted upon by the Magistrate if he chose but he is not bound to deal with it judicially, 1839 A.W.N. 201. It is competent to a Magistrate to receive and take action upon petition relating to a crime when sent to him by post. It frequently happens that information of a valuable character in regard to a crime thus reaches a Magistrate which, if not so conveyed, would be withheld altogether and it would be in most cases inadvisable to shut

out such information altogether, whereas in other cases it would be highly indiscreet to take action upon it. A Magistrate in such cases must act upon his own discretion, *Weir II*, 149. Upon evidence recorded by a Magistrate in trying a case of theft against A it appears that possibly B was guilty and the Magistrate directed B to be tried and he tried and convicted B, it was held that the trial was vitiated by S. 191, *infra*, 1904 P.R. (Cr. J.) 68 at p. 254 following 4 C.W.N. 367 & 26 C. 786. A Magistrate may take cognizance on an anonymous communication, 3 C.W.N. 65; 51 A. 377 S. 351, *infra*, is self-contained and complete in itself and is independent of this clause and S. 191, *infra*, 10 Cr. L.J. 303=3 Ind. Cas. 568 where 3 C.W.N. cclxix is followed 1 C.W.N. 105 not followed 4 C.W.N. 367. This clause does not apply to security proceedings under S. 110, *supra*, initiated by Magistrates on information he receives from one, other than a police officer and there is no authority for applying the provisions of the clause and limit the wide and unfettered language used in Ss. 110 and 112, *supra*, 27 Cr. L.J. 1283=93 Ind. Cas. 123 following 27 A. 172. A Magistrate to whom a case is transferred after process had been issued stands in the same position as the Magistrate who originally issued process and when discharging the accused he acts with jurisdiction when he *suo motu* issues process to another person under this clause. 53 C. 1274 distinguishing 1 C.W.N. 105.

Upon his own knowledge or suspicion.—Under this section a District Magistrate has authority to take cognizance of an offence upon information received from any person or upon his own knowledge or suspicion even in case the knowledge or suspicion is based on an anonymous letter provided there is no bar to his taking cognizance, such as previous sanction, say of the Local Government under S. 197, *infra*; until such sanction is obtained no Magistrate can take cognizance under this section and any action taken by him without the requisite sanction is wholly without jurisdiction, 51 A. 377. The power of a Magistrate to proceed under this clause is intended to be used where a Magistrate has good reason to believe that there has been a serious infringement of the law but is unable to take action in the ordinary way because the party aggrieved is either unwilling or unable to prosecute, 2 Pat. L.J. 637. A belief founded on private and anonymous information is not knowledge within the meaning of this section, 4 B.L.R. Appx. 1. The knowledge must be either personal or derived from testimony legally given, 5 B.L.R. 274 at 289. Where a Public Prosecutor files a complaint, cognizance is not taken by the Magistrate under this clause, 15 Cr. L.J. 359=23 Ind. Cas. 737. A Magistrate taking action against a witness in a case which is pending before him upon the facts disclosed by the evidence of another witness does so under this section and not under S. 351, *infra*, 1 C.W.N. 105; 1907 A.W.N. 93. When a Magistrate takes cognizance under this clause upon his own knowledge or suspicion he has no power to refuse to transfer the case, 13 A. 345 but he does not deprive himself from all jurisdiction to hear and determine the case which in fact had been instituted upon his peculiar knowledge of the facts. He may hold a preliminary inquiry preparatory to commitment, 20 Cr. L.J. 47=48 Ind. Cas. 697; 26 C. 786; 21 A. 109; 22 M. 143. In such cases S. 191, *infra*, enables the accused to apply for a transfer of the case and the Magistrate shall also inform the accused that he is entitled to have the case tried by another Court, but unless the accused exercises that privilege, the jurisdiction of the Magistrate to institute, hear and determine the particular case is unquestionable, 1893' A.W.N. at p. 79.

Sub-section (2).—See S 529 (e), *infra*, which saves proceedings before a Magistrate not authorized to take cognizance of an offence. See also 5 Pat. 447.

191. When a Magistrate takes cognizance of an offence under

Transfer or commitment on application of accused.

sub-section (1), clause (c), of the preceding section the accused shall, before any evidence is taken, be informed that he is entitled to have the case tried by another Court, and if the accused, or any of the accused if there be

more than one, objects to being tried by such Magistrate, the case shall, instead of being tried by such Magistrate, be committed to the Court of Session or transferred to another Magistrate.

Object of the section.—The object is that before proceedings are to be taken against an accused such as would bring him before a Court of Justice, a Magistrate must have before him information independent of his own knowledge based either on complaint, or a police-report, 11 A.L.J. 331. The principle underlying the provisions of this section is that when a Magistrate acts on information privately obtained and which is not open to scrutiny by the accused, the Legislature presumes that the Magistrate will probably have formed an opinion on such *ex parte* materials adverse to the accused which the latter will have no means of correcting. Under the circumstances to dispel any feeling of distrust of the impartiality of the tribunal and to foster confidence in the administration of justice, the Legislature has given the accused the option of asking for a change in the personnel of the Judge, 10 Cr. L.J. 333 at 333=3 Ind. Cas. 563. As stated in the well-known English case of *Sargeant v. Dale* the principle underlying this section is to clear away everything which might engender suspicion and distrust of the tribunal and to promote the feeling of confidence in the administration of justice which is so essential to social order and security. The principle of this section is applicable to security proceedings though the section is confined to offences. 4 Pat. L.J. 7; 27 A. 172 followed in 72 Cr. L.J. 1280=98 Ind. Cas. 128. Under this section a Magistrate when he takes cognizance under sub-section (1) (c) of S. 190, *supra* is not precluded from holding a preliminary inquiry and committing the case to the court of sessions, 21 A. 109.

Takes Cognizance of an offence under S. 190 (1) (c).—The expression "taking cognizance of an offence" is not defined in the Code, it is not equivalent to taking cognizance of the offender. It is difficult to ascertain at what precise stage cognizance is taken. When a Magistrate on receipt of police-report makes over the case to another Magistrate for inquiry, and the latter issues process to the accused, the latter and not the former can be said to take cognizance, 17 C.W.N. 795. After taking cognizance of an offence the Magistrate has jurisdiction to inquire into the case of all persons whom the evidence shows as offenders, 21 C.W.N. 959. This section and S. 190, *supra* only apply to "offences" and need not necessarily govern proceedings under Chapter VIII of the Code dealing with security proceedings, but the principle contained in this section was applied in 29 C. 392 and 4 Pat. L.J. 7; on the ground that no man ought to be a judge in his own case and the case was transferred to another Court, but in 27 A. 172 at 174 *Sir George Knox, J.*, held otherwise, "no authority has been shown to me for this and I am not prepared without authority to apply the provisions of S. 190 and limit by them the wide and unfettered language used in Ss. 110 and 112, Cr. P.O." See 27 Cr. L.J. 1280=98 Ind. Cas. 123 following 27 A. 192. The fact that previous to the making of a written complaint to the Magistrate who happened to be in the village the complainant narrated his story to the Magistrate orally and the Magistrate also inspected the locality does not bring the case within the purview of S. 190 (1) (c) *supra* 27 Cr. L.J. 1306=98 Ind. Cas. 718.

Accused shall be informed that he is entitled.—These words are mandatory and the competency of a Magistrate to try the accused person for an offence which he has taken cognizance of under S. 190 (1) (c) *supra* is dependent upon the strict observance of the provisions of this section, and failure to comply with the imperative provisions of law contained herein is a defect which invalidates the proceedings, 51 A. 164; 13 Cr. L.J. 52=13 Ind. Cas. 333, 21 A.L.J. 89=25 Cr. L.J. 656=73 Ind. Cas. 576; 27 Cr. L.J. 325=92 Ind. Cas. 741, 13 A. 345, 17 C.W.N. 795, 27 Cr. L.J. 1037=96 Ind. Cas. 983. The Magistrate has no discretion in the matter and he cannot refuse to transfer or commit, and any trial held after such refusal is not by a Court of competent jurisdiction and the irregularity cannot be cured by S. 537 *infra*, 13 A. 345 at 347. The right view appears to be that the accused are only entitled to object to the trial by the Magistrate when he has taken

cognizance under S. 190 (1) (c) *supra*. On the objection being raised to a trial by the particular Magistrate, he is not bound to transfer the case; he may elect to commit the case to the Court of Session, 22 M. 143 at 149; 7 Bom. L.R. 637; 26 C. 788. This section does not disqualify a Magistrate who has jurisdiction from holding a preliminary inquiry. What the section provides is that if the Magistrate takes cognizance of an offence under S. 190 (1) (c) and if, before evidence is taken, the accused objects to being tried by such a Magistrate, he may either transfer the case to another Magistrate or commit the case to the Court of Session. He is thus empowered to make a commitment in a case within his cognizance, and he cannot make a commitment without holding a preliminary inquiry, 21 A. 103, or the Magistrate may discharge the accused if no *prima facie* case was made out, and in deciding which of the three courses he will adopt the Magistrate should exercise a sound judicial discretion. A Magistrate in deciding whether he should under this section commit the case to the Court of Session or transfer it for trial to another Magistrate should exercise a judicial discretion. His decision will depend chiefly upon whether the punishment which a Magistrate is competent to inflict in case of conviction will be adequate or not 10 Cr. L.J. 224 12 C.W.N. 438. Failure on the part of the accused to take objection to the trial is of no avail. An obligation is imposed on the Magistrate to inform the accused of his right to have the case tried by another Court, 3 C.W.N. cclxxix referred to in 41 C. 1013 at 1020 and failure to inform the accused that he is entitled to have his case tried by another Court is a ground for having the proceedings set aside, Weir II, 151. There cannot be any waiver of right by an accused in a criminal trial, 46 M. 117 at 120; 18 M.L.J. 330; 6 C.W.N. 202; 21 A.L.J. 89; 4 Lah. 376. No serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the counsel or advocate of the accused, 29 Bom. L.R. 813 at 820 (P.C.). No consent of counsel whether for his own convenience, or that of his client or for the convenience of the Court can itself create jurisdiction in the Court to commit irregularities; nor can the commission of irregularities of a serious nature substantially affecting the conduct of the trial and prejudicing the accused be waived merely by consent on the part of the accused's representative, 80 A. 457 at 462, but if the accused after being informed of his right does not choose to exercise it the Magistrate has jurisdiction to try the case, 1893 A.W.N. 79. All that the accused is entitled to is to have the case tried by another Court and the section gives no right to the accused to select or determine by which other Court his case is to be tried, 7 Bom. L.R. 637. The desirability imposed by this section equally applies to the hearing of an appeal by a Magistrate who originally took cognizance of the case under S. 190 (1) (c), *supra* as a Subordinate Magistrate, 12 C.W.N. 438=7 Cr. L.J. 224, but a contrary view was taken by the Allahabad High Court in 1899 A.W.N. 74. When a Magistrate in the course of the trial of one person has reason to believe another person guilty and institutes proceedings against him, he acts still under S. 190 (1) (a) and the accused is not entitled to have the case tried by another Court; when an appellate Court reverses the finding and sentence of the first Court, and the offence is ordinarily triable by it, and makes up its mind to try the accused, the appellate Court takes cognizance of the offence not under cl. (c) of S. 190 (1) but under cl. (a), 30 M. 228. See S. 351 *infra*. In a case contemplated by S. 351 the accused is not placed under any liability to combat with the effect of the suspicious circumstances operating in the mind of the Magistrate and influencing his judgment, and he has full information as to the source and particulars of the materials upon which the Magistrate acts.

192. (1) Any Chief Presidency Magistrate, District Magistrate or Sub-divisional Magistrate may transfer any case,

Transfer of cases
by Magistrates.

of which he has taken cognizance, for inquiry or trial to any Magistrate subordinate to him.

(2) Any District Magistrate may empower any Magistrate of the first class who has taken cognizance of any case to transfer it for inquiry or trial to any other specified Magistrate in his district who is competent

under this Code to try the accused or commit him for trial; and such Magistrate may dispose of the case accordingly.

Scope of the section.—This section provides for the distribution of work among Magistrates. It empowers superior Magistrates to transfer any case of which they have taken cognizance, for inquiry or trial to subordinate Magistrates. But after a Magistrate has proceeded under S. 202 *infra* he cannot make an order of transfer under his section for the purpose of the case being dealt with under S. 203 *infra*, 29 C.W.N. 508=26 Cr. L.J. 990=87 Ind. Cas. 526. This section deals with transfer of cases for administrative reasons, especially for distribution of work among Magistrates by superior Magistrate to whom a general power of transfer is given by S. 523, *infra*. This section can be invoked only after taking cognizance of the offence.

Chief Presidency Magistrate.—All Presidency Magistrates, are subordinate to the Chief Presidency Magistrate and so the latter has power to withdraw any case from any one of them and refer the same for inquiry or trial to any other Magistrate, 1 Bom. L.R. 347. See *Mad. Cr. Rules of Pr. Rule, 12*.

May transfer any case.—Taking cognizance under S. 190, *supra* is a condition precedent to act under this section. A Magistrate cannot transfer under this section a case which had been transferred to his Court and such transfer is *ultra vires*, 12 A.L.J. 277=15 Cr. L.J. 357=23 Ind. Cas. 725; 36 A. 166; 7 M.H.C.R. Appx. 33. The words "any case" are wide enough to include miscellaneous proceedings under Chapter VIII and Chapter XII of the Code, 24 A. 511; 35 C. 243 at 256; 31 C. 350; 22 C. 898; 38 C. 370; 10 C.W.N. 1095; 20 A.L.J. 215; 26 M. 188, but this section does not authorise a District Magistrate to transfer for trial a case to a subordinate Magistrate who is not competent to try it either under S. 28, *supra* or under some special or local law, 23 C. 542. A transfer under this section operates as a transfer of the whole case and not the case against a particular accused and it appears open to considerable doubt whether under this section a case can be transferred piecemeal, 7 C.L.J. 249=7 Cr. L.J. 318; 27 C. 979. This sub-section empowers a transfer for inquiry or trial but its provisions cannot be availed of simply for the purpose of considering the report of an investigation already ordered under S. 202 *infra*, 29 C.W.N. 508=26 Cr. L.J. 990=87 Ind. Cas. 526. But a Sub divisional Magistrate to whom a District Magistrate transferred a particular case for trial cannot transfer the case again to a Magistrate subordinate to him and such transfer is *ultra vires*, 36 A. 166. In proceedings under S. 145, *supra*, this section is applicable only when the property, the subject of dispute, is within the jurisdiction of the Magistrate to whom the case is transferred. If otherwise the Magistrate to whom the case is transferred is *functus officio* and his proceedings are void, 52 M. 241.

For inquiry or trial.—A District Magistrate is not competent to direct a subordinate Magistrate to dispose of a case pending in the Court of the latter in a particular manner, e.g., by commitment, Weir II, 152. The words "for inquiry" cannot mean a preliminary inquiry under Chapter XVIII, 4 M.H.C.R. Appx. xi. The effect of a transfer is that the superior Magistrate becomes *functus officio* unless he again recalls the case, 32 C. 783; 30 C. 449 followed in 49 C.L.J. 378; 48 C. 854; 23 Cr. L.J. 89=65 Ind. Cas. 451; 4 C.W.N. 560 and 242; 27 C. 979; 9 C.W.N. 810.

Notice.—When a case is transferred under this section immediately after a complaint is received it is not essential to give notice to the parties. It stands on the same footing as a transfer made for administrative purposes which is an exception to the rule that no order to the prejudice of a party is to be made without giving him an opportunity to show cause, 24 M. 317. All the High Courts agree in holding that notice to the parties ought to be given before a case is transferred under S. 623, 81 M. 610; 39 M.L.J. 718; 6 M.L.T. 14; 8 M.L.T. 222; Weir II, 691 and 692; 22 B. 549; 21 Bom. L.R. 276; 6 Bom. L.R. 856; 8 C. 333; 7 C.W.N. 114 and 87; 8 C.L.J. 241; 28 A. 421; 3 A. 749; 13 Cr. L.J. 32=13 Ind. Cas. 224; 22 Cr. L.J. 199; 28 Cr. L.J. 517=102 Ind. Cas. 213; 28 Cr. L.J. 33=93 Ind. Cas. 70. The provisions of this and S. 202, *infra* are separate and distinct; the powers conferred by the one are not curtailed by the other, 46 C. 854.

193. (1) Except as otherwise expressly provided by this Code or by any other law for the time being in force, no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in that behalf.

(2) Additional Sessions Judges and Assistant Sessions Judges shall try such cases only as the Local Government by general or special order may direct them to try, or as the Sessions Judge of the division, by general or special order, may make over to them for trial.

Object of the section.—The object is to secure a preliminary inquiry which has the effect of giving the accused especially in serious cases some information of the case he has to answer and also to find out whether the case is a fit one to be tried by a Court of Session, 3 M. 351; 4 M. 227, but it is well established that the Court of Session, once a case is committed to it, has ample power to alter or amend the original charge on which the accused is committed or to add a new charge provided that the new charge can be supported by the evidence on record, 3 B. 200; 9 A. 525; 3 M. 351, See 11 B.H. C.R. (Cr. Ca.) 278, as to the principle which should guide the Sessions Court in amending charges.

Except as otherwise expressly provided by the code.—In this connection see Ss. 195, 351, 436, 471, 476 to 478, 480 to 482, 485, 532 *infra*, wherein special provisions are made in the Code.

As a Court of original jurisdiction.—This section provides that except as otherwise expressly provided no Court of Session shall take cognizance of any offence as a Court of original jurisdiction unless the accused has been committed to it by a Magistrate duly empowered in this behalf. The only section which expressly empowers a Court of Session to commit an accused person by itself is S. 477 *infra* and s 480 *infra* empowers a Court of Session to take cognizance of offences mentioned in that section without a commitment by a Magistrate. Except these two sections there is no other provision in the Code which empowers a Court of Session to take cognizance of an offence as a Court of original jurisdiction. Under S. 423 (1) (b) *infra* a Court of appeal may order an accused to be committed for trial which means that a Court of appeal may direct a Magistrate competent to commit, to commit the accused to the Court of Session for trial S. 423, *infra*, must be read with this section and reading the two sections together it is manifest that except in cases where the Court of Session is expressly empowered to take cognizance, to do so, unless the accused is validly committed to it. 1907 A.W.N. 178=6 Cr. L.J. 7; 22 C. 50. The rule that a Sessions Court cannot take cognizance as a Court of original jurisdiction is also subject to the provisions of Ss. 226 and 227, *infra*; the added charge must be for an offence made out by the evidence recorded before the committing Magistrate or by the evidence recorded before the Sessions in the course of trial under S. 227 *infra*, if charge is altered, 8 B 200. As the Sessions Court is not competent to take cognizance as a Court of original jurisdiction the preliminary inquiry is to be held by a Magistrate, and at that inquiry the accused must have information of the case he has to meet, 3 M. 351; 9 A. 525; 4 M. 227.

Unless the accused has been committed to it by a Magistrate.—The object of this restriction was presumably to secure in the case of a person charged with a grave offence a preliminary inquiry which would afford him the opportunity of becoming acquainted with the circumstances of the offence imputed to him, and enable him to make his defence, 3 M 351 at 353; see also 4 M. 227, at 228 where it was observed that the law contemplates "that in serious cases of which a Sessions Court may take cognizance, the accused should have some information of the case he has to answer." Trial of persons by a Court of Session without a valid commitment to such Court is invalid as the defect is one of

substance and not of form, 15 M. 352; 22 C. 50. Where an approver rested in the Sessions Court from the deposition he gave before the committing Magistrate and was immediately put on trial with the other accused by the Sessions Court it was held that the conviction was bad for want of a commitment, 10 W.R. (Cr.) 10; 19 W.R. (Cr.) 43; 23 B. 493.

A Magistrate duly empowered in his behalf.—See Ss. 206, 213, 215 and 592, *infra*. The onus of proving that the commitment was made by a Magistrate not duly empowered is on the party impugning the commitment, 13 W.R. (Cr.) 17.

Additional Sessions Judges and Assistant Sessions Judges.—For definition of these terms see Ss. 9 (3) and 17 (3), *supra*. There can only be one Sessions Judge for each Sessions division, but there may be more than one Sessions Judge for such Sessions Court. When an additional Sessions Judge is appointed his Court will not be an Additional Sessions Court but the Sessions Court, 1 M.L.J. 397 (F.B.). An Additional Sessions Judge has jurisdiction to hear a reference under S. 123, *supra*, transferred to him by the Sessions Judge, 50 C. 229.

Try such case.—The word "case" used in this section cannot be extended to appeals or other matters. A Sessions Judge has therefore no power to transfer an appeal filed in his Court to an Assistant Sessions Judge, 37 A. 286 where 9 B. 164; 7 A. 661 and 28 A. 93 are followed and 7 A. 661 is referred to. It is significant that in S. 626 (i) (e), (i) and (iii) and in S. 527 *infra* a distinction is made between case and appeal and this distinction is kept in view by the Legislature in the Code.

194. (1) The High Court may take cognizance of offences by High Court. zance of any offence upon a commitment made to it in manner hereinafter provided.

Nothing herein contained shall be deemed to affect the provisions of any Letters Patent granted under the Indian High Courts Act, 1861, or the Government of India Act, 1915, or any other provision of this Code.

(2) (a) Notwithstanding anything in this Code contained, the Advocate General may, with the previous sanction of the Governor General in Council or the Local Government, exhibit to the High Court, against persons subject to the jurisdiction of the High Court, informations for all purposes for which Her Majesty's Attorney General may exhibit informations on behalf of the Crown in the High Court of Justice in England.

(b) Such proceedings may be taken upon every such information lawfully be taken in the case of similar informations filed by the Attorney General so far as the circumstances of the case justify a transfer made to the said High Court will admit.

All the fines, penalties, forfeitures, debts and sums of money payable by or for the Government of India.

The High Court may make rules for carrying into effect the provisions of this and S. 202, *infra*.

(2) in clauses (b) and (c) of sub-section (1) the term "Court" includes a Civil, Revenue or Criminal Court, but does not include a Registrar or Sub-Registrar under the Indian Registration Act, 1877 [1908].

(3) For the purposes of this section, a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court, or in the case of a Civil Court from whose decrees no appeal ordinarily lies to the principal Court having ordinary original civil jurisdiction within the local limits of whose jurisdiction such Civil Court is situate :

Provided that—

(a) where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate ; and

(b) where appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed.

(4) The provisions of sub-section (1), with reference to the offences named therein apply also to *Criminal conspiracies to commit such offences and to the abetment of such offences, and attempts to commit them.*

(5) *Where a complaint has been made under sub-section (1) clause (a), by a public servant, any authority to which such public servant is subordinate may order the withdrawal of the complaint and, if it does so, it shall forward a copy of such order to the Court and, upon receipt thereof by the Court, no further proceedings shall be taken on the complaint.*

Amendment.—The term "sanction" in connection with these prosecutions has been purposely omitted, and a Court or public servant, when of opinion that the interests of justice require an inquiry should be made, a complaint is to be made, in writing in the same way as a private individual. No cognizance is to be taken by any Court of the offences specified herein, except upon such complaint, and the procedure to be followed is that prescribed by S. 476, *infra*. The practice of keeping a sanction granted to a private individual over the head of an accused for six months has frequently been utilised for blackmail. Therefore the prosecution is to be launched by the Court or public servant only, by preferring a complaint in writing when the interests of justice require a prosecution, and no limit of time is prescribed. Sub-sections (4), (5) and (6) have therefore been omitted. Sub-section (7) is numbered as sub-section (3), and sub-section (3) as sub-section (4). Sub-section (3) dealing with subordination of Courts is now made clearer. Sub-section (5) is new and provides for withdrawal of the complaint made by a public servant on the direction of his superior. The effect of the amendment is only an alteration in the procedure, 47 M. 384.

Scope and object of the section.—The section as it stood before the amendment imposed a statutory bar to the law taking its usual course by insisting on a sanction being

obtained before a prosecution is initiated, 41 C. 446; 11 Bom. L.R. 1164. See the observations in 46 C.L.J. 35 at 38, and to prevent prosecutions by private persons on their own motion to satisfy their private spite by requiring sanction of a Court before instituting proceedings. But now private parties have no *locus standi*. All provisions relating to grant or revocation of sanction on the application of the parties have been taken away. Private persons are no longer permitted to prosecute for offences connected with administration of justice, 28 Cr. L.J. 16=99 Ind. Cas. 48. The law forbids any prosecution being instituted now, upon sanction granted to a private party, 47 M. 384. After the amended Act XVIII of 1923 came into force on the 1st of September, 1923, sanctions to prosecute were abolished; any sanction granted after that date is illegal and no Criminal Court could take cognizance of offence alleged on the strength of such illegal sanction. Such a valueless and illegal sanction cannot be treated as a good "complaint" under this section or S. 476 *infra*. In a criminal case involving the liberty of a subject it is not for a criminal appellate court to take a course which will turn it into something which it is not, to get over the difficulty which has occurred by reason of the alteration of the law or to remand the case with a direction that the Lower Court do consider whether on the fact it should make a complaint under S. 476. For in the latter case the Lower Court might take the order of the High Court as an information to it as to the course it should adopt accordingly, 51 C. 652 at 655-656; 26 Cr. L.J. 448=83 Ind. Cas. 64. The new Code envisages an entirely different state of things and for all practical purposes it abolishes sanction entirely. It provides a substitute for the condition precedent not a sanction, but a complaint of Court in writing by the Court before which such proceeding, as the matter arose out of, was tried, or by the Court to which such Court is subordinate, 48 M. 620 (F.B.); 47 M. 384; 2 Ran. 374. Where a sanction granted before the new Act came into force was revoked by the superior Court after the coming into force of the new Act, it was held that the superior Court acted within its jurisdiction in revoking the sanction as the invoking of the aid of the superior Court is a substantive right and not one of procedure only, which cannot be taken away by any change in the law unless a clear intention to that effect is manifested by the new Act, 43 M. 620 (F.B.) followed in 27 Cr. L.J. 181=91 Ind. Cas. 997; 26 Cr. L.J. 90=83 Ind. Cas. 650. By the recent amendment of the Code the necessity for sanction as a pre-requisite to start a prosecution has been done away with altogether and in its place a complaint in writing by the Court has been substituted, 2 Ran. 374. The procedure prescribed by the new Act must be adopted for all prosecutions launched after the new Act came into force, 13 L.W. 463=31 M.L.T. 333; 47 M. 384. See also 7 Lah. 108. A prosecution can be started only on the complaint in writing of a public servant or of a Court, and a large number of rulings of the various High Courts relating to sanction and principles which should guide Courts in granting sanction to private individuals are of little help in construing this section. By the amendment the procedure of grant of sanction to a private party is abrogated. Instead it is enacted that no Court shall take cognizance of certain classes of offences except on the complaint in writing of a public servant or of the Court, 26 Cr. L.J. 751=86 Ind. Cas. 287. A sanction granted after the amendment of the Code in accordance with the old procedure is of no avail and cognizance cannot be taken on such sanction, 26 Bom. L.R. 1233=26 Cr. L.J. 448=83 Ind. Cas. 64; 51 C. 652. Where no complaint had been filed in pursuance of a sanction obtained before the amended Code came into force, no prosecution can be instituted subsequently on the strength of such previous sanction. The new section lays down that a prosecution can only be instituted on a complaint of the Court concerned, 26 Cr. L.J. 383=84 Ind. Cas. 863. When sanction for prosecution was obtained by a party under the old Code and a complaint was also filed before the new Code came into force, held that the case was governed by the old Code and the restriction as to jurisdiction of the Court under the new Code did not apply. 7 Lah. 99 where 6 Lah. 41 and 26 Cr. L.J. 143=83 Ind. Cas. 702 are followed. The provisions of this section cannot be evaded by a device of charging a person with an offence to which this section is not applicable and then convicting him of an offence to which it does apply on the ground that the latter offence is a minor offence of the same character, 47 A. 114. The Court is concerned only where there has been a voluntary obstruction or attempted obstruction of the course of justice in a proceeding before it. The Magistrate has two paramount

(2) in clauses (b) and (c) of sub-section (1) the term "Court" includes a Civil, Revenue or Criminal Court, but does not include a Registrar or Sub-Registrar under the Indian Registration Act, 1877 [1908].

(3) For the purposes of this section, a Court shall be deemed to be subordinate to the Court to which appeals ordinarily lie from the appealable decrees or sentences of such former Court, or in the case of a Civil Court from whose decrees no appeal ordinarily lies to the principal Court having ordinary original civil jurisdiction within the local limits of whose jurisdiction such Civil Court is situate :

Provided that—

(a) where appeals lie to more than one Court, the Appellate Court of inferior jurisdiction shall be the Court to which such Court shall be deemed to be subordinate ; and

(b) where appeals lie to a Civil and also to a Revenue Court, such Court shall be deemed to be subordinate to the Civil or Revenue Court according to the nature of the case or proceeding in connection with which the offence is alleged to have been committed.

(4) The provisions of sub-section (1), with reference to the offences named therein apply also to Criminal conspiracies to commit such offences and to the abetment of such offences, and attempt to commit them.

(5) Where a complaint has been made by a public servant, and the public servant is subordinate may order that if it does so, it shall forward upon receipt thereof by the superior Court on the complaint.

Amendment.—The term "sanction" in the Code was purposely omitted, and a Court or public servant requiring an inquiry should be made, a complaint may be made by a private individual. No cognizance is to be taken of such complaint, except upon such complaint, and the procedure is prescribed by S 476, *infra*. The practice of keeping a sanction granted over the head of an accused for six months has frequently been used. Therefore the prosecution is to be launched by the Court or public servant. Filing a complaint in writing when the interests of justice require a prosecution. A limit of time is prescribed. Sub-sections (4), (5) and (6) have therefore been omitted. Section (7) is numbered as sub-section (3), and sub-section (3) as sub-section (4). Sub-section (5) dealing with subordination of Courts is now made clearer. Sub-section (5) is now amended to provide for withdrawal of the complaint made by a public servant on the direction of his superior. The effect of the amendment is only a modification in the procedure, 47 M. 381.

Scope and object of the section.—The Code imposed a statutory bar to the law taking effect

as it stood before the amendment by insisting on a sanction being

orders have been disobeyed or brought into contempt. The second class is the court in which the offence has been committed and sub-section (5) provides a remedy for an aggrieved party, when a public servant takes action under Cl. (1) (a); while S. 476 B. provides for appeals when a complaint of court is made 6 Pat. 39. There is a distinct difference between the procedure to be adopted by a public servant acting under Cl. (1) (a) and that to be adopted by a presiding officer of the Court under Cl. (1) (b) and (c). In the former case the officer is in the position of an ordinary public servant. He exercises no *quasi-judicial* function of any kind. In the latter case, he is in the position of a presiding officer of a court exercising in *quasi-judicial* functions. He has authority to make a preliminary inquiry and record a finding under S. 476 *infra* that it was expedient in the interests of justice that an inquiry into an alleged offence specified in this section and take security for the appearance of the accused but in the case of a public servant acting under Cl. (1) (a) he has no such power and when he takes action under S. 476 *infra* he acts without jurisdiction and the complaint of court made by him under S. 476 *infra* is a nullity and S. 537 *infra* cannot cure the defect. 28 Cr. L.J. 631=103 Ind. Cas. 409 following 1 Luck. 523 and 27 Cr. L.J. 1247=58 Ind. Cas. 63; 29 Cr. L.J. 912=111 Ind. Cas. 672.

Sub-section (1) (a) —Ss. 172 to 188, I.P.C., deal with contempts of the lawful authority of public servants, and S. 21, I.P.C. defines a public servant. The public servant is to complain in writing in respect of these offences, or some other public servant to whom he is subordinate. In most cases the public servant concerned or his superior may not be a judicial officer or an officer exercising judicial functions. It cannot be said that every offence under Ss. 172 to 188 cannot be taken cognizance of without the complaint of a public servant. Where the order disobeyed was the one promulgated by Government, *e.g.*, under the Epidemic Diseases Act III of 1897, this clause cannot apply as it cannot be said that the Municipal Chairman (the public servant) promulgated the order, 24 M. 70. Even before the amendment a public servant himself, concerning whose lawful authority contempt was committed, may make a complaint against the person who committed the contempt and action contemplated by S. 476 was distinct from such complaint, 32 M. 49 at 57-58. A prosecution under S. 181 I.P.C. by a private person is barred by this sub-section which enacts that no court can take cognizance of such an offence without the written complaint of the public servant concerned, 4 Ran. 437. So also an offence under S. 182, I.P.C. except on the complaint of the public servant or some other public servant to whom he is subordinate, 28 Cr. L.J. 902 (2)=105 Ind. Cas. 230 (2); 28 Cr. L.J. 934=105 Ind. Cas. 454. Although an offence under S. 211 I.P.C. includes an offence under S. 182 I.P.C. the converse will not hold good. Where a complaint to the police is followed by one to the Magistrate who dismissed the same as false the accused cannot be prosecuted for an offence under S. 182, I.P.C. on the complaint of the police but can be proceeded against only on a complaint of court for an offence under S. 211, I.P.C. under Cl. (1) (b) as the charge under S. 182 I.P.C. must be abandoned in favour of the more serious charge under S. 211, I.P.C. 6 Ran. 578 where 32 C. 180; 44 C. 650; 4 Pat. 323; 15 A. 336 are referred, but it has been held in 31 Cr. L.J. 272=114 Ind. Cas. 189, that the power of the police to file a complaint in respect of false information given to them is in no way limited by the filing of a complaint before the Magistrate on the same facts. To prosecute a receiver appointed by the Court for preferring a false inventory under S. 176 I.P.C., no leave of court is necessary. To hold otherwise involves an addition to the provision of this sub-section 30 Bom. L.R. 1273 at 1277. The complaint must be in writing of the public servant concerned, and S. 200 (aa) *infra* provides that the examination of the public servant as complainant shall be dispensed with but the postponement of the issue of process can be made as S. 202 (1) proviso (b) *infra* says only that when a complaint has been made by a Court no such direction shall be made. The new sub-section (5) provides for the withdrawal of the complaint made under this sub-section at the instance of the superior officer. The aggrieved party is given an opportunity to question the legality, propriety and correctness of the action taken against him. The decisions which held that a complaint once made cannot be questioned as in 23 M. 205; 7 C.W.N. 243; 6 Cr. L.J. 25 are no longer law; a Magistrate acting as a public servant is subordinate to the District Magistrate and not to the Sessions Judge

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Sub-section (1) (a)—Ss. 172 to 188, I.P.C., deal with contempts of the lawful authority of public servants, and S. 21, I.P.C. defines a public servant. The public servant is to complain in writing in respect of those offences, or some other public servant to whom he is subordinate. In most cases the public servant concerned or his superior may not be a judicial officer or an officer exercising judicial functions. It cannot be said that every offence under Ss. 172 to 188 cannot be taken cognizance of without the complaint of a public servant. Where the order disobeyed was the one promulgated by Government, *e.g.*, under the Epidemic Diseases Act III of 1897, this clause cannot apply as it cannot be said that the Municipal Chairman (the public servant) promulgated the order, 24 M. 70. Even before the amendment a public servant himself, concerning whose lawful authority contempt was committed, may make a complaint against the person who committed the contempt and action contemplated by S. 476 was distinct from such complaint, 32 M. 49 at 57-58. A prosecution under S. 181 I.P.C. by a private person is barred by this sub-section which enacts that no court can take cognizance of such an offence without the written complaint of the public servant concerned, 4 Ran. 437. So also an offence under S. 182, I.P.C. except on the complaint of the public servant or some other public servant to whom he is subordinate, 28 Cr. L.J. 902 (2)=103 Ind. Cas. 230 (2); 28 Cr. L.J. 934=103 Ind. Cas. 434. Although an offence under S. 211 I.P.C. includes an offence under S. 182 I.P.C. the converse will not hold good. Where a complaint to the police is followed by one to the Magistrate who dismissed the same as false the accused cannot be prosecuted for an offence under S. 182, I.P.C. on the complaint of the police but can be proceeded against only on a complaint of court for an offence under S. 211, I.P.C. under Cl. (1) (b) as the charge under S. 182 I.P.C. must be abandoned in favour of the more serious charge under S. 211, I.P.C. 6 Ran. 578 where 32 C. 180; 44 C. 630; 4 Pat. 323; 15 A. 336 are referred, but it has been held in 31 Cr. L.J. 272=114 Ind. Cas. 189, that the power of the police to file a complaint in respect of false information given to them is in no way limited by the filing of a complaint before the Magistrate on the same facts. To prosecute a receiver appointed by the Court for preferring a false inventory under S. 176 I.P.C., no leave of court is necessary. To hold otherwise involves an addition to the provision of this sub-section 30 Bom. L.R. 1273 at 1277. The complaint must be in writing of the public servant concerned, and S. 203 (aa) *infra* provides that the examination of the public servant as complainant shall be dispensed with but the postponement of the issue of process can be made as S. 202 (1) provides (b) *infra* says only that when a complaint has been made by a Court no such direction shall be made. The new sub-section (5) provides for the withdrawal of the complaint made under this sub-section at the instance of the superior officer. The aggrieved party is given an opportunity to question the legality, propriety and correctness of the action taken against him. The decisions which held that a complaint once made cannot be questioned as in 23 M. 205; 7 C.W.N. 243; 6 Cr. L.J. 25 are no longer law; a Magistrate acting as a public servant is subordinate to the District Magistrate and not to the Sessions Judge.

for purposes of sub-section (5) 6 Pat. 29. A head constable was held to be subordinate to an Inspector, 11 W.R. (Cr.) 22. Although the police-officers in a district are generally subordinate to the District Magistrate, the subordination contemplated by this clause is not such subordination. That subordination contemplates some superior officer of police, 27 C. 452, but see 32 C. 180, where the District Magistrate was treated as head of Railway police, and see also 27 A. 292 and 43 A. 135. The Registrar of a Presidency Court of Small Causes was held to be subordinate only to the Chief Judge of the Court, 27 B. 130. Prosecutions for various offences committed in relation to proceedings before public servants are still punishable, but these proceedings are to be initiated on complaints by the public servants concerned *ex motu* or set in motion by the party aggrieved, 46 M.L.J. 274 and the remedy of a person against whom a complaint is so made by a public servant is that specified in sub-section (5) *i.e.*, to move the authority to which such public servant is subordinate for an order directing the withdrawal of a complaint. If two offences are even remotely connected by the relationship of cause and effect, the first may be said to have been committed "in relation to" the second within this section, 5 Pat. 33, followed in 23 Cr. L.J. 324=100 Ind. Cas. 708, where it was held that a person making a false charge to the police commits an offence in relation to a proceeding in the Sessions Court to which the accused is subsequently committed and the Sessions Court is competent to act under S. 476. See also 23 Cr. L.J. 931=105 Ind. Cas. 454.

Sub-section (1) (b).—A complaint of Court is to be filed by the Court before which the offence is alleged to have been committed and not by the particular officer concerned, who was holding the inquiry 23 Cr. L.J. 643=103 Ind. Cas. 99. Ss. 193 to 211 and 238, I.P.C., occur in Chapter XI of the Indian Penal Code—of false evidence and offences against public justice. The object of this clause seems to be to save the time of Criminal Courts being wasted, and accused persons being needlessly harassed, by safeguarding against rash, baseless and vexatious prosecutions for the offences specified. It aims at doing so by providing that where prior to the institution of a criminal prosecution, a properly constituted judicial tribunal has placed itself in a position to determine whether the facts constituting the offence really exist, the Criminal Court should decline cognizance unless that tribunal has in effect certified that in its opinion the complaint is one worthy of investigation. There is no reason why this safeguard should be limited to cases where the offence is committed *pendente lite* and should not extend to cases of fabrication of false evidence in advance. Its desirability is just as great in the one case as in the other. It is of course necessary that "*proceedings in Court*" referred to in this clause should be actually instituted before the Criminal Court is asked to take cognizance of the offence, and once the Court has lawfully taken cognizance of the case its jurisdiction is not affected by the subsequent coming into existence of a circumstance which would have barred its jurisdiction if it had existed at the time of its institution, 39 M. 677 at 679; 30 Cr. L.J. 710 at 715=117 Ind. Cas. 37; 30 Cr. L.J. 534=116 Ind. Cas. 46 but where the alleged fabrication of evidence in a particular case was not with the intention that that false evidence is to be used in a Court of law but only 'with the intention of its influencing the police in the investigation into the circumstances of an alleged offence, this sub-section cannot apply and the mere fact that the question might possibly arise in a Court of law in some future proceeding would not bring the case within the scope of this clause 29 Cr. L.J. 403=108 Ind. Cas. 801 following 43 B. 668. The offences referred to in this clause, fall under two heads, (1) some of them, *e.g.*, those under S. 205, I.P.C., and the following sections are such as can be committed only in, or, in relation to legal proceedings; (2) there are others which may be committed irrespective of any legal proceedings and it is only in regard to offences under the latter head that the qualification "*when such offence is committed in or in relation to any proceeding*" can have any force. Again some of the offences falling under the second head are such that the accused must have legal proceedings in contemplation, and in such cases legal proceedings must have already been commenced at the time of the commission of the offences, 39 M. 677 at 682-683. This clause and cl. (c) agree in some respects, but differ in this, that the offence is identified in this clause by reference to the fact that it has a direct connection with some proceeding in Court, *viz.*, having been (i) committed in, or (ii) in relation to the proceeding; whereas in

cl. (c) the offence has to be connected not with the proceeding, but (i) with a document produced or given in evidence and (ii) by the fact that the document has been produced or given in evidence by a party to a proceeding. In the one case it suffices if the offence has reference to a proceeding; in the other it must have reference to a party to a proceeding and to a document produced or given in evidence by the party. When a complaint was dismissed under S. 203, *infra*, without examining the complainant as required by that section there is no legal disposal of the complaint and no action can be taken directing the prosecution of the complainant under S. 182 or S. 211, I.P.C., 48 B. 360. Where A after filing a complaint of dacoity before a Magistrate against certain persons repeats his charge before the police who, after investigation found the complaint to be false, he could not be put on his trial for an offence under S. 211, J.P.C. at the instance of the police because the offence had already been committed in or in relation to any proceeding in Court and a complaint of Court is necessary for initiating a prosecution, 24 A.L.J. 816, where 46 A. 43 and 906 are distinguished. In 46 A. 906 it was held that the offence under S. 211, I.P.C. was complete when the charge was laid against a particular person before the police. The mere fact that subsequent proceedings are taken in court either against the person originally charged or someone else cannot affect what was done originally if it was a charge. The offence is complete before the complainant went before the Court and therefore it could not be said that the offence was committed in or in relation to any proceedings in court necessitating a complaint of court 51 A 382 following 46 A. 906 and distinguish 24 A.L.J. 816 and not following 44 C. 650. See also 30 Cr. L.J. 272=114 Ind. Cas. 189. See also 29 Cr. L.J. 605 at 608=109 Ind. Cas. 485 9 Lah 490, but see 6 Ran. 578 which takes a different view and holds that S. 182 I.P.C. must be abandoned in favour of the more serious charge under S. 211 I.P.C. 29 Bom. L.R. 1590=28 Cr. L.J. 934=105 Ind. Cas. 454. and includes in S. 211, I.P.C. See also 27 Cr. L.J. 1014=96 Ind. Cas. 870 where it was held that where a person filed his complaint in Court before he made a statement to the police-officer it was not competent for a police officer to proceed against him, and he cannot be tried for an offence under S. 211 I.P.C. without a complaint of Court. When a complaint is dismissed under S. 203, *infra* as false and though the Magistrate is of opinion that the complainant ought to be prosecuted for an offence under S. 211, I.P.C. the proper procedure for him to adopt is to make a complaint of Court and not to hold an inquiry himself and then commit the complainant to the Court of Session, 5 Pat. 450. No court can take cognizance of the offence of perjury except on the complaint of a public servant and such complaint should be produced on the date of the prosecution, 23 A.L.J. 35. Assignments of perjury should be clearly stated especially with regard to statements contained in a long deposition, 18 A. 203; 9 W.R. (Cr.) 58; 10 W.R. (Cr.) 41; 17 W.R. (Cr.) 52; 19 B. 362; 36 C. 808; 3 C.W.N. 35; (1925) M.W.N. 470=28 Cr. L.J. 1582=90 Ind. Cas. 661. Mere denials in pleadings cannot be considered as perjury, 6 M.L.T. 846=19 M.L.J. (8h N.) 33. Before taking action under this section for perjury, the Court should bear in mind, (1) whether the statements alleged to be false are intentionally false 6 M.L.T. 91; (2) whether the statements were material; (3) whether they affect the credibility of the witness, 2 A.L.J. 836. Where two apparent contradictory statements in a deposition whose materiality is remote, the Court ought not to take action for perjury, 37 M. 364. If the statement which is false is clearly immaterial and nothing hinges on it, then the case is not a fit one for making a complaint of court against the witness for perjury 28 Cr. L.J. 310=100 Ind. Cas. 534. It is not advisable or reasonable to take action against a witness for perjury or attempt to commit the same, if he corrects in cross-examination what he stated in examination-in-chief or being confronted with an earlier statement made by him, he corrects or qualifies his statement. The gist of the offence of perjury is that the fact that it amounts to an attempt to mislead or deceive the court and the offence will be complete only if the witness leave the court under the lie with which he began deceiving it. It is not also advisable to order a prosecution for perjury or an attempt to commit it if it is of a most technical nature and there is not any large degree of certitude of conviction. 30 Cr. L.J. 724=117 Ind. Cas. 210. It would be a dangerous doctrine to hold that every case where a comparison of the two depositions given by the same witness, one before the committing Magistrate and the other before the Sessions Court

discloses contradiction, action should be taken to prosecute the witness for perjury especially where there were indications to show that the witness gave a false story before the Magistrate under police influence, 37 C. 618. It is undesirable to prosecute a witness under S. 193 I.P.O. if he has reverted to the truth in the course of the trial especially when he was not in the first instance a willing false witness 29 Cr. L.J. 1031 (2)=112 Ind. Cas. 466 (2). In considering whether a prosecution for perjury in the alternative based on two contradictory statements is necessary every possible presumption in favour of reconciliation of the two statements should be made 13 Cr. L.J. 485=24 Ind. Cas. 576. In an application for making a complaint of court with regard to two contradictory statements by a witness, if the explanation which appears correct is not put forward first but another considered explanation is given instead, the subsequent explanation though true, must be considered an after-thought and no notice should be taken of it but the question should be left to be decided by the trying Magistrate who ought to give all possible consideration for reconciling the two statements and to the true explanation though belated being delayed by any confusion of mind or other doubtful circumstances and the trying Magistrate is the proper tribunal to consider these questions. It is not the function of an appellate court to allow the person sought to be prosecuted for making two contradictory statements to start a fresh theory in the appellate court though that explanation may be considered by the court trying him. 7 Cr. L.J. 136. A mere attempt to get a medical certificate which was refused will not come within S. 196 I.P.O., there must be something more to show that the party was using or attempting to use anything as evidence, 17 Cr. L.J. 358=33 Ind. Cas. 820.

Committed in or in relation to any proceeding in any Court.—The expression 'in relation to any proceedings' is very general and is wide enough to cover a proceeding in contemplation before a criminal court though the proceedings may not have been commenced when the offence was committed. When a person is tried for an offence under S. 211, I.P.O. for an alleged false accusation against another, it is a question of fact to be decided in the particular circumstances of each case whether he made such false accusation in contemplation of proceedings which he intended to take in a court or not. Where a false accusation was made at the same time in two documents one a petition addressed to the superintendent of Police and the other a complaint posted to a Magistrate to take proceedings, the offence committed by him falls within the purview of the expression 'in relation to any proceedings in a court' within the meaning of this section and a complaint of court is necessary before he is prosecuted under S. 211, I.P.O. 30 Cr. L.J. 732 at 734=117 Ind. Cas. 157 where 24 Bom. L.R. 1153 is followed. The definition of "Court" is wider now. Court includes a Civil, Revenue or Criminal Court, sub-section (2), and not 'means' Civil, Revenue or Criminal Court as before. The opening words of this section "no Court shall take cognizance," clearly limit the meaning of the word "Court" to British Indian Courts to which also the British Indian Legislature could direct the prohibition which follows in the section. Therefore it is difficult to attach a wider meaning to the word "Court in" the remaining clauses of this section. Moreover S. 1 *supra*, limits the ambit of the Code to British India and no reason is shown for widening the meaning of "Courts in British India" to Courts in Native States, 49 B. 850 where 35 B. 139 is referred to. The term "Court" as used here has a wider meaning than a Court of Justice as defined in S. 20, I.P.C., and includes a tribunal entitled to deal with a particular matter and authorised to receive evidence thereon, 45 C. 585; 17 C. 872. Court means the particular tribunal and not the particular Judge who tried the case, but includes his successor also, 5 C.L.J. 176; 34 C. 531; 11 C.W.N. 119; 33 C. 193; 7 A.L.J. 991. The expression 'Court' is nowhere defined in any of the codes. In 32 C. 505 at 624 it was held that a Land Acquisition Collector is in no sense of the term a judicial officer nor is the proceedings before him a judicial proceeding. The award which he passes does not possess finality so far as the persons interested are concerned and reference for the determination of the question by the Court can be asked for. So the Land Acquisition Collector is not a Court but merely acts as the agent of Government for ascertaining the value of the land acquired and to make a tender, 31 C.W.N. 825=28 Cr. L.J. 809=104 Ind. Cas. 243. See also 27 C. 820; 39 B. 310. The expression "Court" in this section

is of a wider scope than the expression "Civil, Revenue or Criminal Court" occurring in S. 476, *infra*. This is made particularly clear by the amendment in sub-section (2) of this section. It reads in cl. (i) and (c) of sub-section (1) the term includes a Civil, Revenue or Criminal Court. Obviously therefore the word Court is of a wider meaning. 33 A. 60. The 'Court' contemplated by S. 476, *supra*, is the Court before which the alleged offence has been committed. Where false evidence was given before the Sessions Court of A and subsequently a part of the territory forming that Court's jurisdiction was constituted a new Sessions Court, it was held that the Judge of the new Sessions Court though having territorial jurisdiction had no power to make a complaint of Court regarding the offence of perjury, 28 Bom. L.R. 1223=23 Cr. L.J. 42=22 Ind. Cas. 81. An Insolvency Commissioner is a Court, 35 B. 642 (F.B.). and also a *Mamildar* holding an inquiry under the Land Revenue Code, 39 B. 310. A District Judge determining the validity of an election under the District Municipalities Act is a Court, 37 B. 393. So also a *Tahsildar* holding an inquiry under Madras Act III of 1862 as to transfer of names in a land register, 25 M. 121. A Village Munsiff is a Court, 11 M. 375. An Official Assignee is not a Court, 37 M. 107. So also an arbitrator to whom a reference was made by a Court, 17 M.L.J. 422 followed in 15 Cr. L.J. 355=23 Ind. Cas. 725. A Commissioner for the examination of witnesses under S. 503, *infra*, is not a Court, as Court here means a Court whose duty it is to consider the evidence and to decide whether it is true or false, 11 C.W.N. 119. A Commissioner appointed to examine accounts under O.XXVI rules 11 and 12 of the Code of Civil Procedure and before whom an offence under S. 172, I.P.C., viz., refusal to answer questions put by the Commissioner is committed is not a Court but he is only subordinate to the Court which appointed him. Intention of the Legislature and public policy appear to be that the alleged offence before the Commissioner is more appropriately to be considered as an offence against the Court itself which appointed the Commissioner and the Court alone can file a complaint in respect of the alleged offence, 23 Bom. L.R. 1476. No complaint of Court will be necessary for prosecution under S. 211, I.P.C., when the false complaint was made to the police, 7 M. 292; 3 C.W.N. 33; 4 B. 479; 25 Cr. L.J. 934=103 Ind. Cas. 454, but if a Magistrate dealt with the matter under S. 203 or S. 253, *infra*, it will be in relation to any proceeding in any Court, 10 M. 232; 43 C. 1152; 44 C. 650 followed in 4 Pat. 323; 5 Pat. 33; 39 M.L.T. 103, but these decisions were distinguished in 23 Bom. L.R. 1593 where it was held that the earlier complaint to the police could not be merged into the subsequent complaint to a Magistrate. 6 Ran. 573 holds that the charge under S. 182, I.P.C., should be abandoned in favour of the more serious offence under S. 211, I.P.C. See also 29 Cr. L.J. 938=111 Ind. Cas. 853; 45 A. 903; 30 Cr. L.J. 272=114 Ind. Cas. 182. Where a person made a complaint at a *Thana* but did not follow it up by a complaint in Court, it was held that this clause did not apply, as by making the report no offence was committed in or in relation to any proceeding in Court, 30 A. 52; 26 C. 783; 44 C. 650.

Except on the complaint in writing of such court.—S. 4 (1) (h), *supra*, defining complaint says "orally" or "in writing". A Court once abolished and re-established two years later with its territorial jurisdiction somewhat curtailed was held by the Madras High Court to be not "such a Court" within the meaning of this clause, 16 Cr. L.J. 787=31 Ind. Cas. 643. See 35 A. 8; 26 A. 514 as to what amounts to complaint. The Magistrate to whom the complaint is made is not competent to inquire into it 5 Pat. 450.

Some other court to which it is subordinate.—See sub-section (3) as to the subordination of Courts.

Sub-section (1) (c)—The word "Court" in this sub-section does not include a Court in a Native State such as Baroda. It is difficult to suppose that the Legislature intended that complaints or sanctions should be made or issued by Courts not within the territorial jurisdiction of the Legislature but outside its control, 49 B. 860 where 35 B. 139 is referred to. The expression "Court" in this section is wider than the expression "Civil, Revenue or Criminal Court" in S. 476, *infra*, 33 A. 60. The words "has been committed" are replaced by the words "alleged to have been committed". In 15 A.L.J. 74 at 77 it was held that the word "committed" meant "alleged to have been committed" as no Court can decide whether an

offence has been committed or not until it has taken cognizance. To meet this criticism the alteration has been made. See 5 Pat. L.J. 135. The only offence which this sub-section bars from the cognizance of Magistrates without a complaint by the Court is when such offence is alleged to have been committed by a party to any proceeding before that Court and it is not right to divorce these words or take only a part of the section in endeavouring to discover what the offence referred to in this section, is 2 Ran. 374; 3 Ran. 43. This clause refers only to cases where a forged document has been produced or given in evidence by a party to a proceeding in Court. In this clause the word "offence" is designedly used in a somewhat abstract manner. It is the offence itself and not the particular offender's offence which the section aims at, and that is in accordance with S. 40, I.P.C., where "offence" is defined as a thing made punishable by that Code. In other words, the clause deals with the case where a substantive offence is committed by a party to a proceeding, 12 Bom. L.R. 383 at 385. The object of mentioning S. 463, I.P.C., in this clause is to include all cases of forgery whatever the nature of the fraudulent intention may be, and hence an offence under S. 463, I.P.C., is covered by the term "S. 463," 22 M.L.J. 141 at 153 following 12 B. 36 and 15 C.W.N. 479; 5 Lah. 550; 1 Luck. 523. An offence under S. 466, I.P.C., comes within this clause, Ratanlal 83. As long as the prosecution is confined to offences connected with a document prior to its production in Court this clause has no application, 34 A. 634. Where it is possible that a document was forged by a person but there was no evidence to suggest that he did so for the purpose of using it as evidence in Court or that he used the same in Court, a complaint under S. 476, *infra*, against him by the Court is not warranted by law, 28 C.W.N. 880=25 Cr. L.J. 1095=81 Ind. Cas. 919. This sub-section is wide enough to include any document produced or given in evidence by a party who is alleged to have committed the offence or any one else and the intention of the Legislature in the framing of the section, as it stands now, was to give authority only to the Court in which a proceeding was pending, to file a complaint in respect of the documents which were produced or given in evidence before it. If there had been any intention to limit the provisions of the section to a document produced or given in evidence by a party to the proceeding then it would have been a simpler matter to insert words to make that intention clear. These words are not there and we can only construe the section as it stands, 49 B. 608 at 614, see also 39 M. 577.

By a party to the proceeding.—This sub-section applies only to parties to the proceeding and does not cover the case of a witness, 29 Cr. L.J. 1061=112 Ind. Cas. 563, 28 Cr. L.J. 986=105 Ind. Cas. 810. A witness is not a party to a proceeding within the meaning of this clause, 3 M. 400. Under this clause the offence must be alleged to have been committed by a party. If therefore the offence has been alleged to be committed by a person not a party this clause is inapplicable, 42 M. 540 at 541. In case of witnesses, there is no necessity to resort to this clause, 3 M. 400; 15 C.W.N. 563; 26 M.L.J. 220; 23 M. 671; 30 M. 226; 32 A. 74; 6 A.L.J. 933; 4 Bom. L.R. 268. In 9 Lah. 678 it was pointed out that S. 190, *supra*, empowers a Magistrate to take cognizance under certain conditions, i.e., certain offences cannot be taken cognizance of except on complaint of Court. Parties to the proceeding alone are within this sub-section. Against those who are not parties, cognizance can be taken without such Complaint of court and the fact that the party to the proceeding was not proceeded against is no reason for not taking cognizance against a person who is only an abettor, 10 Lah. 442. The question whether, when an offence, say, forgery is committed by several persons, one at least being a party to the proceeding in which the document is produced, the participants who were not parties to the proceeding could be prosecuted otherwise than under the provisions of this and S. 476, *infra*, primarily depends on the construction of the word 'offence' occurring in this section, whether it refers to the transaction of forgery as a whole so that the Court is debarred from taking cognizance without a complaint of Court of the whole transaction or whether it refers only to the share taken by the party to the proceeding before the Court and not against the non-parties. It is contrary to public policy that some only of the participants in an alleged act of forgery and most probably those who play a subordinate part are exposed to a prosecution, while the party in whose interest the act is said to have been done is protected from prosecution, but the point was left undecided,

66 M L J. 205-28 L W. 687, but this decision is doubted more than once and the decision in 10 Lah. 412 holds that there was nothing in the section to prevent the trial of an abettor of the offence referred to herein committed by a party to the proceeding without action being taken under S. 476 against the principal. The decisions in 32 A. 74; 12 Cr. L.J. 101; 9 Lah. 678 are followed and 32 M. 842 (F.B.) and 12 Bom. L.R. 333 are dissented, see also 9 Lah. 678. A vakil holding a special vakalat is not a party within this clause and cannot be proceeded against and punished in his client's place, 23 L.W. 787=29 Cr. L.J. 1061=112 Ind. Cas. 363. The Court has power to initiate proceedings against a person for forgery whether he is a party or not to the proceeding before the Court, 23 Cr. L.J. 303 (2)=100 Ind. Cas. 522(2) where 43 B. 638 and 24 A.L.J. 122 are followed and 2 Kan. 374 not followed. This sub-section does not prevent the Court from taking action against persons not parties to the proceeding. If the Court desires to proceed against accomplices to a forgery it is right to make an inquiry itself or through the police or through some Subordinate Court and after considering the result of such inquiry, record a finding against each person separately that interests of justice require an inquiry by a Magistrate into the matter of the alleged offence, 23 Cr. L.J. 936=105 Ind. Cas. 810. A claimant who files a claim in an insolvency petition in the High Court is a party to the proceedings. If his claim is disputed he has to appear to support it and then a lis is constituted between himself on the one hand and the Official Assignee as representing the estate of the debtor on the other. If his claim is rejected and he is not satisfied with it, he appeals to the Court just like any other party in other proceedings, 43 M. 1 at 3. 14 A.L.J. 74, 43 A. 60.

In any proceeding in any court—A complaint of Court is necessary under this clause, only if the offence alleged to have been committed in connection with proceedings pending in a Court and not before an executive officer, 29 Cr. L.J. 1023 at 1029=112 Ind. Cas. 336. See 9 Lah. 433.

Produced or given in evidence—The word "produced" was introduced in the Code of 1829 with the set purpose, to give the Courts a larger jurisdiction to regulate the institution of criminal proceedings against parties or other persons who may be concerned in the commission of offences in connection with documents not only given in evidence but produced in the course of any proceedings before them. It is not at all necessary that the proceedings must be pending before the Court. They may even be commenced by the very act of production of the forged document itself before the Court, merely filing a forged document as an annexure to a petition is a sufficient production of the document in Court, 23 Cr. L.J. 338 at 393=100 Ind. Cas. 1041 referring to 22 G. 1004. A document which was tendered by a witness who did not prove it in Court, but inspected by the Court and placed in file by the Court, it was held there was production within this clause, 13 Cr. L.J. 201=13 Ind. Cas. 201 but when certain receipts alleged to be forged were entered in a list of documents which was filed in Court, such filing of the list is not the same as the production of the documents themselves within this clause, 33 G. 820, production of a document in Court is not the same thing as "giving it in evidence." Wide interpretation was given to the word "produce" occurring in this sub-section in 49 B. 608. The words are 'not given in evidence'. The word 'or' which intervenes between the 'word not given in evidence' shows that it is disjunctive and the proceeding in cases where the document has been given in evidence but also in produced and the ambit of the word 'produced' is very wide as it was held that a document presented to the court as evidence rejected by the Court on the ground that it was time-barred within the meaning of this clause and in 52 G. 831 it was held that a document, if filed in support of a pleading even though it was rejected by the Court, 30 Cr. L.J. 238 at 238=113 Ind. Cas. 712. The words refer to the production of the original in Court and not because when a copy is produced the Court will not rest its opinion about the genuineness of the original. But the clause is to be construed to mean making use of a forged document.

and not the Sub-divisional Magistrate, 31 M. 787; 18 M. 487. A Subordinate Judge is subordinate to the District Court. An appeal ordinarily lies to the District Court, 44 M.L.J. 320=17 L.W. 311, but when the value of the subject-matter of the suit exceeds Rs. 5,000, the appeal in such cases lies to the High Court, 7 M. 314; 2 B. 481; 11 B. 438; 17 A. 51; Ratanlal 937. But see 99 Ind. Cas. 957 (a Madras decision) which holds that the appeal lay to the District Court and not to the High Court. See also 8 Pat. 428, which holds that the appeal lies to the subordinate judge from the order of the District Munsif.

In the case of Civil Court from whose decree no appeal ordinarily lies.—An appeal from Bench of Honorary Magistrates ordinarily lies to the District Magistrate, 26 Cr. L.J. 423=35 Ind. Cas. 39. "Where no appeal lies" was the wording before and in 34 A. 197 at 202, it was held that the Legislature had not made any provision as to the subordination of a Court of Small Causes as the words "where no appeal lies" refer to cases in which no appeal lies, and not to Courts against whose decisions no appeal ever lies. To meet this objection the language has been altered to make it clearly applicable to Court of Small Causes. The word "civil" has now been specially added to meet the decision in 31 A. 313 at 314, where it was held that the clause is not limited to Court of Small Causes, but extended to all Courts where the orders are not appealable and the finality of the decision of the Court with reference to the nature of the case and not with reference to the constitution of the Court is the element which determined subordination. In 34 A. 197 at 202, *Chamier, J.*, said: "I can discover no jurisdiction for reading the word 'the principal Court of original jurisdiction' as if they were 'principal Court of original civil jurisdiction,' and the Legislature never intended the principal Court of original civil jurisdiction to revise orders of Criminal and Revenue Courts with which it has no concern as a Civil Court." So the clause contemplates only Courts of Small Causes and they are subordinate to the principal Court of original civil jurisdiction and the concluding words of this clause "*such Civil Court is situate*" also makes this clear.

Principal Court of ordinary original jurisdiction.—The District Court in the mofussil will be the principal Court having ordinary original jurisdiction so far as Provincial Court of Small Causes is concerned, and the High Court will be the principal Court so far as the Presidency Court of Small Causes is concerned. There is no Court to which appeals ordinarily lie from decrees of Presidency Small Cause Courts and so an appeal from an order under S. 476, *infra*, lies to the principal Court having ordinary original jurisdiction, i.e., the High Court which exercises ordinary original civil jurisdiction. It has been held that for the purpose of this sub-section the original side of the High Court is not different from the rest of the High Court so the appeal lay to the appellate side of the High Court, 48 M. 395 following 36 M. 183 and 45 M. 928. It is submitted that the addition of the word "ordinary" newly made supports the view that it is to the original side of the High Court. The decision in 21 C.W.N. 654 the High Court from any

Proviso (a).—In cases where appeal lies to more than one Court, the Court of inferior jurisdiction shall be the Court to which such Court shall be subordinate. For example, an appeal lies to the District Court from a Subordinate Judge's Court when the value of the subject-matter is less than Rs. 5,000, and to the High Court when the value of the subject-matter is over Rs. 5,000. In such a case the District Court is the Court of inferior jurisdiction to the Court to which the Court shall be deemed to be subordinate, 7 M. 314; 2 B. 481; 11 B. 438; 17 A. 51. See also 22 C. 487; 20 C. 916; 44 M.L.J. 320=17 L.W. 311, but see 99 Ind. Cas. 957. (a Madras decision) which holds that the appeal lay to the District Court and not to the High Court. In 46 A. 511 it was held that the order of a Commissioner hearing an election petition under the Municipal Act directing the prosecution of one of the parties for having committed forgery in connection with a voting paper is not amenable to the Revisional jurisdiction of the High Court. Nowhere is the relation of an election Court to the High Court defined and there is no statutory provision in the Municipal Act reserving the ordinary Civil Revisional jurisdiction of the High Court which is exercised under S. 115, C.P.C.

Proviso (b).—This proviso was enacted in the Code of 1873 in consequence of the difficulties which had arisen in construing the section. See 10 A. 532 (F.B.); 19 A. 121 (F.B.); 1891 A.W.N. 82.

According to the nature of the case.—The words "nature of the case" used in this clause mean "nature of the case pending." The word "case" does not mean "suit" and it would be proper to refer back to the original suit or to consider what its nature was. The proceedings which were pending constituted the "case" and it was the nature of those proceedings which had to be looked to. The offence was alleged to have been committed not in connection with the suit but in connection with the execution proceedings, 34 A. 197 at 198.

Sub section (4).—This sub section was introduced in the Code of 1873. The decision in 25 M. 8 to the effect that this section did not apply to abetment of the offence mentioned herein is no longer law. See S. 210 *infra* in this connection, where we find the words *previous sanction* is still retained. See also 33 C. 103, where it was held that when once sanction has been obtained to prosecute for the substantive offence no fresh sanction is necessary to prosecute for abetment of that offence.

Sub section (5).—This sub-section is new and provides for the withdrawal of the complaint made by a public servant on the direction of his superior, 23 Cr. L.J. 547=102 Ind. Cas. 433. The expression, "the authority to which such public servant is subordinate" occurring herein is very wide and connotes apparently a more distant and general entity than a departmental superior and covers the District Magistrate in relation to the police of his district. It would not seem at all unreasonable that the Legislature should restrict the making of the complaint to the department and yet permit the withdrawal thereof (at times perhaps on grounds of policy transcending departmental considerations) by superior authorities also. Therefore where a District Magistrate orders the withdrawal of a complaint made by a police-officer he exercises jurisdiction administratively and his order is not open to interference by a judicial tribunal even in a case where such withdrawal by the District Magistrate rested on misconception of law, 30 Cr. L.J. 710 at 714=117 Ind. Cas. 37 *distinguishing* 5 Pat. 33 and 28 Cr. L.J. 902=103 Ind. Cas. 230. Where the offence is one falling under sub-section (1) (a) of this section, S. 476 *infra*, has no application and no complaint of Court can be filed under S. 476 *infra*. Where a complaint is filed by a public servant with regard to an offence referred to in sub-section (1) (a), no appeal lies under S. 476B *infra* but the matter can be brought however under the Revisional jurisdiction of the High Court and the High Court when a proper case is made out may direct the withdrawal of the complaint, 6 Ran. 529. A District Magistrate cannot direct the withdrawal of a complaint made by a special Magistrate under S. 476 *infra* for an offence under S. 211 I.P.O., as such complaint does not fall within this sub-section, 28 Cr. L.J. 543=102 Ind. Cas. 351. Thus where the Registrar of the Presidency Court of Small Causes files a complaint under sub-section (1) (a) as public servant for an offence under S. 182, I.P.O., the Chief Judge of that Court to whom the Registrar is subordinate may order withdrawal of the complaint, 27 B 130. For the purposes of the Code, unless it is shown that there is some express provision to the contrary, the District Magistrate and not the Sessions Judge is the authority to whom the Sub-divisional Magistrate is subordinate and therefore when we find in the Code words relating to an officer to whom the sub-divisional Magistrate is subordinate (See S. 17 (1) and (5) *supra*), we must construe that as meaning not the Sessions Judge but the District Magistrate. There are exceptions to this, see S. 435, explanation *infra*. So when a Magistrate files a complaint as a public servant acting under sub-section (1) (a), an application for withdrawal of the complaint lies not to the Sessions Judge but to the District Magistrate, 6 Pat. 39. A District Superintendent of Police is subordinate to the District Magistrate under S. 4 of the Police Act, 45 A. 135. The procedure for the withdrawal is to send a copy of the order to the Court before which the complaint is pending and the Court shall not take further proceedings on the complaint.

Costs.—A proceeding under this section ought not to be treated as a proceeding between private parties. It is done in the interests of administration of justice and so no one can claim costs from the party against whom a complaint of Court is made or where a complaint of Court is refused to be made. A complaint of Court does not establish the guilt of the

person proceeded against and it may ultimately transpire that the person is innocent. No costs are to be awarded in proceedings under this section, 13 Cr. L.J. 8=13 Ind. Cas. 99 16 Cr. L.J. 281=28 Ind. Cas. 329. Proceedings under this section must be treated as of a Criminal and not of a civil nature and the Criminal Law of Procedure is to be applied to them. This Code does not authorize an order for payment of costs in this connection and it is not possible to justify an order for cost with reference to any inherent power of the Court. The order for costs made by the Lower Court was set aside by the High Court as unsustainable 17 Cr. L.J. 184 (1)=33 Ind. Cas. 824, following 30 M. 311. In 43 M. 1 at 5 the costs of the respondent the Official Assignee was allowed in a sanction appeal to come out of the estate.

196. No Court shall take cognizance of any offence punishable under Chapter VI or IXA of the Indian Penal Code (except section 127), or punishable under section 108A, or section 153A, or section 294A, or Section 295A† or section 505 of the same Code, unless upon complaint made by order of, or under authority from the Governor-General in Council the Local Government, or some officer empowered by the Governor-General in Council in this behalf.

Prosecution for offences against the State.

Object of the section.—"The object of the section is to prevent unauthorized persons from intruding in matters of State by instituting State prosecutions and to ensure that prosecutions shall only be instituted under the authority of Government," 22 B. 112. The true implication of the section is that the judgment of the Local Government should be specifically directed to the particular sections of Chapter VI of the Indian Penal Code in respect of which proceedings are to be taken and that the order or authority should be preceded by, and be the result of a deliberate determination that proceedings should be taken, 18 C.L.J. 452 (Sp. B.)=14 Cr. L.J. 321=1 Cr. L. Rev. 430=23 Ind. Cas. 81; 37 C. 437. The question whether where a person is accused of committing acts which constitute a grave offence requiring sanction under this section and also a minor offence which requires no such sanction the omission to obtain the sanction precludes the Court from trying the accused for the minor offence was left undecided in 7 Lah. 218 as in that particular case the High Court was of opinion that on the allegations in the complaint no offence requiring sanction was committed and therefore there was no law which offered any obstacle to the trial of the accused for the minor offence. Where the law has provided certain sanctions, it cannot be permitted that the same action may be taken by adopting a different course. It is wrong to proceed against a person under S. 108 *supra* when he ought to have been prosecuted under S. 153A. I.P.C. especially where it is obvious that proceedings under S. 108 *supra* was taken to avoid the trouble and possible refusal of Government to prosecute the person for an offence under S. 153A. I.P.C. When substantive offences are committed the law does not provide an easy way of providing of dealing with them under Chapter VIII of the Code, 30 Cr. L.J. 216=114 Ind. Cas. 48. The provisions of the Code allowing the Court to frame a charge of the offence it finds to be proved, to alter the charge or to convict an accused person of an offence, although he was not charged therewith must be read subject to the provisions of this section, i.e., those powers can be exercised in respect of offences falling within this section when a prosecution for the offence of which it is proposed to charge or to convict the accused has been duly authorised under this section and cannot be exercised when the prosecution has not been so authorised, 4 Ran. 131. There is nothing in the section to warrant the construction that the actual complaint must be authorised by the Local Government. The only question which the Court has to consider with reference to S. 193 is:—"Is the complaint which I am asked to entertain, a complaint made by the order or under the authority of Government?" 32 M. 3 at 9. The substitution of the word "the prosecution has been sanctioned" in sub-section (2) makes this quite clear now. The Government when acting under this section is certainly not acting in a judicial capacity or exercising a judicial

† Added by Act XXV of 1927, S. 8 (ii).

Sessions Judge irregularly appointed, 16 C.W.N. 1105=15 C.L.J. 517. Where the law clearly says that it is a condition precedent to the prosecution that a sanction should be obtained from the Local Government, it is not open to any subordinate authority to override the provision of law by saying that the offence falls under another section of the Indian Penal Code, that no sanction was necessary for prosecution under that section and that the offender may be prosecuted without any sanction, 47 A. 268. There is no special mode laid down in the Code whereby the order of sanction of Government is to be conveyed to the officer who puts the law in motion under S. 121 or 121A, I.P.C. It need not contain the charge for the offence. All that the Court has to see is whether the complaint is made by order or under authority of Government, 25 Cr. L.J. 401=77 Ind. Cas. 481. A letter issued from the office of the Chief Secretary to Government conveying sanction under this section to a prosecution under S. 294A, I.P.C., which is not signed by the Chief Secretary but by some other officer on his behalf is no legal proof that the Local Government has ordered or authorised the prosecution. The capacity of the Chief Secretary being that of a delegate of the head of the Local Government, the order could not be certified on his behalf but must be proved under S. 78, Indian Evidence Act, 50 C. 135. The law does not lay down any particular form in which the sanction to prosecute should be accorded. It is sufficient if it names the person or persons to be prosecuted, and specifies the section under which they are alleged to have committed the offence, as also the time and place of the alleged offence. Failure to specify the utterances of the accused will not affect its validity, 25 Cr. L.J. 279=76 Ind. Cas. 871. The order of Government need not be addressed to any determinate person, 44 M.L.J. 166=17 L.W. 100=24 Cr. L.J. 539=73 Ind. Cas. 155. Consent in writing of the authority specified in this section is not necessary to a prosecution for criminal conspiracy to commit a non-cognizable offence where S. 195 (4) *supra* is applicable, 50 C. 461.

Prosecution for certain classes of conspiracy. **196A.** No Court shall take cognizance of the offence of criminal conspiracy punishable under section 120B of the Indian Penal Code,

(1) in a case where the object of the conspiracy is to commit either an illegal act other than an offence, or a legal act by illegal means, or an offence to which the provision of section 196 apply, unless upon complaint made by order or under authority from the Governor-General in Council, the Local Government or some officer empowered by the Governor-General in Council in this behalf, or

(2) in a case where the object of the conspiracy is to commit any non-cognizable offence, or a cognizable offence not punishable with death, transportation or rigorous imprisonment for a term of two years or upwards, unless the Local Government, or a Chief Presidency Magistrate or District Magistrate empowered in this behalf by the Local Government, has, by order in writing, consented to the initiation of the proceedings :

Provided that while the criminal conspiracy is one to which the provisions of sub-section (4) of section 195 apply no such consent shall be necessary.

This section was added by Act VIII of 1913, in consequence of the addition of Chapter VA in the Indian Penal Code. For general rule in criminal conspiracy and what a complaint should set forth see the elaborate judgment of *Mockerjee, J.* in 16 C.W.N. 1105=15 C.L.J. 517 (F.B.).

Criminal conspiracy.—The offence of criminal conspiracy was unknown to Indian Law except what was contained in S. 121A, I.P.O., Criminal Conspiracy is now made a substantive offence in British India. Conspiracy unlike other offences does not require an intention to do an overt criminal act but only an agreement between persons to do some act and it does not matter whether the act is done or not. This section applies only to prosecutions under S. 120B, I.P.O., and not for abetment by conspiracy punishable under S. 109, I.P.O. § Ran. 95.

Sub-section (2).—The Magistrate has no jurisdiction to take cognizance of the offence of conspiracy until after the order consenting to the institution of the proceedings for that offence was passed by the Local Government. The Magistrate takes cognizance when he framed the charges against the accused and under this sub-section it is only the existence of the order of Government that it is necessary to enable the Court to assume jurisdiction. § C. 155.

196B. *In the case of any offence in respect of which the provisions of section 196 or section 196A apply, a District Magistrate or Chief Presidency Magistrate may, notwithstanding anything contained in those sections or in any other part of this Code, order a preliminary investigation by a police-officer not being below the rank of Inspector, in which case such police-officer shall have the powers referred to in section 155, sub-section (3).*

Preliminary inquiry in certain cases.

This section contemplates a preliminary inquiry by a police-officer not below the rank of an Inspector under the orders of a District Magistrate or Chief Presidency Magistrate as the offences involved are of a very serious character, designated in English Law as "high treason," etc.

197. (1) *When any person who is a Judge within the meaning of section 19 of the Indian Penal Code, or when any Magistrate, or when any public servant who is not removable from his office save by or with the sanction of a Local Government or some higher authority, is accused of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duty, no Court shall take cognizance of such offence except with the previous sanction of the Local Government.*

Prosecution of Judges and public servants.

(2) Such Government may determine the person by whom, the manner in which, the offence or offences for which the prosecution of such Judge, Magistrate or public servant is to be conducted, and may specify the Court before which the trial is to be held.

Power of Government as to prosecution.

Amendment.—Sub-section (1) is newly drafted. For the words "as such Judge or public servant of any offence" the words "of any offence alleged to have been committed by him while acting or purporting to act in the discharge of his official duties" have been substituted with regard to the amendment the Select Committee remarked thus "It has been pointed out to us that difficulties with regard to S. 197 have recently come to light. There are certain public servants who are only removable from office by the Secretary of State for

India and it is unreasonable that they should obtain no protection under the section. In view of S. 4, Cl. (2) of the Code the word 'judge' has to be interpreted according to definition given in S. 19, I.P.O., with the result that Magistrates acting in certain cases under the Code, e.g., when holding inquiries obtain no protection. We have therefore prepared a re-draft of sub-section (1) of S. 197 to meet these difficulties. We have continued the operation of the section, to public servants removable by a Local Government or some authority and have provided that the sanction required for a prosecution will be that of the authority which has power to remove. "When any Judge or public servant is, as such Judge or public servant of any offence no Court shall take cognizance of such offence except with previous sanction. It is proposed to amplify the words with the effect of rendering the section clear reverting rather to the wording of the Code of 1872."—*Statement of Objects and Reasons.*

Scope and object of the section.—The section is framed in very wide terms and requires that Judges, Magistrates and certain public servants shall not be proceeded against without the sanction of the Competent authority for offences alleged to have been committed by them while acting or purporting to act in their discharge of the official duty. The object is obviously to protect responsible public servants against institution of vexatious criminal proceedings alleged to have been committed by them while acting or purporting to act as public servants. The policy of the Legislature is, to afford protection to public servants, ensure that they are not proceeded against for anything in the discharge of official duties without reasonable cause and if sanction is conferred on the local Government, if they choose to exercise it, complete control over prosecution. There is nothing in these precautions to which the public at large are exempted and consider that the section should be construed as widely as possible. Under the present section which materially differs from the corresponding section of 1882 and 1898 Codes, it will not be necessary to decide the fact of the being a Judge or a public servant as a necessary element in the offence or the offence which could have been committed by a private individual. If it is found that a Magistrate or certain public servants has committed the offence at a time when he was acting or purporting to act in the discharge of his official duty, this will be sufficient for the provisions of this section and sanction referred to herein is necessary before a prosecution. The Legislature has now explicitly reverted to the policy of 1872 because that policy had been nullified by a series of judicial decisions. If it is alleged to have been committed by a public servant while he was actually engaged in the discharge of his official duty, sanction under this section will be required, 52 M. 602 following 9 M. 439 and referring to 52 M. 337, 12 M. 26 C. 852, 17 Cr. L.J. 394=85 Ind. Cas. 826. The object of the section is to prevent vexatious proceedings against public servants and to secure the considered opinion of a superior authority before their prosecution, 31 Bom. L.R. 78. The object being thus is to safeguard against vexatious proceedings being brought against responsible public servants, the section therefore insists that before starting proceedings, the sanction of the superior authorities specified in the section is required. Superior authorities are also empowered when sanctioning prosecution of public servants to specify the person by whom and the manner in which the offence or offences for which prosecution is ordered is to be conducted. There is no mention in this section of any authority. Obviously the intention was to simplify the law regarding sanction under the new Code and the circle of public servants for whose prosecution sanction was required under the previous Code has been narrowed. The section presents no difficulty. The obvious intention of the Legislature is borne in mind. It is no part of the British law to set an official above the common law. If he commits a common law offence he is not allowed to be prosecuted without its sanction for the obvious reason that official action would be beset by private prosecution. Judges would be charged with defamation, policemen with wrongful restraint and distrainers with theft. This of immunity from prosecution without sanction only extends to acts which can be

I.P.O., was held to come within this section, 5 Kan. 128. A Chairman *delegata* is not protected by this section, Weir 11, 226. No sanction is necessary to prosecute a municipal secretary, 23 Cr. L.J. 750=63 Ind. Cas. 638. A Village-headman in Madras exercising jurisdiction under Regulation XI of 1816 is a Judge, 23 M. 540. A Village-headman who fabricates a false record in a criminal case cannot be properly said to be acting as a Judge so as to require sanction for his prosecution, 32 M. 235, but it was held in (1920) M.W.N. 7=21 Cr. L.J. 233=55 Ind. Cas. 105 distinguishing 32 M. 255 that where a Village-headman in a case pending before him created a false record, *viz.*, a judgment and a calendar he acted as a Judge and sanction was necessary before he could be prosecuted for the offences under Ss. 167, 218 and 469, I.P.O. The new amendment makes this very clear. Similarly no sanction is necessary to prosecute a Village-headman of extortion, 6 M.L.T. 128=11 Cr. L.J. 162=4 Ind. Cas. 1056 but in 52 M. 602 following 9 M. 439 and distinguishing 52 M. 347 and referring to 25 M. 15; 26 M. 837; 33 Ind. Cas. 826, it was held that sanction was necessary to prosecute a Village-headman who was charged with wrongful confinement committed while purporting to act in the discharge of his official duties, and after this well considered decision it is submitted the earlier decisions which took the view that the offence must be one which can be committed only by a Village-headman, etc., as such and not by any individual seem to be of doubtful authority. See the observations in 29 L.W. 17. See also 26 C. 832, as to the exact scope of the provisions of this section. Action taken under this section is more of the nature of an executive than a judicial action, 17 L.W. 226. When it is not alleged that an accused obtained an advantage to himself by acting or purporting to act in the discharge of his official duty as a public servant the case does not fall within this section, 8 Lah. 647.

Not removable from office without sanction of a Local Government or some other authority.—The Chairman of a Union Committee cannot be said to be not removable from office save by the Local Government because it appears that he can be removed under certain circumstances by a Commissioner and consequently no sanction of the Local Government is necessary for his prosecution, 26 Cr. L.J. 1178=83 Ind. Cas. 602. To prosecute a Sub-Overseer of P.W.D. who can be appointed or removed by the Superintending Engineer without reference to Local Government, no sanction is necessary, 12 M.L.T. 231=13 Cr. L.J. 770=17 Ind. Cas. 402. A Village-headman is not a public servant removable from office without the sanction of the Local Government. He may be prosecuted for bribery without sanction but sanction will be necessary if he acts as a Judge in his capacity as a Village Munsif or a Village Magistrate. See 29 L.W. 17; 36 M.L.J. 500=23 L.W. 579, 57 M.L.J. 31=30 L.W. 116=1923 M.W.N. 339. The section as amended refers only to public servants not removable from office without the sanction of local government and would not apply to a receiver appointed by the High Court. There is no provision that leave of the Court should be obtained as a condition precedent before starting a criminal prosecution against such receiver, 52 B. 833 where 45 C. 432 is *disapproved*. Attestation of a vakalat by a Village-headman is not a judicial function and he does not act as a Judge then, 9 Cr. L. Rev. 395=18 Cr.L.J. 737=36 Ind. Cas. 862.

Before the amendment the power of sanctioning the prosecution of a Village-headman in Madras was vested by G.O. No. 1886 J., dated 9th October, 1874, in the District Magistrate, 17 L.W. 226=24 Cr. L.J. 116=71 Ind. Cas. 234 and similarly the power is delegated to the Board of Revenue to sanction prosecution of Sub-Magistrates, Tahsildars and Deputy Tahsildars (G.O. 12812., dated 29th June, 1891); the Inspector-General of Police and the District Magistrates were empowered (G.O. 1036, J., dated 8th June, 1874, and G.O. 1965, J., dated 25th July, 1874) to sanction the prosecution of Police Inspectors. But under the section as now amended, the Local Government cannot delegate its powers and the delegation of powers before the amendment is of no use whatever now, and cannot be availed of. 23 Bom. L.R. 707=28 Cr.L.J. 534=102 Ind. Cas. 342.

Of any offence.—These words are wide enough to include "abatement" also. See 32 M. 1 at 35. Offence need not be specified in the order of Government with the same

precision as is necessary in a charge, 13 C.W.N. 1062=10 Cr. L.J. 463=4 Ind. Cas. 13. See also 12 Cr. L.J. 217=10 Ind. Cas. 166.

Acting or purporting to act in the discharge of public duties—Offences committed by one who happens to be a public servant or not necessarily committed by him as such public servant and unless they are committed in the capacity as a public servant, they must be regarded as acts of individuals, in their private capacity, 13 Cen. Pro. Rep. 126 at 129. It is not enough for a public servant merely to be in an official position which he may abuse. He must act in his official capacity. The section presents difficulty on account of the sense in which 'acting' is understood in this country; 'offence alleged to have been committed while acting in the discharge of his official duty' is interpreted by some as 'any offence committed by him while he was in office'; that interpretation is quite wrong and 'acting' here refers to specific action which composes the offence, 50 M. 734 following [1916] 1 M.W.N. 334=17 Cr. L.J. 168=33 Ind. Cas. 645 See 33 C.W.N. 1058. To attract the provisions of this section, the offence must be committed in dereliction of the duty cast upon the person as a public servant, 29 L.W. 17; 1920 M.W.N. 7. The question whether a person acted or purported to act in the discharge of his official duty is a pure question of fact 3 Lah. 647. Use of public position to insult or annoy others cannot be held to be in the discharge of public duties and no sanction is necessary, 4 L.W. 555; Weir II 221; 17 Cr. L.J. 394; 30 C. 927. Sanction under this section need not be based on legal evidence and the Government acts purely in its executive capacity, 17 L.W. 225=24 Cr. L.J. 116=71 Ind. Cas. 244, no set form of sanction is required under this section, 21 Cr. L.J. 584=57 Ind. Cas. 104. No notice to accused is necessary and it is a matter entirely in the discretion of Government whether such opportunity should be given before sanctioning prosecution, 27 M. 54; the Code does not prescribe any particular form for the sanction; hence the omission to mention the place or time of the alleged offence does not affect its validity, 27 M. 54, no set form of sanction is necessary under this section, 21 Cr. L.J. 760=58 Ind. Cas. 344; 21 Cr. L.J. 584=57 Ind. Cas. 104. The Government in granting sanction need not specify the offences with the same precision as is necessary in a charge, 13 C.W.N. 1062=10 Cr. L.J. 463=4 Ind. Cas. 13; 29 Bom. L.R. 996. There can be no objection to the validity of the sanction granted when the date given in the original had to be altered, on account of a mistake and otherwise there was no vagueness in the sanction, 29 Bom. L.R. 996 at 1001 referring to 16 M. 468; 43 B. 147; 13 C.W.N. 1062; inquiry before granting sanction is departmental and not judicial, 23 M. 223. Power of superior Court or officer to sanction prosecution of a subordinate remains in fact unless expressly limited by Government, 7 M.H.C.R. 58. As a general proposition an official is subordinate to the authority which appointed him and which has the power to dismiss him, 21 Cr. L.J. 760=58 Ind. Cas. 344. It is to be noted that the saving clause of S. 537, *infra*, does not apply to this section and want of sanction under this section invalidates the whole trial and S. 537, cannot apply, 31 M. 80. It is clear that under this section the sanction is to be obtained prior to the proceedings and the proceedings begun and continued without such sanction is void and this position cannot be contested, 29 Bom. L.R. 707=28 Cr. L.J. 534=102 Ind. Cas. 342 following 42 B. 172. Where sanction of the Local Government is necessary before cognizance is taken by a Magistrate and no such sanction is obtained, the Magistrate has no jurisdiction to take cognizance of the case and in such a case, the High Court has inherent power to interfere with the exercise of jurisdiction by the Magistrate, 51 A. 377. As to power of Government to specify the Court before which the Judge or public servant shall be tried subject to the exercise of the general power of the High Court to transfer criminal case, see S. 526 (7), *infra*.

Subsection (2).—The Local Government exercising powers conferred by this section is entitled to specify any Court for the trial of a public servant irrespective of the jurisdiction and the Magistrate so specified had power to take cognizance of the offence and he acts illegally in declining to receive the complaint holding that the offence was committed outside the jurisdiction of the High Court to which he is subordinate. 8 Cr. L.J. 70=4 L.B.R. 265.

199. No Court shall take cognizance of an offence under section 497 or section 498 of the Indian Penal Code, except upon a complaint made by the husband of the woman or, in his absence, *made with the leave of the Court* by some person who had care of such woman on his behalf at the time when such offence was committed :

Provided that, where such husband is under the age of eighteen years, or is an idiot or lunatic, or is from sickness or infirmity unable to make a complaint, some other person may, with the leave of the Court, make a complaint on his behalf.

Amendment.—The words "made with the leave of the Court" in the section and the proviso are newly added; when the husband is absent or is under 18 years or an idiot or lunatic, etc., some other person may complain with the leave of the Court.

Object of the section.—It is true that the law is designed to protect the rights of the husband but that is not the sole aim. The violation of the rights of guardianship is also entitled to its protection. The object of the law is not so much to afford protection to the husband or the guardian as to inflict punishment on those who interfere with the sacred relation of marriage. The restriction in this section is not intended to afford immunity to the offender, but to prevent a person unconnected with the woman from giving publicity to a matter which neither the husband nor guardian is willing to agitate, 17 Cr. L.J. 353 at 354=35 Ind. Cas. 667. The offences of adultery and enticing away a married woman are obviously of a private character and hence the limit on the person by whom initiation of proceedings is allowed, for it would be eminently undesirable that any one should have it in his power to drag into a Court of Justice offences of this sort, and thus guard against the mischief which would otherwise be done, 23 B. 181 at 183. Without a formal complaint from the husband or the care-taker during his absence, a Court is forbidden to take cognizance of these offences and the Legislature has left it entirely to the husband or the care-taker to decide whether he shall bring the matter which affects his honour before a public Court, and trial by the Court may necessarily aggravate the injury he had already suffered by giving publicity to what has occurred. S. 497, I.P.C., deals with adultery and S. 498, I.P.C., with enticing away a married woman. These offences are compoundable by the husband alone. An agent prosecuting under this section is not competent to compound under S. 315, *infra*, 24 Cr. L.J. 120=71 Ind. Cas. 243; 24 Cr. L.J. 780=74 Ind. Cas. 441.

No Court shall take cognizance except upon a complaint.—The death of a husband after lodging a complaint does not necessarily put an end to the prosecution for adultery, since the section requires only that the prosecution is to be initiated by a formal complaint by him, 4 M.H.C.R. Appx. 55. See also 8 Cr. L.J. 190, where it was held that once the Court gets jurisdiction to inquire into the offence by virtue of a complaint made by the husband, his subsequent death will not divest the Court of its jurisdiction and there cannot be abatement of a criminal prosecution. But when the statement by the husband is not a complaint within this section it is not open to another after the husband's death to revive the proceedings which had been dropped, 5 Cr. L. Rev. 313=85 Cr. L.J. 466=29 Ind. Cas. 93.

The word 'complaint' in this section must be taken as including not only a written complaint but also the examination of the complainant at any rate prior to the issue of process, Ratanlal 584; 43 M.L.J. 543=(1923) M.W.N. 878 which did not follow the view taken in 13 L.W. 695=(1921) M.W.N. 514 to the effect that a sworn statement taken under S. 200 *infra* cannot be read as part of the complaint to ascertain the specific charges preferred by the complainant. See also (1923) M.W.N. 470. Statement made by the husband in the

course of his deposition could not be taken as a complaint as defined in S. 4 (1) (h), *supra*, within the meaning of this section, 14 Bom. L.R. 141=13 Cr. L.J. 287=14 Ind. Cas. 671. The complaint referred to in this section means a complaint of an offence under S. 493 or S. 499, I.P.C., and not any complaint. Complaint is defined in S. 4 (1) (h) *supra* and information laid before the police cannot be regarded as a complaint within this section, 30 C. 910; 23 M. 626; 6 A. 96; 11 M. 443; 14 C. 707; 43 M.L.J. 564=16 L.W. 494. The fact that in a charge of rape by the wife the husband appears as a prosecution witness cannot be regarded as the institution of a complaint by him within this section, 5 A. 233; 27 M. 61; 29 C. 415; 2 Cr. L. Rev. 377, or when a conviction for rape is set aside on the ground that it was only a case of adultery the accused cannot be convicted of adultery if no complaint was made by the husband to give jurisdiction to the Court under this section. The objection is not a mere quibble of law because it does not follow that because a husband may wish to punish a person who had committed rape on his wife, will desire to continue proceedings when it turns out that she was a consenting party to the act, 14 Cr. L.J. 284=19 Ind. Cas. 716 following 5 A. 233. A conviction had for an offence under S. 493 I.P.C. without a complaint by the aggrieved person is illegal and cannot be sustained, Weir II, 235; 31 B. 218; where a husband charges his wife with theft of jewels and also alleges that the person to whose house she went with the jewels had enticed her away, and presents a complaint not with the object of getting the Magistrate to take action under S. 493, I.P.C., but simply to coerce the wife to return the jewel, it was held that there was no complaint under this section which could be proceeded with after the death of the husband, 5 Cr. L. Rev. 313=16 Cr. L.J. 466=29 Ind. Cas. 98.

By the husband of the woman.—The intention of the Legislature is to prevent a Magistrate taking cognizance of offences, namely, those connected with marriage, on his own motion or on the complaint of strangers but only on the complaint of the husband or some other person authorized to make the complaint on his behalf. Where a married woman is defamed by imputation of unchastity, her husband is the person aggrieved under this section entitled to prefer a complaint of defamation. 47 M.L.J. 746=20 L.W. 921; 5 Lah. 101 following 14 M. 379 and 25 B. 151 (F.B.).

Or in his absence by some person who had care of the woman.—Primarily the husband is to lodge a complaint for adultery or for enticing, and an exception is made only in the case of a person having the care of the woman during the husband's absence, to complain. If the wife is under the care of the husband at the time of the offence, and the husband does not want that proceeding should be instituted, it is not open to a person, whether he be the father or brother, to institute a complaint. But at the time of the offence if the wife was left under the care of another, the fact that the husband stands by, will not prevent the temporary guardian from preferring the complaint, 17 Cr. L.J. 353 at 364=33 Ind. Cas. 567. Before the amendment when the husband is present and is incapable of complaining, say a minor, a lunatic or an idiot or a paralytic, he cannot be said to be "absent" and another person cannot lodge a complaint, as the terms of this section expressly prohibit such a procedure, but the addition of the new proviso to the section provides for the making of a complaint where the husband of the woman is an incapacitated person through a guardian or other person lawfully entrusted with the care and custody of the person or property of such person. The words "some person who had care of such woman" certainly do not imply that there should be any express delegation of trust by the husband to another before the latter could be competent to file a complaint. The words mean a person who had care of the woman on the husband's behalf during the latter's absence. It may sometimes be absolutely necessary that when the husband is away a complaint should be promptly filed, whether his absence be for a few days or more. There is a probability that unless prompt action is taken, the accused may entirely vanish from the scene with the woman whom he had enticed and it may not be possible to trace their whereabouts. It is also necessary under the amended section for a valid complaint, that the leave of the Court must be expressly given to the complainant and where the proceedings of the Magistrate

showed that he accorded such leave, the provisions of the section would be held to be substantially complied with even though such leave was not expressly recorded, 27 Cr. L.J. 415 = 93 Ind. Cas. 78. Unless it is shown that the husband is absent, a father cannot institute proceedings for enticing a married woman and leave of the Court is also necessary for instituting the complaint when the husband is found absent. The fact that the husband was ashamed to go to Court and did not prefer a complaint himself is not *absence* within the meaning of this section, 28 L.W. (Sh. n.) 14 but where the wife was not under the care of her husband at the time of the offence and the husband knowing what had happened went away and the complaint was filed by the father, without consulting the husband, the latter not being anxious to complain, it was held that the fact that the husband stood by did not prevent the temporary guardian from preferring the complaint, 17 Cr. L.J. 363 = 35 Ind. Cas. 667. The husband must be absent from the place at the time the offence is committed, 9 Cr. L.J. 450. The words 'in his absence' refer to the original entrustment and not to the time when the complaint was made, 17 Cr. L.J. 363 = 35 Ind. Cas. 667.

Proviso.—The proviso newly added allows other persons acting with the leave of the Court on behalf of the husband when he is a minor, an idiot or lunatic or one unable to make a complaint owing to sickness or infirmity, to prefer a complaint. The decision in 23 Cr. L.J. 613 = 68 Ind. Cas. 837 is no longer law.

199A. *When in any case falling under section 198 or section 199, the person on whose behalf the complaint is sought to be made is under the age of eighteen years or is a lunatic, and the person applying for leave has not been appointed or declared by competent authority to be the guardian of the person of the said minor or lunatic, and the Court is satisfied that there is a guardian so appointed or declared, notice shall be given to such guardian, and the Court shall, before granting the application, give him a reasonable opportunity of objecting to the granting thereof.*

Objection by lawful guardian to complaint by person other than person aggrieved.

This section is new and is enacted to safeguard the rights of guardians legally appointed. When a complaint is filed not by a husband but by some person on account of the latter's minority or incapacity not being his guardian appointed by a competent authority, the Court is bound to give notice of the application, if it is satisfied that there is a guardian already appointed by a competent authority and give such guardian a reasonable opportunity of objecting to the granting of leave to complain by the Court.

CHAPTER XVI.

OF COMPLAINTS TO MAGISTRATES.

Scope of the Chapter.—The object of the procedure prescribed by this Chapter which is entitled "Of Complaints to Magistrates" is the separation of unfounded from substantial cases at the outset, and to prevent innocent persons from being brought into Court and subjected to annoyance on frivolous charges, 37 M. 181 at 183; on receipt of a complaint by a Magistrate under the law four courses are open to him (1) he may order an inquiry under S. 202, *infra*, (2) he may dismiss the complaint under S. 203, *infra*, (3) he may issue process to the accused under S. 204, *infra*, (4) he may postpone the commencement of the proceedings under S. 214, *infra*, 43 C.L.J. 389 at 391.

200. A Magistrate taking cognizance of an offence on complaint shall at once examine the complainant upon oath, and the substance of the examination shall be reduced to writing and shall be signed by the complainant, and also by the Magistrate :

Provided as follows:—

(a) when the complaint is made in writing, nothing herein contained shall be deemed to require a Magistrate to examine the complainant before transferring the case under section 192;

(aa) when the complaint is made in writing, nothing herein contained shall be deemed to require the examination of a complainant in any case in which the complaint has been made by a Court or by a public servant acting or purporting to act in the discharge of his official duties ;

(b) where the Magistrate is a Presidency Magistrate, such examination may be on oath or not as the Magistrate in each case thinks fit, and *where the complaint is made in writing** need not be reduced to writing ; but the Magistrate may, if he thinks fit, before the matter of the complaint is brought before him, require it to be reduced to writing ;

(c) when the case has been transferred under section 192, and the Magistrate so transferring it has already examined the complainant, the Magistrate to whom it is so transferred shall not be bound to re-examine the complainant.

Amendment.—The opening words "subject to the provisions of S. 476," have now been omitted and proviso (aa) is added allowing a Magistrate to take cognizance on a written com-

Act II of 1926, S. 3.

Object of the section.—The object aimed at by the examination under this section is to ascertain whether there is a *prima facie* case and to prevent unnecessary issue of process in cases where the examination of the complainant would show that the complaint was really false, frivolous, or vexatious and further proceedings will tend merely to harass accused persons and waste public time, 10 A.L.J. 79=13 Cr. L.J. 704=16 Ind. Cas. 512. When a complaint is in writing and is sufficiently clear it is sufficient compliance with this section if the Magistrate reads over the complaint and asks him to subscribe to it on oath and it is only when it is obscure or vague that the Magistrate is bound to examine the complainant at length for clearly ascertaining the allegations on which it is based, 26 Cr. L.J. 1101=38 Ind. Cas. 189. The examination of the complainant under this section is a valuable safe-guard that the Legislature has provided and must be scrupulously observed and insisted upon. Complaint petitions are not generally drafted by complainants themselves and it is therefore necessary that before action is taken upon written complaints filed in Court, the complainants should be examined on oath, 20 Cr. L.J. 247=49 Ind. Cas. 919 followed in 21 Cr. L.J. 779=58 Ind. Cas. 459. The evident object of

* Inserted by Act II of 1926, S. 3.

showed that he accorded such leave, the provisions of the section would be held to be substantially complied with even though such leave was not expressly recorded, 27 Cr. L.J. 415 = 93 Ind. Cas. 78. Unless it is shown that the husband is absent, a father cannot institute proceedings for enticing a married woman and leave of the Court is also necessary for instituting the complaint when the husband is found absent. The fact that the husband was ashamed to go to Court and did not prefer a complaint himself is not absence within the meaning of this section, 28 L.W. (Sh. n.) 14 but where the wife was not under the care of her husband at the time of the offence and the husband knowing what had happened went away and the complaint was filed by the father, without consulting the husband, the latter not being anxious to complain, it was held that the fact that the husband stood by did not prevent the temporary guardian from preferring the complaint, 17 Cr. L.J. 363 = 35 Ind. Cas. 667. The husband must be absent from the place at the time the offence is committed, 9 Cr. L.J. 450. The words 'in his absence' refer to the original entrustment and not to the time when the complaint was made, 17 Cr. L.J. 363 = 35 Ind. Cas. 667.

Proviso.—The proviso newly added allows other persons acting with the leave of the Court on behalf of the husband when he is a minor, an idiot or lunatic or one unable to make a complaint owing to sickness or infirmity, to prefer a complaint. The decision in 23 Cr. L.J. 613 = 68 Ind. Cas. 837 is no longer law.

199A. *When in any case falling under section 198 or section 199, the person on whose behalf the complaint is sought to be made is under the age of eighteen years or is a lunatic, and the person applying for leave has not been appointed or declared by competent authority to be the guardian of the person of the said minor or lunatic, and the Court is satisfied that there is a guardian so appointed or declared, notice shall be given to such guardian, and the Court shall, before granting the application, give him a reasonable opportunity of objecting to the granting thereof.*

Objection by lawful guardian to complaint by person other than person aggrieved.

This section is new and is enacted to safeguard the rights of guardians legally appointed. When a complaint is filed not by a husband but by some person on account of the latter's minority or incapacity not being his guardian appointed by a competent authority, the Court is bound to give notice of the application, if it is satisfied that there is a guardian already appointed by a competent authority and give such guardian a reasonable opportunity of objecting to the granting of leave to complain by the Court.

CHAPTER XVI.

OF COMPLAINTS TO MAGISTRATES.

Scope of the Chapter—The object of the procedure prescribed by this Chapter which is entitled "Of Complaints to Magistrates" is the separation of unfounded from substantial cases at the outset, and to prevent innocent persons from being brought into Court and subjected to annoyance on frivolous charges, 37 M. 181 at 183; on receipt of a complaint by a Magistrate under the law four courses are open to him (1) he may order an inquiry under S. 202, *infra*, (2) he may dismiss the complaint under S. 203, *infra*, (3) he may issue process to the accused under S. 201, *infra*, (4) he may postpone the commencement of the proceedings under S. 214, *infra*, 49 C.L.J. 388 at 391.

200. A Magistrate taking cognizance of an offence on complaint shall at once examine the complainant upon oath, and the substance of the examination shall be reduced to writing and shall be signed by the complainant, and also by the Magistrate :

Provided as follows :—

(a) when the complaint is made in writing, nothing herein contained shall be deemed to require a Magistrate to examine the complainant before transferring the case under section 192;

(aa) *when the complaint is made in writing, nothing herein contained shall be deemed to require the examination of a complainant in any case in which the complaint has been made by a Court or by a public servant acting or purporting to act in the discharge of his official duties ;*

(b) where the Magistrate is a Presidency Magistrate, such examination may be on oath or not as the Magistrate in each case thinks fit, and *where the complaint is made in writing** need not be reduced to writing ; but the Magistrate may, if he thinks fit, before the matter of the complaint is brought before him, require it to be reduced to writing ;

(c) when the case has been transferred under section 192, and the Magistrate so transferring it has already examined the complainant, the Magistrate to whom it is so transferred shall not be bound to re-examine the complainant.

Amendment.—The opening words “subject to the provisions of S. 476,” have now been omitted and proviso (aa) is added allowing a Magistrate to take cognizance on a written complaint by a presiding officer of a Court and by a public servant acting, or purporting to act in the execution of his official duties without examining the complainant on oath, thus avoiding possible inconvenience to public officials. The italicised words in proviso (b) were added by Act II of 1926, S. 8.

Object of the section.—The object aimed at by the examination under this section is to ascertain whether there is a *prima facie* case and to prevent unnecessary issue of process in cases where the examination of the complainant would show that the complaint was really false, frivolous, or vexatious and further proceedings will tend merely to harass accused persons and waste public time, 10 A.L.J. 79=13 Cr. L.J. 704=16 Ind. Cas. 512. When a complaint is in writing and is sufficiently clear it is sufficient compliance with this section if the Magistrate reads over the complaint and asks him to subscribe to it on oath and it is only when it is obscure or vague that the Magistrate is bound to examine the complainant at length for clearly ascertaining the allegations on which it is based, 26 Cr. L.J. 1101=83 Ind. Cas. 189. The examination of the complainant under this section is a valuable safe-guard that the Legislature has provided and must be scrupulously observed and insisted upon. Complaint petitions are not generally drafted by complainants themselves and it is therefore necessary that before action is taken upon written complaints filed in Court, the complainants should be examined on oath, 20 Cr. L.J. 247=49 Ind. Cas. 919 followed in 21 Cr. L.J. 779=58 Ind. Cas. 459. The evident object of

* Inserted by Act II of 1926, S. 8.

getting the substance of the examination of the complainant signed, is to make use of it in case of need as against the complainant's subsequent deposition as a witness for starting against him a prosecution for perjury for making two contradictory statements. The reading over of a deposition of a witness is an essential condition to sustain a prosecution for perjury. But this section merely requires the substance of the complainant's oral examination on oath recorded by the Magistrate, to be signed by him. To hold that the Magistrate should read over the statement recorded by him is importing into section something which would certainly be very desirable especially if the statement is to be ultimately used for contradicting him. The principle underlying S. 860 (1), *infra*, should be made applicable on grounds of public policy to sworn statements if the accuracy of the record is to be vouchsafed. The provision is not in the section and is in the province of the Legislature 26 Cr. L.J. 1401=89 Ind. Cas. 713.

Taking cognizance of the offence.—The expression "taking cognizance" is not defined in the Code. It means action taken with a view to prosecute an offender for an offence and denotes a stage preliminary to the commencement of an inquiry or trial. A Court may be empowered to take cognizance of an offence and yet not be empowered to "inquire" or "try." S. 201, *infra*, makes provision for such cases. S. 190, *supra*, mentions the ordinary ways in which a Magistrate takes cognizance of an offence; where there was only an oral complaint to a Magistrate who did not record the same under this section, nor was there a police-report, nor did the Magistrate profess to act under S. 190 (1) (c), *supra*, it was held that the Magistrate had not duly taken cognizance of the offence under S. 190, *supra*, and he had no power to arrest and remand the accused to custody, Weir II, 241. Once a Magistrate takes cognizance of a complaint he ought to proceed under Ss. 202 to 203, *infra*. He cannot act otherwise than under those sections. If he does not choose to summon the accused he may direct an inquiry under S. 202, *infra*, but he cannot direct the police to treat the complaint as first information and investigate thereon. There is no provision in the Code justifying such a course, 23 Cr. L.J. 374=103 Ind. Cas. 333.

Shall at once examine the complainant on oath.—The provisions of the Code as to procedure should be strictly complied with. Complaints are very frequently drawn up by ignorant persons or by careless petition writers and the examination of the complainant may and should be of much assistance in eliciting the facts on which the complainant desires the Court to take cognizance and how much of the facts complainant himself has knowledge of, 18 A. 221. Non-observance of the provisions of the Code leads to much confusion and waste of public time, not to speak of putting the parties to unnecessary expense, 37 A. 628. It is imperative that the complainant be examined at once, 13 B. 590 (F.B.); 18 A. 221, 3 B.L.R. (Ap. Cr.) 53; 4 M.H.C.R. 162; 10 A.L.J. 79=13 Cr. L.J. 704=16 Ind. Cas. 513, 10 M.L.T. 120=(1911) 2 M.W.N. 74=12 Cr. L.J. 453=11 Ind. Cas. 999; and the facts that the allegations were fully set out in the written complaint will not absolve the Magistrate from examining the complainant on oath forthwith, 3 C.W.N. 17. But omission to examine a complainant is only an irregularity cured by S. 537 *infra*, 4 Lah. 359; 1 Han. 517; 43 M.L.J. 710=(1922) M.W.N. 631=16 L.W. 220=23 Cr. L.J. 691=69 Ind. Cas. 371; 30 C. 923; 12 Cr. L.J. 533=12 Ind. Cas. 515; 33 M. 606; 11 M. 443; 13 L.W. 461=25 Cr. L.J. 730=81 Ind. Cas. 218 followed in 55 M.L.J. 715=23 L.W. 621=1928 M.W.N. 1235=30 Cr. L.J. 432=115 Ind. Cas. 527; 30 Cr. L.J. 706=116 Ind. Cas. 722. The person prejudiced by such an irregularity is the complainant and when the case ends in a conviction he has no grievance and the accused cannot in general complain of the irregularity, as the omission to take a sworn statement from the complainant cannot prejudice him. If the complainant is not examined, it must be a matter of evidence to be decided by the Court hearing the case whether the evidence without that of the complainant is sufficient for a conviction, 19 L.W. 461=25 Cr. L.J. 730=31 Ind. Cas. 218; 15 L.W. 220. The object of the provision as to examination of the complainant at once on oath is really to prevent issue of process to accused in cases of frivolous or vexatious complaints. Such examination cannot be regarded as part of the complaint to ascertain what specific charges are preferred by the complainant, 13 L.W. 693=(1922) M.W.N. 353. The words "at once" in this section clearly indicate that a complaint must ordinarily be presented in

person; otherwise a Magistrate should be very loath to take cognizance and should not accept the complaint not signed by the alleged complainant and not preferred by a person duly authorized to institute the specific complaint. No process should be issued against accused unless the Magistrate has first examined the complainant and when a *yardanashin* makes a complaint the Magistrate may take cognizance if satisfied that it was really her complaint by whatever means it reaches him, and he may issue a commission under S. 503, *infra*, for the examination required by this section, but a Magistrate has no power to issue process to an accused person when a complaint was presented to him by the alleged agent of a *yardanashin* on her behalf without the complaint being signed by her and without a power-of-attorney filed along with the complaint, 42 C. 19. A complaint which is otherwise proper is not illegal, merely because the person making it has no personal knowledge of the offence committed, 21 Cr. L.J. 346=55 Ind. Cas. 682 but in such a case the Magistrate must satisfy himself fully that a case has been made out for issue of process, 10 C.W.N. 1090. A Presidency Magistrate need not examine the complainant on oath at once; complaints to the Presidency Magistrates are generally made by means of an affidavit or solemn affirmation before the Magistrate himself and so no further examination on oath is necessary. See 35 M. 606. If a complaint is dismissed without examining the complainant under this section, the Magistrate cannot call upon the complainant to show cause why he should not be proceeded against under S. 211, I.P.O. 23 Bom. L.R. 490=27 Cr. L.J. 740=95 Ind. Cas. 68.

Substance of examination shall be reduced to writing.—The Legislature does require that a Magistrate taking cognizance of a complaint shall examine the complainant upon oath and the substance of that examination is by law required to be reduced to writing and that writing must be and was intended to be distinct from the complaint, and merely asking the complainant to swear to the complaint and sign it, is not sufficient compliance with law, 18 A. 221. The examination will certainly be of much assistance in eliciting the actual facts on which the complainant desires the Magistrate to take cognizance and how much of the facts alleged, the complainant knows personally, 18 A. 221.

Shall be signed by complainant.—When the complainant did not sign the examination which was reduced to writing by the Magistrate under this section, it was held that it cannot subsequently be used as evidence of the statement made by the complainant in a prosecution against him for perjury under S. 193, I.P.O., 6 C.W.N. 840.

Proviso (a) was intended to meet decisions like, 9 B.L.R. 146 (F.B.); 8 B.L.R. 19 which held that referring the case to a Subordinate Magistrate for disposal before reducing the examination of complainant to writing was illegal.

Proviso (aa)—This proviso has been newly added allowing a Magistrate to take cognizance of written complaint by the presiding officer of a Court and by a public servant acting or purporting to act in the discharge of his official duties under Ss. 195 and 476 and 476A, *infra*, without examining such presiding officer or public servant on oath. This is enacted for the purpose of avoiding inconvenience to public officials, of appearing before Magistrates when exercising their statutory functions. When a police-officer makes a report in writing even in a non-cognizable offence, the Court can take cognizance without examining the police-officer on oath as a complainant, 49 M. 525 (F.B.).

Sub-section (b).—The Municipal Magistrate of Calcutta is a Presidency Magistrate and in cases of complaint made to him under the provisions of the Calcutta Municipal Act, he is required to examine the complainant subject to the provisions of this sub-section and any provision in the Municipal Act must be taken to be subject to the provisions of this sub-section and where the provisions of this sub-section have not been complied with, the conviction and sentence should be set aside, 32 C.W.N. 1091=45 C.L.J. 190=30 Cr. L.J. 231=114 Ind. Cas. 82.

Magistrate may require complaint to be reduced to writing.—A complaint under S. 4 (1) (h), *supra*, may be oral, but a Presidency Magistrate may require the complaint to be reduced to writing and generally in Presidency towns complaints are made by affidavits, sworn before the Magistrate. The examination referred to in this section by a Presidency

Magistrate is not therefore obligatory, but the Magistrate is not excused from the necessity of placing on record the necessary evidence of complainant's authority to file a complaint, 32 C. 469 at 472. From the wording of this section and the next it is clear that a complaint need not be in writing but can be oral.

201. (1) If the complaint has been made in writing to a Magistrate who is not competent to take cognizance of the case, he shall return the complaint for presentation to the proper Court with an endorsement to that effect.

Procedure by Magistrate not competent to take cognizance of the case.

(2) If the complaint has not been made in writing, such Magistrate shall direct the complainant to the proper Court.

Magistrate not competent to take cognizance.—If a Magistrate is not competent to take cognizance of a case, he shall return the complaint for presentation to the proper court with an endorsement to that effect and he is not entitled to examine the complainant on oath under S. 200, *supra*, 10 C.W.N. 1086. A Magistrate may not be competent because (1) of his not being empowered under S. 190, *supra*, or (2) of his not having local jurisdiction or (3) of want of sanction under Ss. 197 to 199, *supra*, or (4) of any special or local law, or (5) of his being not empowered to try under Sch. II, col. 8 or to commit for trial under S. 206, *infra*, or (6) of the accused claiming the special privileges of Chapter XXXIII of the Code.

Shall return the complaint.—If a Magistrate on a perusal of the written complaint finds he has no jurisdiction to entertain the complaint, his duty is to return that complaint to be presented to the proper Court, 5 Pat. 477, or he may send the case to the Magistrate or Court competent to try the offence disclosed in the complaint, 17 M.L.J. 559 = 7 Cr. L.J. 6. He need not or rather should not examine the complainant in such a case, 10 C.W.N. 1086.

Sub-section (2).—This sub-section which was introduced in the 1898 Code permits an oral complaint being made. See 1 Ran. 549 at 552.

202. (1) Any Magistrate, on receipt of a complaint of an offence of which he is authorized to take cognizance, or which has been transferred to him under section 192, may, if he thinks fit, for reasons to be recorded in writing,

Postponement for issue of process

postpone the issue of process for compelling the attendance of the person complained against, and either inquire into the case himself or, if he is a Magistrate other than a Magistrate of the third class, direct an inquiry or investigation to be made by any Magistrate subordinate to him, or by a police-officer, or by such other person as he thinks fit, for the purpose of ascertaining the truth or falsehood of the complaint:

*Provided that *save where the complaint has been made by a court* no such direction shall be made unless the complainant has been examined on oath under the provisions of section 200.*

(b) [Omitted by Act II of 1926, S. 6.]

* Added by Act II of 1926, S. 4.

(2) *If any inquiry or investigation under this section is made by a person not being a Magistrate or a police-officer, such person shall exercise all the powers conferred by this Code on an officer in charge of a police-station, except that he shall not have power to arrest without warrant.*

(2A) *Any Magistrate inquiring into a case under this section may, if he thinks fit, take evidence of witnesses on oath.*

(3) This section applies also to the police in the towns of Calcutta and Bombay.

Amendment.—Sub-section (1) has been redrafted with a proviso. Sub-section (2) also has been redrafted; Sub section (2-A) is new. Proviso (b) to sub-section (1) has been amended by Act II of 1926 by omitting the same and adding the same to the first portion of the proviso. The following are the principal changes made by the amendment:—

(1) Third class Magistrates have been given power to make preliminary inquiries personally; (2) authority to make a preliminary inquiry has been given in any case in which the Magistrate thinks fit for reasons to be recorded in writing. The only ground contemplated by the present section is if the Magistrate is not satisfied as to the truth of the complaint. This is thought to be undesirable. (3) The words "inquiry or investigation" have been substituted for the expression "previous local investigation" which at present the Magistrate is empowered to order and power is given to take evidence upon oath in the case of such preliminary inquiry. (4) Presidency Magistrates are enabled to act under this section without special authorization.—*Statement of Objects and Reasons.*

Scope and object of the section.—An inquiry or investigation under this section is designed to afford the Magistrate an opportunity of either confirming or removing such hesitation as he may feel in respect of issuing process against the accused; the nature of the inquiry varies with the circumstances of each case, and it is certainly not contemplated that it should be always exhaustive. Frequently all that is required is the elucidation of some minor point or the summary determination of the sufficiency of the available evidence, but least of all is the inquiry—a preliminary trial of the accused at which he is entitled to adduce his evidence before process can issue upon him. The degree of formality of the proceedings and the width and depth of the inquiry is entirely in the discretion of the Magistrate. The provision is enabling and not obligatory as soon as he has satisfied himself, upon the materials placed before him that process should issue, its object is fulfilled and it is certainly not incumbent on him ordinarily or expedient that he should practically enter upon the trial of the case, 30 Cr. L.J. 551 at 558=116 Ind. Cas. 45. This section applies only to complaints of offences. 'Offence' is defined in S 4 (1) (o), *supra*. A proceeding under S. 107, *supra*, cannot be regarded as a complaint of an offence and therefore a Magistrate cannot act under this and S. 203, *infra*, with regard to a proceeding under S. 107, *supra*, 29 Cr. L.J. 865=111 Ind. Cas. 450; 23 Cr. L.J. 267=107 Ind. Cas. 603. Similarly an application for maintenance under S. 433, *infra*, is not a complaint of an offence and the Magistrate is not empowered to send such an application for inquiry and report, 1935 P.R. (Cr. J.) 25=2 Cr. L.J. 421, approved in 23 Cr. L.J. 903=111 Ind. Cas. 657. When a complaint of Court is made by a Civil Court and the records submitted to a Magistrate for inquiry into an alleged offence under S. 476, *infra*, there would be no room for a preliminary inquiry which is contemplated under this section as the Civil Court when acting under S. 476, *infra*, forms a judicial opinion on the evidence before it as to the necessity of a prosecution and such complaint of Court cannot be dealt with under this and S. 203, *supra*, 21 Cr. L.J. 310=55 Ind. Cas. 470 where 16 Cr. L.J. 161=27 Ind. Cas. 545 is followed. The object of the section is to prevent the harassing of innocent persons by an indiscriminate issue of process in cases where there is no sufficient ground for proceeding against them. Unless and until a Magistrate is satisfied that there is in his judgment sufficient ground for proceeding he

should not compel the appearance of the accused before him. The inquiry is to be held to enable him to see whether there is sufficient ground, 49 M. 918 (F.B.). Process is not to issue where there exists doubt as to the truth of the complaint, [1921] Pat 31=21 Cr. L.J. 519=55 Ind. Cas. 775. The procedure of calling upon an accused person to render an explanation to enable the Magistrate to decide if he should issue process, has been condemned on several occasions. It is not fair to the accused that he should be called upon to state his defence before the prosecution have laid all their cards on the table. Though there is no obligation on him either to appear or to tender an explanation in the preliminary inquiry, a refusal or failure on his part to attend in answer to a rule *nisi* issued by a Magistrate is likely to prejudice the mind of the Magistrate and a compliance therewith, to expose him to serious risks, 27 Cr. L.J. 711 at 713=94 Ind. Cas. 903; See 30 C.W.N. 312 where 40 C. 444 is followed. The practice of calling upon the accused why a summons or warrant should not issue against him is, however much advantageous it may be in certain cases, though not illegal, is clearly opposed to the general principles of the Code, and should not be allowed to prevail and must be put an end to. An accused person should not be called upon to disclose his defence unless the Court is satisfied that *prima facie* case has been made out which he should be called upon to rebut, 43 M. 918 (F.B.) following 47 A. 722 and 49 M. 926. See also 29 Cr. L.J. 39=106 Ind. Cas. 455. The Full Bench ruling has condemned in the strongest terms the practice prevailing in the Presidency Towns of the indiscriminate practice of issuing a notice to show cause why a summons should not issue. The decisions in 5 Bom. L.R. 91 and 28 A. 421, were not accepted as laying down the correct law. Notice to show cause why process should not issue is a mere intimation that the Magistrate intends to take action upon the complaint, but does not amount either to a summons or to an invitation to a party charged to appear or to take any other steps in the matter. Moreover it is not included in the fifth schedule of the Code as one of the forms to be issued by the Court, nor does it appear to be prescribed or contemplated by the Code, 37 M. 181 at 182 approved in 49 M. 913 (F.B.). In Calcutta the learned Chief Justice in 27 C.W.N. 196=36 C. L.J. 414=24 Cr. L.J. 333=72 Ind. Cas. 173, remarked thus on this practice. "The Magistrate did not act in accordance with the law contained in S. 202 and the Sessions Judge was right in saying that the procedure was improper and irregular. I hope this judgment and the judgment in 21 C.W.N. 127=25 C.L.J. 606=17 Cr. L.J. 396=35 Ind. Cas. 528 will be brought to the notice of the Magistrate and they will observe in this respect the plain provisions of the Code." Under the Code a wide discretion is given to a Magistrate with respect to the grant or refusal of process and in the interests of the community generally, it is essential that Magistrates should be vested with an ample discretion in respect of the issue of the process. Except as otherwise provided by statute anybody is entitled to prefer a complaint in a Criminal Court, and in India where the Grand Jury system does not exist as an additional shield to innocent persons against whom unfounded complaints are laid, it is specially necessary that caution and discretion should be used in issuing summons. An accused ought not to be dragged off to answer a charge merely because a complaint has been lodged. "An extensive power is confided in the Justices in their capacity as Justices to be exercised judicially. Discretion means, something to be done according to the rules of reason and justice, not according to private opinion, according to law, and not humour. It is not to be arbitrary and fanciful but legal and regular. It must be exercised within the limits to which an honest man competent in the discharge of his office ought to confine himself." A Magistrate should therefore proceed according to the provisions of the Code and if he is of opinion that a *prima facie* case is made out, he ought to issue process and cannot refuse to do so merely because he thinks it unlikely that proceedings will result in a conviction. If he does so at that stage it would be guess work and speculation, which he is not permitted to do. It is settled practice that if the Magistrate having followed the procedure laid down in the Code exceeded a judicial discretion as to whether he should issue process or not the superior tribunal will be slow to disturb his order, 53 C. 606; But the Bombay High Court has taken a slightly different view in 52 B. 448 following an earlier decision in 5 Bom. L.R. 91 not accepted as correct in Madras. The Bombay view of what is ordinarily contemplated by this section, is merely a preliminary examination of the complainant and his

witnesses or such of them as the Magistrate deems fit to examine in the absence of the accused. But it is going too far to say that the section is limited to an inquiry of that kind and if the Magistrate deems it desirable for his inquiry to give the accused an opportunity of appearing before him and stating what he had to say about the accusation and even accepts and considers documentary evidence which he produces he is committing an illegality. There is a clear distinction between considering whether such a procedure is illegal and whether such procedure is desirable. The undesirability of such a procedure is pointed out in 49 M. 918 (F.B.) and 40 C. 444. The section in wide terms gives power to the Magistrate to inquire into the case himself. The words 'the case' are very wide and if the Magistrate considers that the accused should be given an opportunity of being heard there is nothing in the section itself debarring him from doing so. If the police and even a private person can make inquiry under this section *a fortiori* a Magistrate making a preliminary inquiry can do so. Therefore there is nothing absolutely illegal in the issue of a notice by the Magistrate to the accused under this section and the Magistrate after his preliminary inquiry should say plainly whether he dismisses the complaint or he thinks that a summons or a warrant is issued to the accused to appear before him. But see 49 C.L.J. 422 where it was held that a Magistrate acts illegally in allowing an accused to appear and cross-examine witnesses at that stage and the illegal act of the Magistrate does not create a right in the accused to appear at every stage. When a man files a complaint and supports it by his oath rendering himself liable to a prosecution if it is false, he is entitled to be believed unless there is some apparent reason for disbelieving him, and to have the person complained against to be brought before the Court and tried, 17 C.W.N. 290; 11 A.L.J. 754=14 Cr. L.J. 493=20 Ind. Cas. 749. It is undesirable that the inquiry should be prolonged by the cross-examination of the complainant's witnesses and hearing arguments and there is no reason either in common sense or in law why the accused should not be present at the inquiry, 26 Cr. L.J. 1394=89 Ind. Cas. 706. But the accused has no right to be present while the Magistrate is holding the inquiry under this section, 43 C.L.J. 422. It may often be a matter of convenience both to allow the accused to be present and to allow any legal adviser to watch the proceedings, but the grant of such a concession by the Magistrate is a mere act of grace and the accused has no innate right to it. Proceedings under this section are not proceedings *inter partes* but they are instituted and conducted by the Magistrate to enable him to satisfy himself whether there is or not sufficient ground for issuing process and it is not until process is issued, the matter becomes a case, 27 Cr. L.J. 494=93 Ind. Cas. 894. The procedure laid down in this section should be strictly complied with and unless this is done, the order will be illegal, 11 A.L.J. 921=15 Cr. L.J. 21=22 Ind. Cas. 165. This section has application only to a complaint of an offence on which the Magistrate does not deem it fit to issue process, *Weir II*, 293. Under this section a Magistrate has the option of only one out of two alternatives, *vis.*, either to inquire into the case himself or direct a previous local investigation. But he cannot have recourse to both the alternatives. If a Magistrate having partially inquired into a case, then directs a local investigation he commits an irregularity and if he suffers his mind to be influenced prejudicially to the accused by the results of such local investigation, his proceedings will be vitiated, 44 A. 550. First, there must be a complaint within the meaning of S. 4 (1), (h) *supra*, which is distinct from information under S. 190 (1), *supra*, and secondly, the Magistrate authorized to take cognizance thinks fit for reasons to be recorded in writing after examining the complainant to postpone the issue of process for compelling attendance of the accused while he himself inquires into the matter or an investigation is made by another, 37 M. 181 at 183 *followed* in 49 M. 918 (F.B.); 10 A.L.J. 79=13 Cr. L.J. 704=16 Ind. Cas. 512. Any Magistrate authorized to take cognizance may postpone issue of process. The section as it stood before the amendment permitted only the Chief Presidency Magistrate, Presidency Magistrates authorized by Government in this behalf, and any Magistrate of first or second class, to act under this section. It was rather strange that third-class Magistrate who may be empowered under S. 190, *supra*, and S. 14 *infra*, to take cognizance of complaints could not be empowered to act under this section, but now the amendment removes this unnecessary restriction on third-class Magistrates and Presidency Magistrates. The accused person has no *locus standi* to be present at the

preliminary inquiry under this section and to be heard, 29 Cr. L.J. 1059=91 Ind. Cas. 563. The practice of hearing arguments on behalf of the accused in a preliminary inquiry held under this section is not authorized by law and ought to be condemned, 30 C.W.N. 312=28 Cr. L.J. 305=84 Ind. Cas. 449 where 40 C. 444 is followed; see 49 M. 918 (F.B.); 14 C. 131; 40 C 444; 47 A. 722, but see 52 B. 448 following 6 Bom. L.R. 91. All Presidency Magistrates other than the Chief Presidency Magistrate had been invested with powers specified in this section, before the amendment *Mad. Cr. Rul. of Pr. Rule 10*. This is now unnecessary.

For reasons to be recorded in writing.—The Magistrate is bound to record his reasons, 20 M. 337; 9 A. 83; 1900 A.W.N. 187 and 189; 10 M.L.T. 120=(1911) 2 M.W.N. 74=12 Cr. L.J. 483=11 Ind. Cas. 999; 1902 A.W.N. 195; 23 Cr.L.J. 1394=89 Ind. Cas. 706; 13 Cr. L.J. 749=17 Ind. Cas. 61. Where no reasons are recorded for sending the case for enquiry by the police the procedure adopted is not in accordance with law, 29 Cr. L.J. 958=111 Ind. Cas. 878.

May if he thinks fit postpone.—A Magistrate who holds the investigation under this section has no power to dismiss the complaint under S. 203, *infra* 18 C.W.N. 95. Before the amendment, the wording was "*not satisfied with the truth of the complaint*" and this was the only ground contemplated by the section; now wider power is given. If a Magistrate issues process to a set of accused in a case where on the same complaint another set of accused who had been already tried and acquitted, it was held that he acted improperly in issuing process without paying due regard to what had transpired in the earlier proceedings, 30 C.W.N. 546.

The issue of process.—Prosecution of the accused commences with the issue of process after the complaint has been entertained by the Magistrate, 37 M 181 at 183; 38 C. 830. Once process has been issued, subsequent reference for inquiry under this section is illegal, 9 M. 232; 1895 A.W.N. 147; 21 W.R. (Cr.) 44. Before process is issued the accused is not a party to the proceedings under this section and he is not entitled to claim under S. 340, *infra*, the right to be represented by a pleader. If he happens to be present and represented by a pleader that was not by compulsion of law but of his own free will, 38 C. 880 at 887.

Either inquire into the case himself.—A Magistrate is empowered to hold an inquiry into a complaint of an offence in order to ascertain whether there is sufficient foundation for him to issue process against the person or persons complained against. He may allow the complainant to produce such evidence in support of his complaint as he wished to produce and after a consideration of that evidence come to the conclusion that evidence was so wholly unworthy of credit as to warrant his taking no further action in the matter 28 Cr. L.J. 26=99 Ind. Cas. 58. The inquiry under this section by the Magistrate himself does not necessarily mean an inquiry by examining witnesses or by holding an investigation into the case. It is open to him to investigate into the matter in order to ascertain the truth or falsity of the complaint in any way he thinks proper. There is nothing in law to prevent the Magistrate from looking into the police investigation papers for the purpose of ascertaining the truth or otherwise of the complaint. The inquiry under this section is not limited to any particular form of inquiry upon looking into the police papers he is satisfied that it was not a fit case in which process ought to be issued against the person accused, there is nothing in law preventing the Magistrate from doing so, 1921 Pat. 226=26 Cr. L.J. 129=83 Ind. Cas. 683.

Other than a Magistrate of the third class.—A third-class Magistrate must inquire into the case himself, since he is the lowest grade of Magistrates, as there is no Magistrate subordinate to him. He is also not entitled to direct a police-officer or some other person as he thinks fit, to ascertain the truth or falsehood of the complaint.

Direct an investigation by Subordinate Magistrate or Police Officer.—The word "*investigation*" is not defined in the Code. It must be taken to have been used in its ordinary sense. The investigation must be into the truth or falsity of the allegation

made in the petition of complaint, 19 Cr. L.J. 126=43 Ind. Cas. 414. The word "Local" has been omitted now thereby widening the scope of the investigation. Great caution should be shown in sending, for the investigation by the police, charges against members of that force. Where a District Magistrate sent for inquiry a complaint against an Inspector of Police without giving reasons and without expressing his opinion as to the truth of the complaint, the High Court in Revision sent back the case remarking it would generally be better in such a case if the inquiry be prosecuted by a Magistrate, 20 M. 337. See also 1884 A.W.N. 47; 1902 A.W.N. 195; 9 C.W.N. 199. Where an inquiry has been ordered by a person other than the Magistrate who orders the inquiry he is precluded from holding a second inquiry himself in the absence of the accused, 11 A.L.J. 754=14 Cr. L.J. 493=20 Ind. Cas. 749. Where a Magistrate directs an investigation by the police under this section, the police are bound to make a report to the Magistrate as to the result of their investigation. It is not competent to the Police to send up a charge sheet against the accused stating a specific offence to the Magistrate without submitting the report called by the Magistrate and proceedings started on such a charge sheet is clearly illegal. The original complaint is still on the Magistrate's file 53 B. 339 following 54 C. 303. A reference under this section to the police after the evidence of the complainant has been taken and process issued to the accused is illegal, 9 M. 282. Where the police on investigation had examined witnesses in the course of the investigation, there is nothing in law to prevent the Magistrate from looking into the police papers sent up to him after investigation for the purpose of ascertaining the truth or falsehood of the complaint and a Magistrate will not be acting improperly if upon looking into the investigation papers by the police he was satisfied that the case is a fit one to issue process or for dismissal, (1924) Pat. 226=26 Cr. L.J. 129=83 Ind. Cas. 689. Where a complaint is made against a police-officer, it is improper to direct another police-officer to conduct the investigation; the investigation in such a case should be conducted by a Magistrate, 18 A.L.J. 620=21 Cr. L.J. 416=56 Ind. Cas. 64; 21 Cr. L.J. 621=5 Pat. L.J. 61=57 Ind. Cas. 295; 21 Cr. L.J. 343=55 Ind. Cas. 679; 29 Cr. L.J. 958=111 Ind. Cas. 878; 18 A.L.J. 731; 1921 Pat. 31=21 Cr. L.J. 519=56 Ind. Cas. 776; 21 Cr. L.J. 649=57 Ind. Cas. 665. An opportunity should be given to the complainant to prove his case, 16 C.W.N. 143=13 Cr. L.J. 125=13 Ind. Cas. 781. Where a District Magistrate holding an inquiry under this section has evidence before him which is opposed to the complainant's allegations in his complaint and sworn statement, the complainant should be given an opportunity to meet such evidence and to prove his case, and the order of discharge made without affording such opportunity holding that the accused acted *bona fide* cannot be sustained, 23 Cr. L.J. 43=106 Ind. Cas. 464.

Such other person as he thinks fit.—An inquiry may be made by any person chosen by the Magistrate and sub-section (2) empowers such person to exercise all the powers of an officer in charge of a police station except the power to arrest without a warrant. An inquiry may be made by a clerk under the Magistrate, 36 C. 72 and a *Kanungo* can be directed to inquire by the Magistrate, 1 Luck. 259.

Proviso.—Unless a complainant has been duly examined under S. 200, *supra*, an inquiry under this section cannot be ordered, 12 Cr. L.J. 339=12 Ind. Cas. 515 where 27 C. 921 is followed. A Presidency Magistrate has now to examine the complainant himself and to have his statement on oath or not before he can direct an inquiry under this section. The new sub-section (4) empowers evidence to be taken on oath in the inquiry held under this section by Magistrates, investigation is not defined in the Code, it must be taken in its ordinary meaning, 19 Cr. L.J. 126=43 Ind. Cas. 414. See S. 200, *supra*, which lays down that ordinarily on presentation of a complaint the Magistrate shall at once examine the complainant upon oath; exception is made in the case of action taken by Courts under S. 476, *infra*, and a new proviso (aa) is added to S. 200 *supra* which allows a discretion to Magistrates to dispense with the examination of the presiding officer of a Court or public servant who complains acting in the execution of official duties. By the new amendment, S. 3 of Act II of 1926, Presidency Magistrates need not reduce the examination into writing. When

the complaint is already in writing. When the complaint is made by a Court under S. 195, *supra* this section cannot apply; but when a complaint is made by a public servant, this proviso may apply as complaint of court alone is mentioned herein.

Sub-section (2-A).—This sub-section is new and empowers a Magistrate inquiring into the case to take evidence of witnesses on oath and so the decisions which held that the inquiry is not a judicial one are no longer law, 39 M. 750; 21 M.L.J. 795; 22 B. 936; 32 A. 30, and is in accordance with 35 C 72. A prosecution can be ordered on this basis of the evidence recorded under this section, 24 Cr. L.J. 562 (2)=74 Ind. Cas. 1034 (2).

Revision.—The High Court will not ordinarily interfere with the details of an inquiry or investigation under this section and particularly will not do so on the ground that it was inadequate as the degree of formality of the proceedings and the width and depth of the inquiry is entirely in the discretion of the Magistrate (so long as he confines himself to the simple question of issue of process or the dismissal of the complaint) and the provision is enabling and not obligatory, 33 Cr. L.J. 532 at 556=115 Ind. Cas. 48.

203. The Magistrate before whom a complaint is made or to whom it has been transferred, may dismiss the complaint, if, *after considering the statement on oath (if any) of the complainant and the result of the* investigation or inquiry (if any)† under section 202*, there is in his judgment no sufficient ground for proceeding. In such case he shall briefly record his reasons for so doing.

Amendment.—For the words "after examining the complaint and considering the result of the investigation (if any) made under S. 202" the words "after considering the statement on oath (if any) of the complainant and the result of any investigation or inquiry under the preceding section" have been substituted. For the words "any investigation" the words "the investigation" has been substituted and after the words "or inquiry" the words "if any" were inserted by Act II of 1926, S. 5.

Scope of the section.—There is no warrant for the proposition that if a complaint is made against an accused person the Magistrate is bound to summon the accused if there is any evidence in support of the complaint, even though the Magistrate finds that evidence unsatisfactory and believes the complaint to be false. In such a case the Magistrate is justified in acting under this section and a Sessions Judge or District Magistrate could not be legally compelled to summon the accused when the Magistrate finds no sufficient grounds for proceeding, 33 Cr. L.J. 631=115 Ind. Cas. 493. This section provides for the dismissal of a complaint on any one of three grounds—(1) If the Magistrate upon the statement made by the complainant reduced to writing under S. 200, *supra*, finds that no offence has been made out; (2) if the Magistrate distrusts the statement by the complainant; (3) if the Magistrate distrusts the complainant's statement but his distrust is not sufficiently strong to warrant him to act upon it, except upon a further inquiry as provided for in S. 202 *supra*, 14 C. 141; 13 B. 600, 27 C. 921. See also 9 Bom. L.R. 742=6 Cr. L.J. 83; 13 B. 593; 27 Bom. L.R. 352=26 Cr. L.J. 991=87 Ind. Cas. 527. The Magistrate in all other cases is bound as soon as the complainant is examined to issue process to have the accused person brought before him. This section applies only to cases where there has been no issue of process to the accused and once process is issued there has been a commencement of the proceedings and the complaint cannot be dismissed under this section. The proviso to S. 436, *infra*, cannot apply to a dismissal under this section. It only applies to the case where an accused person has been discharged. Where no process is issued to the accused at all and he does not appear in Court and the complaint against him is dismissed summarily, the accused person cannot be said to have been discharged. It is only after he has appeared in Court and the evidence against him is

* 'any' altered into 'the' by Act II of 1926, S. 5.

† inserted by Act II of 1926, S. 5.

found to be insufficient so as to make it unnecessary to call upon him to enter upon his defence that he can be discharged. Before the amendment Courts were unanimous that in the case of the dismissal of complaint under this section notice was not necessary, 35 A. 78; 40 A. 138. The amendment has left those rulings untouched and therefore no notice is necessary when a complaint is dismissed under this section or under S. 204 before further inquiry is ordered, 47 A. 722; 49 M. 918 (F.B.). This section refers only to cases taken cognizance of by a Magistrate. The Magistrate who holds the inquiry under S. 202, *supra*, is not competent to dismiss the complaint under this section, 18 C.W.N. 95. See also 43 C. 173; 15 A.L.J. 642. An application under S. 107, *supra*, does not fall within the definition of complaint in S. 4 (1) (h), *supra*, and therefore this section cannot apply to such a case, 25 Cr. L.J. 89=76 Ind. Cas. 25.

Dismiss the Complaint after examining the complainant.—It is imperative on the Magistrate to examine the complainant on oath and thus give him an opportunity of showing cause against *prima facie* grounds for distrusting his complaint. He cannot dismiss the complaint under this section without giving the complainant an opportunity to substantiate the allegations in the complaint by producing evidence, 55 C. 1230. The provisions of this and S. 200, *supra*, are imperative and any dismissal of the complaint without examining the complainant is without jurisdiction, 13 B. 590 (F.B.); 9 C.W.N. 199; 30 C. 923; 33 C. 1; 21 Cr. L.J. 343=55 Ind. Cas. 679. An order dismissing a complaint under this section is clearly unsustainable when the complainant has not been examined at all and there is no valid disposal of the complaint, 48 B. 360, but it is not illegal to dismiss a complaint under this section without examining the complainant on oath when the complainant was not present in Court on any of the dates on which the matter comes before the Magistrate; if the complainant does not choose to be present in Court, he cannot afterwards be heard to say that the case should be sent back for further inquiry on the ground of failure to examine him on oath, 48 C. L.J. 90=29 Cr. L.J. 798=111 Ind. Cas. 126. After examining the complainant on oath, the Magistrate may dismiss the complaint at once or may elect to hold an inquiry under S. 202. If he elects to proceed under S. 202, *supra*, he is bound to give time to the complainant to produce his witnesses on a particular day fixed by him and if no witnesses are produced on that date, he may dismiss the complaint. A complaint cannot be dismissed on a mere perusal of some documents produced by the accused before the police and by putting certain question to the accused's pleader in an inquiry under S. 202, *supra*, without examining the complainants' witnesses, 15 C.W.N. 143=13 Cr. L.J. 125=13 Ind. Cas. 781. A Presidency Magistrate may dismiss a complaint without such examination, as verification on oath of the complaint is a sufficient compliance, 35 M. 606; but see the amended S. 200 (b). When a Magistrate disbelieves the complainant's story he is not bound to summon his witnesses and examine them before acting under this section, 14 C. 707; 27 C. 921; 6 C.W.N. 293 at 297; 10 C.W.N. 1086, but when once he had issued summonses to complainant's witnesses he is bound to examine them when tendered by the complainant before dismissing his complaint, 20 M. 388. The conclusion must be arrived at by the Magistrate by the exercise of a discretion based on judicial considerations, 25 M.L.J. 510. A Magistrate is not at liberty to dismiss a complaint merely because the complainant is actuated by malicious feelings in making the complaint nor is it open to him to dismiss it, if the offence complained against appear to have occurred long time ago; there being no limitation prescribed by law for a prosecution for an offence, Ratanlal 549, nor can a Magistrate refuse to entertain a complaint or dismiss it summarily on the ground that if it was entertained, it would tend to bring hundreds of similar complaints and would also stir up old religious feelings, Ratanlal 562. Nor can he dismiss a complaint which he believes to be false by methods not warranted by law but should follow the procedure prescribed by the Code. He is bound to examine the complainant and record a finding that he does not believe the evidence and then only he can dismiss the complaint under this section, 30 Cr. L.J. 2=112 Ind. Cas. 770. See also 27 C. 921 at 924. A dismissal under this section does not amount to an acquittal for the purposes of S. 403, *infra*. See explanation to S. 403, *infra*. If a complaint pending before a Magistrate is sent to the District Magistrate with a view to its transfer to some other Court the District Magistrate is seized of the case and

has jurisdiction to dismiss the complaint under this section if after examining the record he is of opinion that the complaint was wholly unfounded, 25 Cr. L.J. 355=81 Ind. Cas. 43. A criminal case does not abate on the death of the complainant and therefore a Magistrate cannot dismiss it on that ground, 16 Cr. L.J. 713=30 Ind. Cas. 1001. Where a complaint is dismissed under this section, no award of compensation under S. 250, *infra*, is allowed as there was no discharge or acquittal, 4 Cr. L.J. 36. This section has no application to a proceeding before a village Magistrate as the provisions of the Code do not apply to proceedings before a village headman except in a very few specific instances. So the dismissal of a complaint by a village headman is not, so far as the Code lays down, any bar to a Sub-Magistrate proceeding with the case on a complaint preferred to him after the dismissal of a previous one for default of appearance by the village Magistrate, 53 M.L.J. 102=28 Cr. L.J. 507=101 Ind. Cas. 891. This section has no application to a case made over for trial and disposal by the District Magistrate to a subordinate Magistrate. The latter Magistrate cannot hold a preliminary inquiry under S. 202 *supra* or dismiss the complaint under this section and he cannot take action under S. 476, *infra*, holding that the complaint to be false after dismissing the same, 18 C.W.N. 93=15 Cr. L.J. 70=22 Ind. Cas. 422.

Considering the result of the investigation or inquiry if any under section 202.—The use of the word "any" clearly implies that an investigation or inquiry under S. 202 may or may not be made and it cannot be said, the change in the language of the section by the amendment makes it obligatory on the Court to make an investigation or inquiry. The change is merely verbal and is not a change in substance. This section is not in any way dependent upon the provisions of S. 202, *supra*, and an investigation or inquiry under the latter section is not a condition precedent to the dismissal of a complaint under this section, 26 Cr. L.J. 921=36 Ind. Cas. 935. A dismissal of a complaint solely on the ground that the Magistrate agrees with the police report is illegal unless such report is made a part of the order, 21 M.L.J. 432=7 M.L.T. 173=11 Cr. L.J. 331=5 Ind. Cas. 928. The inquiry or investigation is for the purpose of ascertaining the truth or falsehood of the complaint. Any report submitted under S. 202 shall form part of the record and is to be considered by the Magistrate before dismissing the complaint, 14 C. 151; 33 C. 1; 13 B. 590 (F.B.).

There is no sufficient ground for proceeding.—The expression "sufficient ground" points conclusively to the fact which the complainant brings to the knowledge of the Magistrate and to his establishing a *prima facie* trustworthy case against the accused. A Magistrate in dismissing a complaint should not be influenced by considerations altogether apart from the facts which are adduced by the complainant in support of the charge and should not proceed exclusively on what he presumed from the surrounding circumstances to be the motive by which the complainant was actuated in moving the matter. In so doing he failed to exercise the discretionary power of summary dismissal under this section. The motives by which complainants are actuated must necessarily be of the most varied description; any attempt to determine them would open but a wide and speculative field of inquiry. The object of the Code is to provide a machinery for the punishment of offences against the substantive criminal law. Had it been intended that the Magistrate should only proceed to inquire into an alleged offence when the complainant's motives were such as he could approve of, very different language would have been used, 13 B. 590 (F.B.) at 595. In dismissing a complaint under this section a Magistrate has to exercise a discretion based on judicial considerations. That the probable result of proceeding is undesirable or the conduct and motives of complainant are discreditable is irrelevant, 38 M. 512. Where the question relates to the civil rights of parties the complaint may be dismissed, 17 Cr. L.J. 403=35 Ind. Cas. 968. A Magistrate cannot dismiss a complaint on the ground that the complainant had suffered no personal injury and is only a mere tool of another, 13 B. 670. A Magistrate has no jurisdiction to dismiss a complaint under S. 202, I.P.C., on the ground that the case was one in which no jury would convict the person complained against, 23 C.W.N. 372. A Magistrate may dismiss a complaint if after perusing the record he is of opinion that no case of a criminal character is made out against the

accused, 6 B.L.R. (Ap. Cr.) 16. Process cannot be refused on the ground that a civil suit may afford a more convenient and appropriate remedy, 9 M.L.T. 332; 17 Cr. L.J. 406=35 Ind. Cas. 906=10 W.R. (Cr.) 40; 8 W.R. (Cr.) 65. Where the Criminal Court entertains a complaint which is purely of a civil nature it undoubtedly countenances the scandalous abuse of its own process, it enormously and unnecessarily increases its own work, it encroaches upon the province of the Civil Court, it deprives the Government of a great deal of its legitimate revenue and last but not least, it deprives itself of its primary function as the vindicator of outraged justice and becomes merely a tool in the hands of the unscrupulous, 2 M.L.T. 10-11 (Jour.); 5 Cr. L.J. 84 (Jour.).

Shall record briefly his reasons.—The provisions of the Code as to procedure ought to be strictly complied with; non-observance of the provisions of the Code leads to much confusion and waste of public time not to speak of involving the parties in unnecessary expense, 37 A. 623. The Magistrate is to record his reasons in writing, 21 C.W.N. 127; 27 C. 921; 15 A.L.J. 642; 40 C. 41; 25 Cr. L.J. 1502=90 Ind. Cas. 159; 16 C.W.N. 885=13 Cr. L.J. 433=15 Ind. Cas. 494; 13 Cr. L.J. 432=15 Ind. Cas. 492. Unless the Magistrate records his reasons for dismissing the complaint under this section it will be impossible for the High Court as a Court of revision to consider under S. 436, *infra*, whether the discretion vested in the Magistrate under this section had been properly exercised, 14 C. 141 at 145, but a failure to record reasons is at the most an irregularity and will not be interfered with in revision unless a failure of justice has in fact occasioned thereby, 25 M. 546, Weir II, 244, but where a Magistrate dismissed a complaint on account of the delay in filing the complaint and also on the ground that the charge was made from improper motives, *held*, there were no sufficient grounds for dismissal in the absence of a finding that the complaint was false or unsustainable, 38 M. 512. The Full Bench decision in 29 M. 126 after an elaborate review of all the authorities has held that a Magistrate who had dismissed a complaint under this section is competent without any order of further inquiry by a superior Court to rehear the complaint. The dismissal of a complaint is no bar to the Magistrate re-entertaining a second complaint on the same facts, 21 Cr. L.J. 815=68 Ind. Cas. 68; 21 Cr. L.J. 379=53 Ind. Cas. 839; 21 Cr. L.J. 660=57 Ind. Cas. 820; 18 Cr. L.J. 296=38 Ind. Cas. 329, but a different Magistrate is not entitled to reopen the matter on the presentation of a second complaint to him on the same facts 28 Cr. L.J. 836=102 Ind. Cas. 344 where 22 A. 103; 36 A. 129 are *followed*. See also 29 Cr. L.J. 1097=112 Ind. Cas. 681, which took the same view *following* 22 A. 103; 29 A. 7; 36 A. 129; 23 C. 983; 23 Cr. L.J. 737=69 Ind. Cas. 625; 25 Cr. L.J. 57=99 Ind. Cas. 89. It is utterly contrary to sound principles that one Magistrate of co-ordinate jurisdiction should in effect and substance deal with as if it were an appeal or a matter for revision, a complaint which had been already dismissed by a competent tribunal of co-ordinate authority, 29 Cr. L.J. 1097=112 Ind. Cas. 681. See also in this connection 16 Cr. L.J. 814=31 Ind. Cas. 830; 36 A. 53 and 129; 22 A. 106; 27 Cr. L.J. 383=92 Ind. Cas. 895; 28 C. 652 (F.B.); 29 C. 725 (F.B.); 35 A. 78; (but see 23 C. 983; 24 C. 286 and 528; 4 C.W.N. 46 and 28; 24 M. 337, 23 M. 235; 36 A. 129; 26 Cr. L.J. 991=87 Ind. Cas. 527, 16 Cr. L.J. 174=27 Ind. Cas. 558; 35 A. 78; 29 A. 7; 9 A. 85; 5 A.L.J. 137; 3 A.L.J. 562=16 Cr. L.J. 814; 1911 P.R. (Cr. J.) 10 (F.B.); 9 Bom. L.R. 250; 1 B. 64; 3 Pat. L.J. 346, 28 Cr. L.J. 975=102 Ind. Cas. 511, 13 Cr. L.J. 688=25 Ind. Cas. 838; 22 A. 106, 21 A.L.J. 215. Unless there are special reasons a Magistrate will not be acting properly if he entertains a second complaint. There is nothing illegal or *ultra vires* of a Magistrate reviving a complaint which he himself had dismissed under this section even though the District Magistrate had declined to order further inquiry at the request of the complainant, 35 C. 415. Though no doubt there is no absolute bar to an accused person being put in peril of a fresh trial in respect of the same offence in a case where the first trial has ended in an order of discharge, it is a well-recognized and salutary rule of law, that a Magistrate of co-ordinate jurisdiction should not entertain a fresh complaint in respect of the same offence when it is based on facts which were known to the complainant and on evidence which was available when the first trial was held. A departure from this rule is in effect an assumption by the Magistrate of the powers of the appellate Court and is utterly contrary to sound principles, 30 Cr. L.J. 444=115 Ind. Cas. 309; 29 Cr. L.J. 1097=112 Ind. Cas. 681.

Further inquiry.—S. 436, *infra*, empowers a further inquiry. That section does not empower a trial which is distinct from an inquiry as defined in S. 4 (1) (k), *supra*. Further inquiry under S. 436, *infra*, has been held to mean an inquiry of the same nature as was previously held under S. 202, *supra*, and cannot include a further inquiry after summoning the accused, 29 Cr. L.J. 372=108 Ind. Cas. 328, *following* 30 C.W.N. 312=26 Cr. L.J. 305=84 Ind. Cas. 449 and 104 Ind. Cas. 633. When further inquiry is ordered after setting aside the order of dismissal under this section, the Subordinate Magistrate who is to hold the further inquiry cannot immediately summon the accused stating that the District Magistrate had set aside the order of dismissal and directed a further inquiry, 29 Cr. L.J. 572=109 Ind. Cas. 503, but see 29 Cr. L.J. 1059=112 Ind. Cas. 563, where it was held that issue of notice to the accused straightway without taking further evidence is a procedure which is not illegal but very undesirable and the Code evidently intends that further inquiry should be made in order to see whether a notice should not issue i.e. it is still an inquiry under this Chapter, see also 49 C.L.J. 422 at 423-25. When a complaint is dismissed under this section for failure of the complainant to appear and to give a sworn statement, the complainant cannot be heard to complain and ask for a further inquiry and no order for further inquiry should be made in such a case, 38 C.L.J. 90=29 Cr. L.J. 798=111 Ind. Cas. 126. When a complaint is dismissed under this section no notice to accused is necessary before ordering a further inquiry, 47 A. 722; 27 Cr. L.J. 302=92 Ind. Cas. 590; 40 A. 138; 49 M. 918 (F.B.) where 47 A. 722 is *followed*; 35 A. 78; but when a complaint is dismissed under this section after giving the accused an opportunity of being heard an order for further inquiry should not be made, without giving notice to the accused, 27 C.W.N. 552=23 Cr. L.J. 150=76 Ind. Cas. 236. This is of doubtful authority as there is no provision of law under which a notice can be given to accused before process is issued against him. When further inquiry is ordered into a complaint which had been dismissed under this section, the Magistrate had no option but to summon the accused and cannot again dismiss the complaint under this section, 11 C. W.N. 316.

Revision.—The High Court will refuse to interfere in revision if after making proper inquiry and after satisfying himself the Magistrate finds the dispute is purely of a civil nature and dismisses the complaint, 11 W.R. (Cr.) 54; 9 W.R. (Cr.) 21. But when the discretion is exercised by the Magistrate improperly by dismissing the complaint holding the case was completely for the Civil Court without assigning satisfactory reasons, the High Court will interfere in such a case, 20 W.R. (Cr.) 60.

CHAPTER XVII.

OF THE COMMENCEMENT OF PROCEEDINGS BEFORE MAGISTRATES.

This Chapter is headed 'Commencement of Proceedings before Magistrates'. S. 203, *supra*, applies only to cases falling under the provisions of Chapter XVI, *supra*, where there has been no issue of process to the accused person; where an accused person is summoned to appear and answer a charge by a Magistrate, then there is a Commencement of proceedings before the Magistrate within this meaning of the Chapter and once the proceedings are commenced the complaint cannot be dealt with under S. 203, *supra*, Ratanlal 544. Process cannot be issued against an accused person without first examining the complainant on oath, Weir II, 244.

204. (1) If in the opinion of a Magistrate taking cognizance of an offence there is sufficient ground for proceeding, and the case appears to be one in which, according to the fourth column of the second schedule, a summons should issue in the first instance, he shall issue his summons for the attendance of the accused. If the case appears to be one in which, according to that column a warrant should issue in the first instance, he may issue a

Issue of process.

warrant, or, if he thinks fit, a summons, for causing the accused to be brought or to appear at a certain time before such Magistrate or (if he has not jurisdiction himself) some other Magistrate having jurisdiction.

(2) Nothing in this section shall be deemed to affect the provisions of section 90. .

(3) When by any law for the time being in force any process-fees or other fees are payable, no process shall be issued until the fees are paid, and, if such fees are not paid within a reasonable time, the Magistrate may dismiss the complaint.

In the opinion of the Magistrate.—The opinion of the Magistrate referred to in this section is his own independent opinion; where an inquiry by the police is held and the result reported to the Magistrate the opinion of the Police Inspector expressed in the report will not warrant the complaint being dealt with otherwise than it would have been if there had been no such report, 4 M.H.C.R. 162. The Magistrate is given a wide discretion to issue process and the section speaks of his opinion. It is not open to a party to contend that the Magistrate exercised jurisdiction vested in him under this section wrongfully, or issued a process on insufficient complaint. If the Magistrate had jurisdiction to issue process the trial would be perfectly regular even if the Magistrate exercised that jurisdiction on insufficient grounds, 16 C.W.N. 1105. A Magistrate has jurisdiction to rescind an order as to the issue of summons under this section and direct a Subordinate Magistrate to hold an inquiry and report under S. 202, *supra*. An order under this section is not a judgment to which the provisions of S. 369, *infra*, will be applicable and the Code does not forbid the Magistrate reconsidering his order on sufficient grounds, 39 C.L.J. 329=27 C.W.N. 651=25 Gr. L.J. 464=77 Ind. Cas. 816.

There is sufficient ground for proceeding.—A Magistrate has full power on receipt of a complaint to issue a summons to the accused if he believes the truth of the complaint. If there are good grounds for proceeding, he may issue process at once without making any inquiry beforehand, 21 Cr. L.J. 220=54 Ind. Cas. 1004. The only condition requisite for issue of process is that the complaint and the sworn statement must show sufficient ground for proceeding, 1864 W.R. (Cr.) 33. See also 18 Cr. L.J. 626=39 Ind. Cas. 994. There is nothing illegal in a Magistrate first issuing process for one of the accused named in the complaint and then changing his mind and issuing process for all the accused without taking further evidence before issuing the second process for all the accused, 29 Cr. L.J. 293=107 Ind. Cas. 778. Where the police after investigation made a report to the Magistrate to the effect that the complaint was true and the Magistrate thereupon directed the case to be entered as such, he cannot subsequently decline to enter into a judicial inquiry merely because in his opinion there was no chance of a conviction and no useful purpose would be served by an inquiry, *held* that the complainant was entitled to be examined under S. 200 *supra* and to have process issued against the accused and for the attendance of his witnesses, 29 C. 410, 1904 A.W. N. 5; 21 A. 265. In a case in which a prosecution is started by a person in the position of a Government Pleader who has no personal knowledge of the facts, who makes statements on information furnished to him, and who does not disclose the source of his information, it is reasonable that the Court before issuing process should satisfy itself upon proper materials that a case has been made out for issuing process to the accused, 10 C.W.N. 1090. The fact that the complainant did not specifically and in terms accuse any one of an offence under the Penal Code does not affect the question; if the fact as stated in the complaint constituted an offence under the Penal Code, then the Magistrate has jurisdiction to proceed with the case, 25 C. 785. Process should ordinarily issue against all the persons accused and the practice of Magistrates issuing process to some of the accused only when no discrimination is made by the complainant is unwarranted, 4 C.W.N. 560.

May issue a warrant, or, if he thinks fit, a summons.—As to issue of summons the word 'shall' is used in this section. A summons becomes unnecessary when the accused appears of his own accord to answer the charge and insists the charge against him be proceeded with or dismissed, 26 B. 532; 1919 P.R. (Cr. J.) 5. It is not imperative on a Magistrate to issue a warrant in every case shown in the column that a warrant shall issue in the first instance. A wide discretion is given to the Magistrate to substitute a summons for a warrant and he may even for sufficient cause shown recall a warrant already issued and issue a summons instead, 8 Cr. L.J. 187, 14 Cr. L.J. 604—21 Ind. Cas. 476. He may even issue a bailable warrant in a non-bailable case [1911] 2 M.W.N. 452=12 Cr. L.J. 430—11 Ind. Cas. 614. The Magistrate may also dispense with the attendance of the accused under S. 205 *infra*, whenever he issues a summons though the case is a warrant case, 21 C. 588. A mere notice to the person complained against that a preliminary inquiry will be held in the matter of the complaint does not amount to a summons. Such a notice is neither contemplated by the Code nor is it one of the forms in Sch. V of the Code, 37 M. 181 followed in 49 M. 218 (F.B.)

If he has not Jurisdiction.—These words were introduced for the first time in the Code of 1898. Though the Court is not bound by the complaint and sworn statement recorded in framing the charge or determining jurisdiction but may look into the evidence, it cannot go outside the record and when evidence has yet to be taken it must decide the question of jurisdiction *prima facie* pending further materials being regularly placed before it on the basis of the complaint and sworn statement, 1908 A.W.N. 115=5 A.L.J. 333=7 Cr. L.J. 394.

Sub-section (3).—This was introduced in the Code of 1898; the Court Fees Act VII of 1870 and the rules made thereunder make provision for the payment of Court fees and process-fees in criminal cases. Under S. 20 of the Court Fees Act, the High Court is to make rules as to the fees chargeable for serving and executing processes issued by all the Courts under its jurisdiction including Criminal Courts, 3 Luck. 563 at 354. No process shall be issued until the prescribed fee is paid and if not paid within a reasonable time the Magistrate may dismiss the complaint. A complainant by omitting to take out a summons cannot keep a case hanging over a man for an indefinite time. The summons is merely a means of procuring attendance, and if the accused appears of his own accord without a summons, he is entitled to require that the complaint shall either be proceeded with, or dismissed. The Magistrate must take care that proceedings are conducted with reasonable expedition as will prevent the parties from being improperly harassed by undue delay, 26 B. 532 at 537. When a complaint is dismissed for failure to comply with this sub-section, a further inquiry may be ordered under S. 436, *infra*, by the Sessions Judge or District Magistrate. In non-cognizable warrant cases neither complainant nor the accused can be compelled to pay process fees for the summoning of witnesses although the complainant must under this section ordinarily pay process fee for summoning the accused, 27 Cr. L.J. 315=93 Ind. Cas. 79. S. 20 of the Court Fees Act has reference only to fees for processes issued in the case of "offences" and since an order for payment of maintenance under S. 436 *infra* is not a conviction for an offence, the application cannot be dismissed under this sub-section for failure to comply with an order for payment of process-fees, 16 M. 235.

Or other fee payable.—The payment in respect of diet money and travelling expenses of witnesses fall under the head of 'other fees payable' and the Court has perfect right in a private prosecution to insist upon these fees being paid in advance before processes are issued. S. 514 *infra* provides for the Local Government to make rules which would permit in certain cases this liability to be transferred to the Crown, 3 Luck. 363 at 365.

Revision.—When neither the complaint nor the evidence for the prosecution disclosed a case against the accused but process had been issued under this section, the High Court can quash the proceedings against the accused, 25 C. 736; 22 C. 131; 23 C. 233; 33 C. 68; 39 M. 561, 20 B. 543, 1899 A.W.N. 212.

Magistrate may dispense with personal attendance of accused.

205. (1) Whenever a Magistrate issues a summons, he may, if he sees reason so to do, dispense with the personal attendance of the accused, and permit him to appear by his pleader.

(2) But the Magistrate inquiring into or trying the case may, in his discretion, at any stage of the proceedings, direct the personal attendance of the accused, and, if necessary, enforce such attendance in manner hereinbefore provided.

Scope of the section.—The provisions of this section should be freely utilised when so much prejudice exists against the appearance of females in public and especially when the law is set in motion to gratify private spite. The mere impression of a Magistrate that certain female accused are not *pardanashin* is not sufficient reason for refusing to allow them the benefit of this section, 11 Cr. L.J. 197=4 Ind. Cas. 1152. A Court should abstain from compelling a *pardanashin* woman's appearance in Court unless and until the case against her has reached the stage at which her personal attendance is clearly and legally required in the interests of justice and it is the duty of the Court to see that the machinery of the law is not utilised as a means of satisfying petty spite, 9 Cr. L.J. 153=1 Ind. Cas. 101. This section applies to all cases in which a Magistrate may issue a summons. Although a case may be one in which a warrant may be issued in the first instance, it is not necessary for him to do so. He may under S. 75 (4) *supra* cancel a warrant issued and substitute a summons. Thus the section applies to all case where the Magistrate in his discretion thinks fit to issue a summons instead of a warrant or cancels a warrant and substitutes in its place a summons, 6 A. 59; 21 C. 588. It does not apply to a case where the accused has been arrested without or after the issue of a warrant, 2 Pat. 793. There is no provision in the Code to proceed against an accused person *ex parte*. It is only with special permission of the Magistrate that the personal attendance can be dispensed with in cases where the Magistrate issues a summons in the first instance. The power of substituting a summons for a warrant is not to *pardanashin* ladies only. It should be exercised in the case of all female accused, 14 Cr. L.J. 604=21 Ind. Cas. 476. S. 366 (3) *infra* provides for the pronouncing of judgment in cases like these in the presence of the pleader where in the case of conviction the sentence is one of fine only. See the new section S. 540A which permits trials being held in the absence of the accused in certain cases.

Issues a summons.—A Magistrate may issue a summons even in a case where a warrant is to be issued. See S. 201 *supra*. This sub-section applies only to cases in which the Magistrate has issued a summons in the first instance and it does not apply to a case where the accused has been arrested without or after the issue of a warrant. After the accused is produced in Court the whole trial had to take place in his presence and if the accused absconded after charge, the trial cannot be concluded and the conviction had in his absence, 18 Cr. L.J. 975=42 Ind. Cas. 335. If a warrant is issued then he is not entitled to dispense with personal attendance of the accused and permit him to appear by pleader except on the ground of illness. See 2 Pat. 793.

If he sees reason to do so.—The power conferred on a Magistrate to dispense with the personal attendance of the accused is discretionary and in a case where he has in the exercise of that discretion permitted a person to appear by a pleader, the concession so granted ought not to be revoked and a warrant issued to the accused to enforce his attendance, 38 C. L.J. 9=24 Cr. L.J. 902=75 Ind. Cas. 150. The Magistrate is to exercise his discretion in the matter of dispensing with the personal attendance of the accused. The Magistrate place upon record his reasons for refusing an application for permission to appear in Court by a pleader, more particularly when the application is made by a *pardanashin* lady accused of an offence, 6 A. 59; 21 C. 583; 43 M. 359; 14 Cr. L.J. 272=19 Ind. Cas. 514; 17 C.W.N. 1249=15 Cr. L.J. 291=23 Ind. Cas. 439. But *pardanashin* ladies are not as of

right exempted from personal attendance in Court, when they happen to be complainants, 5 A. 92, and the High Court has the power to set aside an order requiring personal attendance, 5 C.W.N. 119, where a Magistrate refuses to excuse personal attendance of a lady admitted to be a *pardah* lady on the ground that other ladies of the same class had appeared in Court of their free will, the High Court will interfere with such an order in revision, 28 Cr. L.J. 94 (1)=99 Ind. Cas. 126 (1).

Permit him to appear by pleader.—See S. 340 *infra* as to the right of accused persons to be defended by pleader. The words 'appear by pleader' are nowhere defined. In ordinary acceptance these words mean 'represented by pleader' that is to say, having a pleader to act and plead. In this section the word 'appear' seems to convey a double meaning seemingly connoting not merely authority to act and plead but also authority to personate the accused but there is nothing to show that the double meaning was intended by the Legislature. It is necessary that some one should be present at the trial to look after the interests of the accused and all that this section provides is that, where the Magistrate sees fit, a person against whom a summons has been issued may be exempted from personal attendance, provided he engages a pleader to attend and see that the proceedings are properly and legally conducted. The law considers that the interests of the accused will be completely safeguarded if his pleader is in attendance. That is all that can be gathered from the provisions of this section. A similar intention is to be gathered from the provisions of S. 361 *infra*, also 35 C.L.J. 358 at 376=29 Cr. L.J. 49=106 Ind. Cas. 545; when an order under this section has been made dispensing with the personal attendance of the accused and permitting him to appear by pleader, the imperative provisions of S. 342, *infra*, are complied with when the pleader for the accused is examined on behalf of his client. The section allows the accused to appear by pleader and such appearance involves the performance of all acts which devolve upon the accused in the course of the trial such as answering the examination of the Court under S. 342 *infra*. When the personal attendance is dispensed with and the accused permitted to appear by pleader there should be no objection to allowing the accused to leave to the pleader to make a statement, if any, on their behalf, under S. 342 *infra* and such a course would not in any way prejudice the accused and the Magistrate would be acting improperly when he compelled the attendance of the accused for the purpose of examination, 28 Cr. L.J. 226=99 Ind. Cas. 1026. The terms of S. 366(2) *infra* support this view for it contemplates the absence of the accused up to the stage of judgment and even after that stage when the judgment is one of acquittal or is one of fine. Again the form of summons in Sch. V Form I implies also that the pleader who appears to represent the accused for the purpose of answering the charge and this would include answering questions put by the Magistrate on the case made out by the prosecution or pleading or refusing to plead to a charge under S. 255 *infra*, 46 C.L.J. 353=29 Cr. L.J. 43=106 Ind. Cas. 545. The discretion under this section is one that should be liberally exercised, 15 Cr. L.J. 272=19 Ind. Cas. 545 following 11 Cr. L.J. 197=4 Ind. Cas. 1152.

May dispense with personal attendance.—In a case where a Magistrate dispenses with the personal attendance of an accused and permits him to appear by a pleader under this section, the Magistrate should note on the record that such permission has been granted and not leave it to mere implication, 53 B. 233, and there should also be on record a clear indication that the person who represents the accused was duly appointed by him. See S. 353, *infra*, in this connection. The Magistrate cannot dispense with the personal attendance of the complainant but only of accused persons, 5 A. 92. An accused person to whom a summons was issued failed to appear personally but appeared through his *mukhtar* who requested the Court to dispense with the personal attendance of his client. The Magistrate instituted contempt proceedings against the accused under S. 174, I.P.C., held by the High Court that in case the Magistrate considered personal attendance necessary, he would have fixed a day and informed the *mukhtar* that if his client did not appear, a warrant should be issued, 27 C. 983, but if no special permission to appear by pleader is given, the presence of the pleader cannot be taken as presence of the accused and the case cannot be proceeded with, 25 W.R. (Cr.) 25 and reasons for refusing leave to appear by pleader, should be given, 5 A. 59

and a Magistrate acts unreasonably in enforcing personal attendance of an invalid accused, 6 C.W.N. 11x. In cases where personal attendance is dispensed with, the Magistrate may take a recognizance bond from the accused to appear either personally or by agent when called upon, 5 B.H.C.R. (Cr. Ca.) 64.

Sub-section (2).—S. 306 (2) *infra* permits the absence of the accused up to the stage of delivering judgment and even after that stage when the judgment is one of acquittal or one imposing a sentence of fine. This sub section gives power to the Magistrate at any stage to insist on the personal attendance of the accused and if necessary to enforce the attendance of the accused.

CHAPTER XVIII.

OF INQUIRY INTO CASES TRIABLE BY THE COURT OF SESSION OR HIGH COURT.

Object of Preliminary Inquiry.—The object of the law in providing the inquiry shall be held by the Magistrate before the accused has to undergo a trial in the Court of Session seems to be to prevent the commitment of cases in which there is no reasonable ground for conviction. The provision of law is calculated on the one hand, to save the subjects from prolonged anxiety of undergoing trials for offences not brought home to them; and on the other hand, to save the time of the Court of Session from being wasted over cases in which the charge is obviously not supported by such evidence as would justify a conviction, 5 A 161 at 162. A Court of Session cannot take cognizance of any offence unless the accused has been committed to it by a Magistrate. The object of the restriction was presumably to secure, in the case of a person charged with a grave offence, a preliminary inquiry which would afford him an opportunity of becoming acquainted with the circumstances of the offence imputed to him and to enable him to make his defence, 3 M. 351 at 353; 10 B.L.R. 285 at 289. The object of the preliminary inquiry is (1) to prevent charges being tried by Sessions Courts without a *prima facie* case and (2) to give to the accused full notice of the charge he has to meet. The Magistrate must not lightly take upon himself the duties of the Sessions Court on the one hand but he must not subject the accused to the anxiety and expense of a trial on the other, without giving him an opportunity so long as any reasonable probability exists showing that he should not be tried, 13 Cr. L.J. 877 at 884=17 Ind. Cas. 813.

206. (1) Any Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or Magistrate of the first class, or any Magistrate (*not being a Magistrate of the third class*) empowered in this behalf by the Local Government, may commit any person for trial to the Court of Session or High Court for any offence triable by such Court.

(2) But, save as herein otherwise provided, no person triable by the Court of Session shall be committed for trial to the High Court.

Amendment.—The words ‘not being a Magistrate of the third class’ have been newly added depriving third class Magistrates of the power to commit.

May commit—By the new amendment third-class Magistrates are incompetent to commit. In Madras, previously all third class Magistrates were empowered to commit. A Magistrate is not bound to commit in every case. A Magistrate who has been invested with power to commit under this section has authority to carry into effect any of the provisions of Chapter XVIII of the Code which relates to cases triable exclusively by the Court of Session

and to cases which in the opinion of the Magistrate ought to be tried by such Court and therefore the Magistrate could legally pass an order of discharge, 6 A. 477 at 479. For purposes of commitment, a Subordinate Magistrate, if duly empowered, has equal powers with the District Magistrate who cannot give instruction to the Subordinate Magistrates regarding judicial proceedings, such as commencement of preliminary inquiry or the desirability of committing the accused. The only course open to the District Magistrate, if he wishes to interfere is first to withdraw the case to his own file and deal with it according to law, 8 W.R. (Cr.) 61. If the case is one which a Magistrate is both competent to try and adequately punish he has no discretion to commit the accused to the Court of Session, 13 Cr. L.J. 664=25 Ind. Cas. 923. Although a Magistrate has large powers of discharging the accused he should only exercise it when he is clearly of opinion that the evidence for the prosecution is unworthy of credit. If it is a matter of weighing probabilities, he should be well advised in leaving the case to the Court of Session which alone is empowered to try it, and should not discharge the accused because in his opinion he ought to have the benefit of doubt, 26 A. 534 at 570; 13 A.L.J. 111; 30 Bom. L.R. 639 at 641; 1 Ran. 526; 33 M.L.T. 135=28 Cr. L.J. 120 (1)=99 Ind. Cas. 321 (1); 30 Cr. L.J. 234=114 Ind. Cas. 88; 35 B. 163; 4 Lah. 69; 31 C. 849; 43 M. 874. See also notes under S. 209, *infra*, at pp. 398-401. In committing cases not exclusively triable by the Court of Session the Magistrates shall exercise a proper discretion and give adequate reasons for their action. When a Magistrate of the first class committed a case of theft to the Court of Session on the ground that the case was connected with another case which he felt bound to commit, the High Court of Bombay set aside the order of commitment as no valid reason was given for departing from the ordinary procedure prescribed by the Code, 15 Bom. L.R. 998=2 Cr. L. Rev. 387. See 1905 A.W.N. 23, where the order of a Magistrate committing a case of criminal trespass under S. 447, I.P.C., was set aside as unsustainable in law. See S. 215, *infra*, for power to set aside illegal commitments by the High Court. See also 21 A.L.J. 420=25 Cr. L.J. 663=81 Ind. Cas. 153, where it was held that a petty case ought not to be committed to the Court of Session.

Magistrate empowered in this behalf.—Where a commitment is made without jurisdiction, it is void, 11 C.L.R. 53, but when the Magistrate acts with jurisdiction the commitment, e.g. to a wrong Sessions Court, could be set aside only on a point of law by the High Court under S. 215, *infra*, 35 M. 387. See S. 532, *infra*, which makes provision for validating irregular commitments made by Magistrates not duly invested with power to commit.

Or to the High Court.—Presidency Magistrates commit direct to the High Court which exercises its original criminal jurisdiction in cases committed to it; when a moffussil Magistrate committed to the High Court, such commitment is not void, because the local Sessions Court has jurisdiction, 42 M. 791. An inquisition drawn up by a Coroner, under Act IV of 1872 has the effect of a valid commitment to the High Court in Calcutta and Bombay, when the High Court has accepted the commitment, 31 C. 1, but the jurisdiction of a Presidency Magistrate is not ousted by the inquisition drawn up by the Coroner, 16 B. 159. The Coroners Act does not apply to Madras.

For any offence triable by such Court.—"Triable" and not "exclusively triable." A Sessions Court can try any offence under the Penal Code, see S. 28, *supra*, and there is nothing in law prohibiting a Magistrate committing a summons case to the Court of Session. But there are sections like 245 and 254, *infra*, which limit the Magistrate's power of commitment. See also 42 M. 63, where commitment to a Court of Session of a case which could adequately be punished by the Magistrate was held good, but see the observations in 15 Bom. L.R. 993=2 Cr. L. Rev. 387, as to the committal of cases which Magistrates can try and decide to the already overworked Courts of Session. A case properly triable by a Magistrate cannot be committed to the Court of Session merely because the witnesses for the defence are not in attendance nor for the reason that the Magistrate is going on leave, and it would be inconvenient for his successor to hold a *de novo* inquiry.

207. The following procedure shall be adopted in inquiries before Magistrates where the case is triable exclusively by a Court of Session or High Court, or, in the opinion of the Magistrate, ought to be tried by such Court.

Procedure in inquiries preparatory to commitment.

In a case in which a Magistrate is competent to try and adequately punish, no discretion is allowed to him under this section to commit to the Court of Session 15 Cr. L.J. 664=25 Ind. Cas. 892.

The Code seems to have been carefully framed with a view to provide that no one shall be committed for trial without his having previously had a fair opportunity of meeting the charge upon which he is to be committed, 10 B.L.R. 285 at 299. The object of the law in providing that the inquiry shall be held by the Magistrate before the accused has to undergo a trial in the Court of Session seems to be to prevent the commitment of cases in which there is no reasonable ground for conviction, 5 A. 161 at 162. The words "*ought to be tried*" occurring in this and S. 317, *infra*, must be read with S. 254, *infra*, and a case which ought to be tried by a Court of Session is one which a Magistrate is not competent to try or is one in which in his opinion an adequate punishment cannot be inflicted by him, 24 C. 429; 4 Bom. L.R. 85; Ratanlal 110. See also 16 B. 590; 11 A.L.J. 439=14 Cr. L.J. 304=19 Ind. Cas. 960. They do not restrict the ground on which a Magistrate should arrive at his opinion as to the want of jurisdiction in himself or to his inability to sentence the accused adequately. If, for instance the Magistrate considers that a complicated question of law arises, or that some connected matter is already before the Sessions Court, or that a trial with a jury or with assessors who may be chosen from experts would be more satisfactory, there is nothing preventing him from committing the case to the Court of Session, 42 M. 83 following 1 M. 289 (F.B.) and 3 C. 495. A commitment so made cannot be quashed by the High Court on the mere ground that the punishment which the Magistrate could have awarded would have been sufficient, 11 A.L.J. 439=14 Cr. L.J. 304=19 Ind. Cas. 960. Where a case is not exclusively triable by the Court of Session but the Magistrate is of opinion that the case ought to be tried by the Court of Session, then he must give reasons for his entertaining that opinion as the order of commitment is a judicial order, 29 Cr. L.J. 612=109 Ind. Cas. 804 following 11 Bom. L.R. 18=9 Cr. L.J. 163=1 Ind. Cas. 104 and 24 C. 429; 1 C.W.N. 414. If from the very beginning the Magistrate is convinced that the case in his opinion ought to be tried by the Court of Session he should forthwith follow the procedure laid down in this Chapter, but if in the course of the proceedings, he is so convinced, he should stay proceedings and then adopt the procedure laid down in this Chapter. The provisions of S. 317, *infra*, do not override the express provisions of this Chapter, 13 Cr. L.J. 877 at 882=17 Ind. Cas. 813. If a Magistrate decides under this section that the case is one which ought to be tried by a Court of Session then he must adopt the procedure laid down in the chapter and not the procedure prescribed by Chapter XXI and this discretion cannot be limited by the provisions of S. 254, *infra*, 3 Ran. 42.

208. (1) The Magistrate shall, when the accused appears or is brought before him, proceed to hear the complainant (if any), and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution or in behalf of the accused, or as may be called for by the Magistrate.

Taking of evidence produced.

(2) The accused shall be at liberty to cross-examine the witnesses for the prosecution, and in such case the prosecutor may re-examine them.

(3) If the complainant or officer conducting the prosecution, or the accused, applies to the Magistrate to issue process to compel the attendance of any witness or the production of any document or thing, the Magistrate shall issue such process unless, for reasons to be recorded, he deems it unnecessary to do so.

Process for production of further evidence.

(4) Nothing in this section shall be deemed to require a Presidency Magistrate to record his reasons.

Scope and object of the section.—Sub-section (1) and sub-section (3) of this section are framed in different terms. By sub-section (1) all defence witnesses that may be produced on behalf of the accused must be examined but where it is necessary to issue process to procure the attendance of such witnesses a discretion is conferred by sub-section (3) on the Magistrate to refuse such an application if he sees fit to do so, recording reasons in writing for his refusal, 31 Bom. L.R. 523. The object of this section is to have the whole of the procurable evidence placed at the trial before the Court of Session and not merely a part of it. For this end a Magistrate is required to make a full and careful inquiry and record all the available evidence before he commits the case to the Court of Session. Sub-section (1) contemplates the production of the evidence by the prosecution or by the accused without the aid of the Magistrate while sub-section (3) contemplates the intervention of the Magistrate to secure the attendance of the witnesses and in regard to this evidence, the Magistrate has a discretion for reasons to be recorded by him to refuse to issue process if he deems it unnecessary to do so. When therefore S. 209, *infra*, requires the evidence referred to in these sub-sections to be recorded before a charge is drawn up, it does not require the Magistrate to record the evidence of witnesses whom in the exercise of the discretion given by sub-section (3) he has deemed it unnecessary to summon. This procedure appears to be convenient and reasonable whereas the procedure of allowing the accused to wait till the last moment and then require the Magistrate to summon witnesses will lead to undue delay in committing cases. The proceeding before the Magistrate is only an inquiry preliminary to the trial and, while the law in order to avoid unnecessary commitments, is careful to require the Magistrate to examine any witness produced before him by the accused and provides for the Magistrate also summoning and examining defence witnesses before drawing up a charge even gives the Magistrate a discretion under S. 212, *infra*, to examine defence witness after charge, then cancel the charge and discharge the accused under S. 213, *infra*. It does not compel the Magistrate to summon and examine defence witnesses after charge or even before charge, if for reasons recorded he deems it unnecessary to do so, 36 M. 321. See also in this connection, 49 M. 978.

When the accused appears or is brought before him.—The accused appears in obedience to a summons issued to him on the day fixed for the inquiry. He is brought before the Magistrate under arrest in pursuance of warrant issued against him. The accused, when his personal attendance is excused can appear by his pleader. See S. 205, *supra*. But under this section the accused must appear in person. A commitment cannot be made in the absence of the accused. Where a Magistrate recorded the evidence in the absence of the accused and committed the accused for trial to the Court of Session, it was held that his procedure was illegal, Weir II. 259.

Here the complaint is to be made and such evidence as may be produced.—It is laid down in this section that 'the Magistrate shall hear the complainant and take all such evidence as may be produced in support of the prosecution or on behalf of the accused.' This provision is mandatory and cannot be disregarded, 6 Ran. 531. Under S. 190 (1) (c), *supra*, a Magistrate may take cognizance on his own personal knowledge or suspicion without a formal complaint being made to the police, or to the Magistrate, or there may be a complaint of court in writing, or one by a public servant under Ss. 195, 476 and 476A, *infra*. In such cases there will be no complainant before the Court and to meet such a case the words "if any" are used in this section.

In the manner hereinafter provided.—See Ss. 856, 857, 859, 860 and 862, *infra*.

Take all the evidence produced by prosecution or by accused, etc.—This sub-section contemplates the production of evidence by the prosecution or by the accused without the aid of the Magistrate while sub-section (3) contemplates the intervention of the Magistrate to secure the attendance of the witnesses and in regard to this evidence the Magistrate has a discretion to refuse to issue process for reasons to be recorded by him in writing, 35 M. 321 at 323. It is the duty of the prosecution to bring before the Court as witnesses all persons who are alleged or are known to have knowledge of the facts constituting the offence charged, and the Court is bound to examine them, 10 C. 1070. But the prosecution is not bound to call persons whom they reasonably believe will not speak the truth, 8 C. 121. In every inquiry into a Sessions case the Magistrate is bound before he draws up a charge to take all such evidence as may be produced, (1) in support of the prosecution, (2) on behalf of the accused, (3) as may be called by the Magistrate. If he does not take the evidence, he errs, unless he can justify his procedure, on some such ground as that the evidence of such and such a witness produced is obviously irrelevant, or that because he considers the fact in issue between the parties proved in one or the other way by the evidence already produced, 10 A.L.J. 141 at 145. The section only requires that the Magistrate should hear all the evidence produced before him. The section does not require the summoning of further witnesses on an application made for that purpose on the date on which the commitment was made, 42 C. 608 where 20 A. 264 was followed and 26 A. 177 not followed. A Magistrate is not empowered to frame a charge or to commit until he has taken all such evidence as may be produced on behalf of the accused, 20 A. 264; 26 A. 177. The Magistrate must make his proceedings conform with the provisions of this Chapter and before he wrote and signed a committal order he must carry out the provisions of this chapter which specially provides procedure antecedent to a trial by the Sessions Court or the High Court, 6 Ran. 531 following 13 Cr. L.J. 877 (F.B.)=17 Ind. Cas. 813. A commitment made without examining any of the defence witnesses is bad, 1906 A.W.N. 306=4 Cr. L.J. 432. The provision is mandatory and cannot be disregarded. It is essential that the defence evidence, if tendered, is considered because the Magistrate has got the power to cancel the charge if he is satisfied that there are sufficient grounds for committing the accused under S. 218 (1), *infra*. The failure to do so is an illegality and not an irregularity, 6 Ran. 531 following 13 Cr. L.J. 877=17 Ind. Cas. 813. This section requires that the commitment should not be made till the Magistrate has heard the complainant and taken all such evidence as may be produced in support of the prosecution or on behalf of the accused. Where the original complaint was one under S. 342, I.P.O., and after hearing the evidence for the prosecution, the Magistrate framed a charge under S. 395, I.P.O., and without asking the accused whether they had any evidence, and rejecting the application of the accused to have some witnesses summoned, committed the accused, it was held that the commitment was illegal and should be set aside, 46 A. 137.

Or as may be called for by Magistrate.—Under S. 212, *infra*, a Magistrate may in his discretion summon and examine any witness named in the list given by the accused under S. 211, *infra*.

Sub-section (2); right of cross-examination.—This sub-section was introduced in the Code of 1898 probably on account of the suggestion made in 21 C. 642 to the effect that the provision as to cross-examination contained in the Code of 1872 was omitted in the Code of 1892 perhaps through inadvertence. The accused is at liberty to cross examine the witnesses. From the wording of this section it is clear that the intention of the Code was that as each witness was examined he should be then and there cross-examined, re-examined and allowed to go to his home. The Code has consideration for witnesses and their convenience, but this consideration is not always shared by Magistrates, 10 A.L.J. 144 at 147. This section does not confer on the accused the right of reserving the cross-examination until after all the prosecution witnesses have been examined in chief. Probably the true view is if the Magistrate purporting to exercise a discretion had made an order giving leave to reserve the cross-examination of the prosecution witnesses it would

have amounted to nothing more than an irregularity which would not have the effect of vitiating the trial, 14 M.L.T. 532=15 Cr. L.J. 29=22 Ind. Cas. 173. Under this section the accused has no right to reserve cross-examination. There is no provision in this chapter similar to that contained in S. 256 (1), *infra*, and this fact will show that the right to reserve cross-examination do not exist. The accused must exercise his right of cross examination of the prosecution witnesses after the close of the examination in chief and any refusal to allow cross-examination at the close of the prosecution is no error of law which could entitle the accused to quash the commitment had under S. 215, *infra* 33 C.W.N. 535. There is no provision in this chapter similar to the special provision relating to the trial of warrant cases under Chapter XXI entitling the accused to postpone the cross-examination of the prosecution witnesses till a certain stage but the Magistrate however, has a discretion to do so in suitable cases. He cannot of course throw obstacles in the exercise of the liberty of an accused to cross-examine the prosecution witnesses and when they were not able to do so on account of their not being furnished with copies of the statements made under S. 162, *supra*, already applied for and ordered to be given to them, he cannot refuse an adjournment, the accused under such circumstances cannot be based to have waived their right and the Magistrate could not take away the right by noting that the accused refused to cross-examine. He is bound to postpone the trial for enabling the accused to cross-examine after getting copies of the statement under S. 162, *supra*, 6 Pat. 329. In 36 C. 48 it was held that the provisions of S. 347 *infra* laying down that the Magistrate shall stop further proceedings when he had made up his mind to commit, is not controlled by the provisions of this section, and once he has made up his mind the Magistrate is not bound to allow the accused an opportunity to cross-examine the prosecution witnesses, and call witnesses for his defence. In that case the accused did not cross-examine the prosecution witnesses immediately after examination-in-chief, but applied to the Magistrate at the close of the prosecution to cross-examine them and to examine defence witnesses and the Magistrate's refusal was held justified under S. 347, *infra*. But the Madras High Court in 36 M. 321 doubled the view taken in the above case as to the applicability of S. 347, which refers to stoppage of proceedings at a trial. But where a Magistrate after drawing up a charge with a view to commit allowed the accused to cross examine the prosecution witnesses and as a result cancelled the charge it was held that the course taken by the Magistrate was proper, 39 C. 895; 5 C.W.N. 110; 1913 M.W.N. 728=14 M.L.T. 200=14 Cr. L.J. 529=21 Ind. Cas. 129.

Sub-section (3).—It is clear that this sub-section must be read subject to the provisions of S. 204 (3), *supra*. It is mandatory to the extent that it directs the Magistrate to issue process unless he deems it unnecessary to do for reasons to be recorded. This sub-section must be read with the other provisions of the Code. An essential preliminary before process is issued is the payment of the fees and unless the fees are paid no process is to issue as directed by S. 204 (3), *supra*. The general rule in private prosecutions is that the complainant is to pay the reasonable expenses of the witnesses although it is open to the Local Government under S. 544, *infra*, to make rules permitting in certain cases the liability to be transferred to the Crown, 3 Luck. 363.

Officer conducting prosecution.—Under S. 495, *infra*, a Magistrate inquiring into or trying a case may permit the prosecution to be conducted by any person other than a police-officer whose rank is to be fixed by the Local Government. But no person other than the law officers of the Crown such as the Advocate-General, Standing Counsel, Public Prosecutor, Government Solicitor, etc., or other officers, generally or specially empowered by Government shall be entitled to do so without such permission.

Issue of process for production of evidence.—A Magistrate is bound if the complainant or officer conducting the prosecution of the accused applies to him to issue process to compel the attendance of witnesses, and as a matter of consequence to take evidence produced. Here, there is one exception provided by law; the Magistrate can record reasons showing that it is unnecessary to compel attendance of witnesses in question, and can in such a case decline to issue process, 10 A.L.J. 144 at 145-147. The procedure that has to be followed by the committing Magistrate with regard to the evidence

produced before him by the accused is quite different from that prescribed in regard to evidence not produced before him but what the accused desires him to obtain by issue of process. There is no duty cast on an accused person to disclose his defence in the course of a preliminary inquiry and no inference can be drawn against the accused for non-disclosure of his defence, 23 Cr. L. J. 611 at 614=102 Ind. Cas. 899. An accused cannot delay asking for process against witnesses until the last moment, and a Magistrate is under no duty to issue summons merely because the accused asks for it, if in his opinion there are no sufficient grounds to grant the application, 36 M. 321; 42 C. 603 where 25 A. 177 is not followed. Where the Magistrate for reasons recorded by him refuses to issue process to compel the attendance of defence witnesses, it cannot be held that he acted illegally and commitment is bad. The High Court is not concerned whether the reasons given by the Magistrate would have appealed to any other person or not, but has only to see whether the provisions of the section have been complied with or not, 6 Pat. 329, but the Bombay High Court in 31 Bom. L.R. 523 took the view differing from the view expressed in 6 Pat. 327 that the reasons recorded by the Magistrate should be such as the High Court would regard them as valid and acceptable and the High Court can interfere if the reasons appear on the face of it to be illegal or untenable. It is submitted that the latter view is more reasonable. Where a Magistrate after recording the evidence for the prosecution, had summoned the witnesses for the defence, and had consented to make a local inspection also, but committed the accused without examining the defence witnesses without making a local inspection merely on a direction of the Sessions Court, it was held that the commitment was bad in law, 1905 A.W. N. 306=4 Cr. L.J. 452.

Unless for reasons to be recorded he deems it unnecessary.—The Magistrate is to record his reasons for refusing process for the production of further evidence. The accused has a right to adduce his evidence and the Magistrate cannot refuse process and take down his evidence without recording sufficient reasons, Ratanlal 100; 39 M.L.T. 14=27 Cr. L.J. 1327=98 Ind. Cas. 399.

Sub-section (4).—Curiously in this sub-section it is enacted that Presidency Magistrates need not record reasons for refusing process. The reason for this distinction is not at all clear. Presidency Magistrates enjoy several such privileges, e.g., (1) Sec. S. 213, *infra*, which enacts that they need not record reasons for commitment for trial. (2) Also under S. 362 (4) they are not bound to record evidence or frame a charge in non-appealable cases. (3) Under S. 373, *infra*, when convicting an accused and passing a non-appealable sentence they need not write a judgment and need not record reasons for conviction. (4) Under S. 441, *infra*, they may send up along with the records called for by the High Court in the exercise of its Revisional Jurisdiction a judgment setting forth reasons for the conviction.

209. (1) When the evidence referred to in section 208, sub-sections (1) and (3) has been taken, and he has (if necessary) examined the accused for the purpose of enabling him to explain any circumstances appearing in the evidence against him, such Magistrate shall, if he finds that there are not sufficient grounds for committing the accused person for trial, record his reasons and discharge him, unless it appears to the Magistrate that such person should be tried before himself or some other Magistrate, in which case he shall proceed accordingly.

(2) Nothing in this section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case if, for reasons to be recorded by such Magistrate, he considers the charge to be groundless.

When accused person to be discharged.

Scope of the section.—The object of the law in providing that the inquiry shall be held by a Magistrate before the accused had to undergo a trial in the Court of Session is to prevent the commitment of cases in which there is no reasonable ground for conviction. The provision of law is calculated, on the one hand to save the subjects from prolonged anxiety of undergoing trials for offences not brought home to them, and, on the other hand to save the time of the Court of Session being wasted in cases in which the charge is not obviously supported by such evidence as would justify a conviction, 5 A. 181. This section empowers a Magistrate holding an inquiry preparatory to commitment to discharge the accused if he finds that there are no sufficient grounds for committing. Compare S. 253 (2) with regard to the discharge in warrant cases.

When evidence.....has been taken.—The evidence referred to here is the evidence produced in support of the prosecution and on behalf of the accused or as may be called by the Magistrate. A commitment made without a preliminary inquiry under this Chapter is illegal, 17 Bom. L.R. 910=16 Cr. L.J. 747=31 Ind. Cas. 347. A commitment must depend on the evidence actually before the Court and not on evidence that may be given in the future, 16 Cr. L.J. 5=25 Ind. Cas. 309.

When the Magistrate has, if necessary, examined the accused.—The words "if necessary" have been introduced in the Code of 1893. The examination of the accused prior to commitment, is in the discretion of the Magistrate. He only examines the accused when he thinks it necessary to enable him to explain any circumstances appearing in evidence against him. If the accused is unwilling to make a statement, it is sufficient for him to make a note of that fact and record it as a reason for not examining the accused, 18 Cr. L.J. 913=42 Ind. Cas. 143. There is no duty cast on an accused person to disclose his defence in the course of the preliminary inquiry and no inference can be drawn against him from his non-disclosure of his defence at that stage, 28 Cr. L.J. 611=102 Ind. Cas. 899. It is not absolutely necessary that the Magistrate should examine the accused in every case. The Magistrate is not bound to examine the accused if he makes up his mind to discharge the accused, but he is bound to examine him if he means to commit. It is the duty of the Magistrate before committing the accused persons for trial to have them examined for the purpose of enabling them to explain any circumstances appearing in the evidence against them. The effect of this section is that it is not left to the discretion of the Magistrate who intends to commit, to examine the accused person. He is bound to examine them and if he makes an order of commitment without examining them the order is irregular, 23 M. 636 at 637.

For enabling him to explain any circumstances against him.—See S. 842, *infra*, which deals with power to examine the accused at any stage of any inquiry or trial. The purpose is there also to enable the accused to explain any circumstances appearing in evidence against him. The real object of the law in allowing the accused to be examined, is to enable the Judge to ascertain from time to time from a prisoner, particularly if he is undetained, what explanation he may desire to offer regarding any fact stated by the witnesses or after the close of the case how he can meet what the Judge may consider to be damning evidence against him, 6 C. 98 at 102. The discretionary power given by this section should be used to ascertain from the prisoner how he may explain facts appearing in evidence against him so that these facts should not stand against him unexplained, but not to drive him to make self-criminating statement, 1 M.H.C.R. 199; 10 M. 295 at p. 315; 5 A. 233; 30 A. 540; 1 C.L.R. 435; 5 C.L.R. 431; 6 C. 279. Statements obtained from the accused by such examination should not be used to remedy gaps in the prosecution case, 27 M. 238; 39 M. 770, 26 C. 49; 23 C. 689, and the accused should not be examined when there was nothing for him to explain, 5 M.L.T. 216, 10 W.R. (Cr.) 25; 39 M. 770. A Magistrate has no power to direct an accused person to file a written statement in proceedings under this Chapter, but it is not competent to the Court to refuse to allow the accused to make a statement, Weir II, 255.

If he finds there are no sufficient grounds for committing.—A *prima facie* case should be made out to justify a commitment to the Court of Session, 15 M. 59. A

Magistrate should not treat a grave offence beyond his jurisdiction as a less grave one to bring it within his jurisdiction and he should not ordinarily go into the defence in a case triable exclusively by the Court of Session when a *prima facie* case for committal has been made out. To do so would be to take upon himself the function of a superior Court, (1910) M.W.N. 852-9 M.L.T. 71=12 Cr. L.J. 23=8 Ind. Cas. 1103. The duty of the committing Magistrate is only to see whether there is evidence which, if believed, would warrant a conviction. It is not his function to consider the probabilities and to weigh the evidence as if he is a trying Court, 38 M.L.T. 135=23 Cr. L.J. 120 (1)=99 Ind. Cas. 323 (1). The words "*sufficient ground for committing*" which occurred previously in the section have been explained to mean in 27 B. 81 not ground for convicting, but where the evidence is sufficient to put the accused on his trial, and such a case arises when credible witnesses made statements, which, if believed, would sustain conviction. The weighing of their testimonies with regard to improbabilities and apparent discrepancies is more properly a function of the Court having jurisdiction to try the case. It is not necessary that the Magistrate should satisfy himself fully of the guilt of the accused before making a commitment. It is his duty to commit when the evidence for the prosecution is sufficient to make out a *prima facie* case against the accused, and he exercises a wrong discretion if he takes upon himself to discharge an accused in the face of evidence which might justify a conviction, (1913) M.W.N. 728 at 733=14 M.L.T. 200=14 Cr. L.J. 529=21 Ind. Cas. 129. The section provides that if a Magistrate finds that there are no sufficient grounds for committing the accused person for trial he may discharge him. It is not merely therefore that the Magistrate in the case put is empowered to discharge the accused; he is bound to do so. What then is the case put? It is the case where the Magistrate finds that there are no sufficient grounds for committing the accused person for trial. He may so find either because there is no evidence whatever, or because the evidence tendered for the prosecution appears to him to be totally unworthy of credit. But in this latter case, equally with the former case, it would be his duty under the section to discharge the accused since the grounds relied on for a commitment would, in his opinion, be insufficient. That is the construction which the words of the section suggest to us and which we understood was accepted in 9 Bom. L.R. 225. It is perhaps unnecessary to add that where the Magistrate entertains any real doubt as to the weight or quality of the evidence the task of resolving that doubt and assessing the evidence should be left to the Court of Session, 35 B. 163; 4 Lah. 69. Except in cases where the charge is found to be groundless, in other words where the evidence on record is of such a nature, that no tribunal, judge or jury would ever convict the accused on that evidence, the Inquiring Magistrate is bound to commit to the Court of Session for trial. What the Inquiring Magistrate has to determine is not whether a case has been made out, but only whether there is a case to be sent up for trial to the Sessions Court. Where the Magistrate discharged the accused because he considered that no case has been made out against the accused it was held that the order of discharge was based on a mistaken notion of the function of the Inquiring Magistrate and therefore should not be allowed to stand. The intention of the Legislature is to make a distinction between grounds for conviction and grounds for committing for trial which mean satisfactory evidence to go to trial which must be regarded as the ground for committing for trial, 43 M. 874 at 881. It is the duty of the Magistrate merely to record the evidence and leave it to the jury at the Sessions to decide as to the credibility of the evidence. The Magistrate acts wrongly in expressing his opinion with regard to the credibility of the witnesses who are before him. But according to the decisions of the various High Courts it is open to the Magistrate to form his opinion with regard to the credibility of the witnesses called before him but it is not his duty to closely criticize their evidence. If a *prima facie* case is made out he should clearly leave it to the jury at the Sessions to form their own view as to the credibility of the evidence. But, if, after hearing the evidence he is satisfied that it is not trustworthy and that a conviction will not result, then he is entitled to record a finding that the witnesses who speak to the charge cannot be believed and that a conviction will not result with an order of discharge in such a case, the District Magistrate will not be justified in interfering and when he does interfere the High Court in Revision will set aside the order of further inquiry and uphold the

order of discharge, 51 C. 649; 27 Cr. L.J. 509=93 Ind. Cas. 973. Although a Magistrate has large power of discharging the accused he should only exercise it when he is clearly of opinion that the evidence for the prosecution is untrustworthy. If it is a matter of weighing probabilities he would be well advised in leaving the case to the Court which alone is empowered to try it and should not discharge the accused because in his opinion the accused ought to be given the benefit of doubt, 26 A. 564; 13 A.L.J. 111=16 Cr. L.J. 139=27 Ind. Cas. 203; 38 M.L.T. 135=23 Cr. L.J. 120 (1)=99 Ind. Cas. 329 (1). Ordinarily speaking when the evidence for the prosecution tends to show that a grave offence exclusively triable by the Sessions Court say under S. 302, I.P.C., has been committed, it is not for the Magistrate to weigh the evidence but it is better for him to commit the case to the Court of Session and leave it to the Sessions Court to decide upon the value of the evidence, 30 Cr. L.J. 234=114 Ind. Cas. 58. There are certainly authorities which can be cited in support of the view that credibility of prosecution witnesses in a charge which is beyond the jurisdiction of a Magistrate is a question which can at any rate be properly be placed before the higher tribunal which has jurisdiction and it cannot be said that in law the Magistrate who says that he will not merely act upon his appreciation of the evidence but will leave such appreciation to a higher tribunal is in error, 30 Bom. L.R. 639 at 641 following 1 Ran. 526. When a committing Magistrate pronounces upon evidence, merely because it does not commend itself to his mind he is really trying the case and not merely considering whether there are sufficient grounds for committing an accused for trial, 1904 A.W.N. 5. The existence of a possible ground of defence is not a sufficient reason for a Magistrate to refuse to commit a person for trial against whom a *prima facie* case is made out. It is ordinarily for the Court that has to try the case, not for the Magistrate who makes the preliminary inquiry, to determine having regard to all the facts and probabilities whether the guilt is brought home to the accused, (1913) M.W.N. 725 at 732=14 M.L.T. 200=21 Ind. Cas. 129. In the case of offences exclusively triable by a Court of Session the committing Magistrate cannot be considered to have the power to proceed to the trial of the accused in the inquiry and the chief business of the Magistrate is to see whether the prosecution has adduced such evidence as is not on the face of it absolutely incredible on every ingredient of the offence that is charged, (1915) M.W.N. 233=16 Cr. L.J. 307=28 Ind. Cas. 643. A Magistrate holding a preliminary inquiry under Chapter XVIII of the Code into an offence exclusively triable by a Court of Session is entitled to discharge the accused if the evidence tendered by the prosecution appears to him to be totally unworthy of credit but if there is evidence as to some material facts deposed to by credible witnesses on which facts a Court of Session or a jury may not unreasonably find the accused guilty, that is a case in which the accused should be put on his trial before the Sessions Court leaving it to the Judge and jury as the case may be, to find the accused's guilt proved or not proved on these facts, 3 Cr. L. Rev. 375. See 42 M.L.J. 49=16 L. R. 463, where it was held that when the evidence is untrustworthy in the Magistrate's opinion he is not bound to commit; to hold otherwise is to make preliminary inquiry a mere matter of form. Where a Magistrate has heard the evidence for the prosecution with entire disbelief when he considers himself in a position to show that the prosecution witnesses are totally unworthy of credit and *a fortiori* where, after examining certain witnesses named on behalf of the accused he comes to the conclusion that the evidence given by them is reliable and disproves that given by the prosecution witnesses, he is well within his discretion in discharging the accused and not committing him to the Sessions, 37 A. 355 followed in 44 A. 67; 21 A. 266; 5 A. 161; 70 W.N. 77; 12 C.W.N. 117; 26 Cr. L.J. 117=83 Ind. Cas. 677; 11 Cr. L.J. 18=4 Ind. Cas. 612; 12 A.L.J. 150=14 Cr. L.J. 431=20 Ind. Cas. 747; 49 A. 443. Having regard to the previous wording of the section a Magistrate can hardly be said to be satisfied that sufficient grounds for committing are supplied by the evidence of witnesses if he himself is unable to believe those witnesses. Before he can be so satisfied it is manifest that all grounds for discrediting them must be taken as excluding all cases in which the alleged grounds for commitment appear insufficient, whatever the reason for this insufficiency may be, and is not limited as to the essentials of the alleged offence, 9 Bom. L.R. 225. For consideration which should weigh with a Court in committing the case to the Sessions, see 42 B. 172. The test which should be applied to decide whether a commitment ought or ought not to be made on the facts is—

assuming that whole of the evidence telling against the accused is true, is there a case which a Judge at a trial could leave to a jury? If the evidence is such that a Judge would have been bound to rule that there was no evidence on which a jury could convict, then a committal ought not to have been made. If there was any evidence which called for an answer, however great the preponderance in favour of the prisoner might be, then the committal was proper, 9 C.W.N. 829 at 839 not approved of in 37 A. 335 at 357. It is now settled law that if a Magistrate is satisfied that the charge is without foundation and that there are no sufficient grounds for committing the accused for trial, he is entitled, and indeed it is his duty to discharge him, 46 A. 537 at 538, where 26 A. 564; 12 A.L.J. 150; 37 A. 335; 44 A. 57 are followed; 27 Cr. L.J. 274-92 Ind. Cas. 450. It is well established that if a Magistrate hearing a charge triable by a Court of Session comes to the conclusion that the evidence before him is totally unworthy of credit and there is no reasonable possibility of the case resulting in a conviction he is entitled and it is his duty to discharge the accused under this section. The same result follows if he comes to a similar conclusion after hearing witnesses for the defence under S. 213 (2), after framing a charge. Of course the discretion is to be exercised carefully and whenever there is possibility that different Courts might take different views of the evidence, the Magistrate even though he may himself not think the evidence sufficient for conviction, should leave it to the Sessions Court to decide, 24 A.L.J. 133 at 134=27 Cr. L.J. 2-91 Ind. Cas. 34; see also 51 C. 819; 25 Cr. L.J. 1089=81 Ind. Cas. 913; 4 Lah. 69. A distinction must be made between a case where the Magistrate discharges the accused under this section refusing to commit him and one where in fact he has directed a commitment although he disbelieves the main prosecution evidence. In the former case the rulings in 35 B. 163 and 17 Bom. L.R. 910 would be very strong authorities in favour of the High Court not interfering with the order of discharge but in a case where the Magistrate has been satisfied that there are sufficient reasons for committing the accused in spite of his disbelief of the prosecution evidence, the commitment is valid and cannot be interfered with, 30 Bom. L.R. 639-29 Cr. L.J. 987=112 Ind. Cas. 107. A Magistrate is not compelled to commit to the Sessions any case in which he considers the conviction to be impossible. But he must however exercise a proper discretion in discharging an accused charged with an offence triable by a Court of Session. It is not enough for him merely to doubt some portions of the prosecution evidence. He must be satisfied that the prosecution will fail and rightly fail in the Sessions Court, 25 Cr. L.J. 1189=82 Ind. Cas. 53; 51 C. 849. It is impossible to lay down any general rule or rules which must be applied in every case and it is extremely difficult to arrive at a formula which will be of assistance in all circumstances. But the general result of decided cases may be expressed shortly as follows: (1) that a Magistrate is competent to consider the credibility and weigh the probabilities of the evidence. This is clearly and reasonably contemplated by statute. Unless this is so his duty will merely be to record evidence and then commit every case for trial. (2) In this consideration, his discretion is limited. In a matter of reasonable doubt he must not rely on his own opinion; in fact he must not encroach on the functions of a Court of trial, (3) he must keep before him the question whether there are fair grounds for concluding the accused to be guilty, i.e., where there is a *prima facie* case upon the evidence reasonably credible by a court of trial, he must commit, 4 Ran. 471.

Record his reasons.—Reasons are to be recorded for making the order of committal, but a Presidency Magistrate need not record reasons, S. 213 (1). Reasons are to be recorded to enable the Court of Revision to exercise its powers effectively under Ss. 435 to 439, *infra*.

Unless it appears such person should be tried before himself, etc.—This proviso applies to a case which according to sch. II, Col. (8) may be triable by the Court of Session as well as the Magistrate. See 10 C. 85.

Shall proceed accordingly.—That is, try the case under the provisions of Chapters XX to XXII, *infra*.

Sub-section (2).—This sub-section relieves the Magistrate from the necessity of going on with an inquiry when he is reasonably convinced it will serve no useful purpose and empowers him to discharge the accused before complying with the procedure laid down in

S. 208 (1) or (3) and the examination of the accused if he considers the charge to be groundless. Before he does so he must record his reasons. See S. 253 (2) *infra*, as to discharge in warrant-cases. This sub-section empowers a Magistrate holding a preliminary inquiry to see whether the case is to be committed. It does not preclude him from trying the case if he thinks that only an offence within the jurisdiction of a Magistrate has been committed, and when he does so he acts within his jurisdiction, 10 C. 89 at 86.

Revision.—The remedy in cases of erroneous and improper discharge is provided by ss. 436 and 437, *infra*. S. 437 refers to cases of discharge of offence *exclusively triable by Court of Session*. In such cases the Sessions Judge or District Magistrate may direct a commitment to the Court of Session instead of ordering a further inquiry contemplated by S. 436, *infra*. But in considering whether an accused person has been improperly discharged within the terms of S. 437, *infra*, a Sessions Judge or District Magistrate is bound to consider all the grounds upon which the discharge has been passed including the evidence which has not been disbelieved or held to be sufficient to establish a *prima facie* case, 7 C.W.N. 77; 27 M. 55; 14 M. 334; 12 C.W.N. 117. The High Court will go into questions of fact in such cases, 30 M. 224; 3 Cr. L. Rev. 375=15 Cr. L.J. 373=23 Ind. Cas. 744. S. 436, *infra*, contemplates a further inquiry into the case where an improper or illegal discharge is made.

210. (1) When, upon such evidence being taken and such examination (if any) being made, the Magistrate is satisfied that there are sufficient grounds for committing the accused for trial, he shall frame a charge under his hand, declaring with what offence the accused is charged.

When charge is to be framed.

Charge to be explained, and copy furnished, to accused.

(2) As soon as such charge has been framed, it shall be read and explained to the accused, and a copy thereof shall, if he so requires, be given to him free of cost.

Object of the Section.—The provision of law is calculated on the one hand to save the time of the Court of Session being wasted over cases in which the charge is obviously not supported by evidence which would justify a conviction as also to save the subjects from prolonged anxiety of undergoing trials for offences not brought home to them, 5 A. 161.

Upon such evidence being taken.—"Such evidence" refers to evidence taken under S. 208, *supra*. But a Magistrate need not record evidence of witnesses whom he deemed unnecessary to summon under S. 203 (3), *supra*, 36 M. 321. It is imperative on a Magistrate to record evidence in a preliminary inquiry which results in a committal. A Magistrate inquiring into a case for this Chapter is not empowered to frame a charge or make out an order for commitment until he has such evidence as the accused may produce before him, 20 A. 264; 28 A. 177. It is doubtful whether S. 347, *infra*, applies to preliminary inquiries, 36 M. 321 at 322. This section empowers a Magistrate to commit at any stage of the proceedings.

against the accused and there is nothing to rebut or weaken the force of those allegations. But difficulty will be felt where, as often happens, there are counter allegations and opposing circumstances. The requirement that the grounds for committing the case should be sufficient, must be taken as excluding all cases in which the alleged grounds for commitment appear insufficient whatever the reasons for the insufficiency may be, and is not limited to a requirement for merely formal allegations, whether credible or not as to the essentials of the alleged offence, 9 Bom. L.R. 225=5 Cr. L.J. 213; see also 45 A. 837. A Magistrate in considering the sufficiency of grounds may take into account whether on the evidence before him it is probable that a conviction will be arrived at, 7 C.W.N. 77; see 37 A. 353; 26 A. 564; 21 A. 265; 35 B. 163; 27 B. 84; 17 Bom. L.R. 910; 12 Bom. L.R. 923; (1915) M.W.N. 233; Weir II, 263; 44 A. 57; 13 A.L.J. 111; 9 C.W.N. 829; 4 Lah. 69. The duty of a committing officer is to ascertain by the evidence for the prosecution whether a *prima facie* case is made out against the accused. Magistrates are apt to suppose that it is incumbent on them to satisfy themselves fully of the guilt of the accused before making a commitment. This idea is erroneous, 3 N.W.P.H.C.R. 27; 15 M. 39; Weir II, 542. In a charge exclusively triable by a Court of Session if there is some evidence in support of the charge, it is not obligatory for the Magistrate to commit in all cases. He should exercise his discretion and see the facts in true proportion and decide whether or not he should try the case himself, 37 C.L.J. 34.

He shall frame a charge.—The duty of framing a charge rests primarily with the Magistrate and with the prosecutor and the charge is to be framed in accordance with the offence disclosed by the evidence recorded by the Magistrate, and a Magistrate is not restricted to the sections or offences named by the complainant in his original complaint, 12 W.R. (Cr.) 40; 26 C. 785. The drawing up of the charge must always follow the determination of the Magistrate to commit the case, but the mere framing of a charge against the accused is distinct from and does not amount to an order of commitment which has to be made under S. 213, *infra*, 12 Bom. L.R. 521=11 Cr. L.J. 435=7 Ind. Cas. 430; 15 Cr. L.J. 16=22 Ind. Cas. 160. After framing a charge the Magistrate can allow the accused to cross examine the prosecution witnesses and as a result of such cross-examination cancel the charge, 39 C. 885, where 5 C.W.N. 110 is referred to.

Sub-section (2).—This makes it imperative on the Magistrate to read and explain to the accused the charge he has framed. Mere reading of the charge is not sufficient. It must also be explained to the accused so that he may have sufficient notice of what is imputed to him. Where in a case of murder the meaning of "murder" was not explained to the accused as required by this section and the accused pleaded killing the deceased, it was held that it was not an admission of murder which could be acted upon, 9 M. 81. A copy of the charge shall, if the accused requires the same, be given to him free of cost.

211. (1) The accused shall be required at once to give in, orally or in writing, a list of the persons (if any) whom he wishes to be summoned to give evidence on his trial.

List of witnesses for defence on trial.

(2) The Magistrate may, in his discretion, allow the accused to give in any further list of witnesses at a subsequent time and, where the accused is committed for trial before the High Court, nothing in this section shall be deemed to preclude the accused from giving, at any time before his trial, to the Clerk of the Crown a further list of the persons whom he wishes to be summoned to give evidence on such trial.

Further list.

The accused shall be required at once to give in a list—A duty upon the Magistrate to call upon the accused at once to give a list of persons whom to be summoned to give evidence on his behalf. The question "Have you evidence?"

ambiguous and is not a sufficient compliance with the section. The Magistrate is bound to call upon the accused to give a list of witnesses he desires to call, 7 Bom. L.R. 723 but, a Magistrate cannot force the accused to disclose either the names of his intended witnesses or what those witnesses would prove. An accused person may reserve his defence and also refuse to give a list of his witnesses but in that case he will have to bring his witnesses and cannot have the assistance of the Court to compel their attendance, 14 A. 242; 19 A 502. The accused is entitled as of right to have any witness named in the list filed by him to be summoned and examined, 23 W.R. (Cr.) 56; 15 W.R. (Cr.) 7; 3 W.R. (Cr.) 36. But there is nothing in the section which prevents a Magistrate from allowing an accused person to reserve his defence for the Court of Session, 14 B.L.R. (Appx.) 1. An accused is not entitled as of right to have his witnesses not named by him before the Magistrate, summoned at the Sessions trial. But there is no reason to refuse an application by an accused person for summons simply because a large number of witnesses is mentioned in his list. 11 C. 762 at 766.

Sub-section (2). provides for giving a further list of witnesses at any subsequent time. See Ss. 216, 231 and 291, *infra*.

Power of Magistrate to examine such witnesses.

212. The Magistrate may, in his discretion, summon and examine any witness named in any list given in to him under section 211.

The object of the section.—The object of the section is to prevent concoction of evidence by the accused after his commitment. This section gives a discretion to the Magistrate to summon and examine any defence witness named in the list furnished by the accused under the last section, but the discretion should be used very sparingly as such a course may seriously prejudice the accused person in his defence. But such examination may result in the benefit of the accused in some cases, for, if after examining any such witness the Magistrate is satisfied there is no sufficient ground for his committal, the Magistrate may act under S. 213 (2), cancel the charge and discharge the accused. This section did not exist in the Code of 1861. It appeared for the first time in the Code of 1873 on account of two conflicting decisions of the Calcutta High Court reported in 4 B.L.R. (Appx.) 1 and 15 W.R. (Cr.) 16. With these cases before them the Legislature inserted a new S. 200 in Act X of 1872 and retained it as S. 212 in Act X of 1882. That section gave the Magistrate the widest possible discretion to summon and examine any witness in any list given to him under S. 211. With that discretion the High Court cannot interfere, nor do we see how any line could be drawn limiting it one way or another. The Code does not require a Magistrate to record his reasons for acting or refusing to act under the section and the High Court cannot lay down a direction that before exercising his powers he should record reasons. He is given a discretion which he may be trusted to use properly and it will be for a person impugning his order to satisfy the High Court that a judicial discretion has not been used before that order under this section could be interfered with. We need not go into or state any reason why it is necessary that this section should appear in the Statute Book. It is there; and as it is there, it is the duty of every Magistrate who considers that the use of it is necessary and expedient in the interests of justice to make use of it to the fullest extent necessary in the interests of justice. If he does not do so, he neglects an obvious duty, 18 A. 380 at 381—382.

May summon and examine.—It is not imperative on the Magistrate to summon and examine any defence witnesses after reaching the stage of framing a charge under S. 210, *supra*. The fact that the Magistrate had already issued summonses to the defence witnesses named in the list put in by the accused and had examined some of them before he made up his mind to commit, does not prevent his stopping proceedings under S. 317, *infra*, as his power under this section is unqualified, 17 M.L.T. 83=15 Cr. L.J. 701=26 Ind. Cas. 152, but it was held in 1906 A.W.N. 306 that a commitment made by a Magistrate was bad where a Magistrate after recording the prosecution evidence had summoned certain defence witnesses

and had consented to make a local inspection at the request of the accused, but committed the accused without examining the defence witnesses summoned, and without making the local inspection. A Committing Magistrate is not justified either in law or in common fairness in enforcing the accused to disclose the names of his intended witnesses or what those witnesses would be called on to prove, or when they attend, to threaten them with penalties unless they are giving wilfully false evidence or persistently refuse to give facts within their knowledge, 14 A. 212.

213. (1) When the accused, on being required to give in a list under section 211, has declined to do so, or when he has given in such list and the witnesses (if any) included therein whom the Magistrate desires to examine have been summoned and examined under section 212, the Magistrate may make an order committing the accused for trial by the High Court or the Court of Session, (as the case may be) and (unless the Magistrate is a Presidency Magistrate) shall also record briefly the reasons for such commitment.

(2) If the Magistrate, after hearing the witnesses for the defence is satisfied that there are not sufficient grounds for committing the accused he may cancel the charge and discharge the accused.

May make an order committing accused for trial by the High Court or the Court of Session.—If a Mufassal Magistrate commits a case to the High Court Sessions, he should communicate with the Commissioner of Police, Madras, immediately in order that the latter officer, may depute a responsible officer to be in charge of the case. *G. O. No 654 dated 10-4-1907.* According to this section a Magistrate may make an order

ity of a Magistrate

Held to exercise

" L.J. 49=16 L.W.

on " here can only

mean the Court of Session having jurisdiction to try the case under S. 177, *supra*. S. 63 of Act X of 1872 provided that Magistrates shall ordinarily commit to the Court of Session for the Sessions division in which the district to which they are appointed is situated. But the Code of 1898 contained no similar provision. The Bombay High Court in 8 B. 312 held that the commitment should be to the Court empowered to try the case under S. 177, *supra*, and held the commitment in a similar case bad, but instead of quashing the illegal commitment directed the transfer of the case to the Court having jurisdiction. By such a course, the express ruling of the Privy Council in 9 A. 191 to the effect that a transfer from a Court having no jurisdiction would not render the proceedings legal, was lost sight of.

Shall record briefly reasons for commitment.—The law requires that reasons for the commitment shall be recorded, and failure to give reasons is more than an irregularity, but an illegality vitiating the commitment, 38 B. 114; 11 Bom. L.R. 18=9 Cr. L.J. 163=5 M.L.T. 225; 24 C. 429; 6 A.L.J. 939. In a case where the trial may either be by the Magistrate himself or by the Court of Session, the reasons for the commitment which the Magistrate is bound to record under this section must include also special reasons for sending the accused before the Court of Session and when he does not do so there is a failure to comply with the law. This no doubt would amount to no more than an irregularity if the case were one which ought to be committed to the Sessions, but when the case is not one which ought to have been committed then to commit without giving reasons is more than an irregularity and it is an illegality, 38 B. 114.

Unless he is a Presidency Magistrate.—A Presidency Magistrate enjoys the privilege of committing without stating reasons. For similar instances see note at P. 327,

Under the Code a Court of Session has no power to withdraw a case from the jury. The power of quashing commitment, in other words, withdrawing the case from the jury is specially given to the High Court which has to consider whether there is a point of law, 5 C.W.N. 411 at 413. But if the Sessions Court finds the commitment illegal the procedure to be followed is to make a reference to the High Court under S. 433, *infra*. The words "on a point of law" occurring in this section have been the subject of a liberal as well as a narrow and literal construction by various High Courts. In the case of offences either exclusively or not at all triable by the Court of Session under Col. 8 of Sch. II of the Code no difficulty arises. But in the case of offences triable either by the Court of Session or by a first class Magistrate whether an improper exercise of judicial discretion in committing is not a point of law, is a question on which there is difference of opinion. The Madras High Court in 42 M. 83 is in favour of a narrow and literal construction of the words as also the Bombay High Court in 13 Bom. L.R. 201=12 Cr. L.J. 236=10 Ind. Cas. 802. If this interpretation is adopted it is difficult to say how any point of law can possibly arise in the case of offences triable either by a Court of Session or Magistrate. In 4 Bom. L.R. 85; 38 B. 114; 42 B. 172; 24 C. 429 the broader interpretation was adopted, 28 Bom. L.R. 293=27 Cr. L.J. 479=93 Ind. Cas. 703.

Or by a civil or revenue court under S. 478.—The words were introduced in the Code of 1898.

• Can be quashed by the High Court only on a point of law.—The expression "The High Court" occurring herein is to be construed as defined in S. 266, *infra*, and so the Judge presiding over the Criminal Sessions of the High Court and exercising ordinary original criminal jurisdiction can quash a commitment made to the High Court Sessions on a point of law, 56 C. 785 following 36 C. 48, but in 42 M. 83 the Criminal Bench dealt with the objection. The use of the word "only" is significant and imposes an important restriction on the powers of the High Court. The High Court alone is competent to quash a commitment once made. The High Court when acting under this section has no concern with the credibility of the evidence when there is in fact, some evidence on the committal record which would justify the Sessions Judge leaving the question of guilt or innocence to the jury. If the Committing Magistrate says he has some doubt about the evidence but he thinks it better that the case should go before the jury, it cannot possibly be said that in so doing he committed an error of law which could justify the High Court in quashing the commitment under this section. The High Court must be satisfied from the record that there was an illegality in the committal order. The test in a matter of this nature is to see from the order what the Magistrate's findings are on the evidence and whether those findings are capable *prima facie* of sustaining the charges he has framed and on which the committal is made. A question of misjoinder is for the Sessions Court to determine and may be urged in that Court and not in the High Court in an application under this section to quash commitment, 31 Bom. L.R. 523 at 524. In 4 A. 150, it was held that even in a compoundable case, *viz.*, adultery, a Magistrate who had committed the accused to the Court of Session had no power to discharge the accused subsequently when the offence was compounded and the fact made known to the Magistrate. See also 16 M.L.J. 525; Weir II, 262. A doubt was raised in 36 C. 48 at 50 whether the High Court in exercising its ordinary appellate jurisdiction could quash a commitment made to it by a Presidency Magistrate for trial under its ordinary original criminal jurisdiction and it was suggested that the practice in somewhat similar cases had been to apply to the Judge exercising ordinary original criminal jurisdiction of the Court, but the Court did not decide the point but dealt with the case on the merits as the application was urgent, See 42 M. 83. Commitment can be quashed at any stage of the case, 6 C. 554. But where the prisoner is put on his trial and has pleaded to the charge the commitment is not to be quashed, 12 C.L.R. 120.

A commitment can be quashed only on a point of law, 36 A. 4. The order may be inconvenient or it may be indiscreet but it cannot be quashed unless it is illegal, 13 Bom. L.R. 201=12 Cr. L.J. 236=10 Ind. Cas. 802; 18 Cr. L.J. 64=22 Ind. Cas. 335; 13 Cr. L.J. 270=23 Ind. Cas. 478; 26 Cr. L.J. 1015=87 Ind. Cas. 965; 37 M.L.J. 632; 11 A.L.J. 439; 14 Cr. L.J. 304=19 Ind. Cas. 960; 49 A. 181. A question of jurisdiction is a

point of law, 15 Cr. L.J. 270=23 Ind. Cas. 478; Weir II, 235, it cannot be quashed on the ground that there is no evidence to justify a commitment, 27 M. L.J. 593 and 13 Bom. L.R. 201=12 Cr. L.J. 256=10 Ind. Cas. 802. It can be quashed on the ground that the facts did not necessarily establish the offence charged, 2 C.L.J. 467=2 Cr. L.J. 383; 23 Cr. L.J. 187=99 Ind. Cas. 335 but see 6 A. 98; 9 C.W.N. 529, which took a different view, or on the ground that the evidence is of a doubtful character, 3 Cr. L. Rev. 167. An unnecessary commitment was held to be an error of law, 26 Cr. L.J. 148 at 151=53 Ind. Cas. 708; 15 Bom. L.R. 999=15 Cr. L.J. 657=21 Ind. Cas. 897. Insufficiency of evidence has never been treated as a ground for quashing a commitment. 1 W.R. (Cr.) 8, but the absence of evidence to warrant a commitment is a point of law and may furnish a good ground for quashing the commitment, 5 C.W.N. 411; 30 Cr. L.J. 519=115 Ind. Cas. 692, but as pointed out in 27 M. L.J. 593=15 Cr. L.J. 663=25 Ind. Cas. 993 and 13 Bom. L.R. 201=12 Cr. L.J. 256=10 Ind. Cas. 802, the result of quashing commitment on the ground of absence of evidence may not be to the benefit of the accused as he may be charged again with the offence, but if the committal were allowed to stand the Court of Session will have to acquit him on the ground that there is no evidence against him. A commitment made of some of the accused while others have not yet been arrested is no ground for quashing the commitment, 7 M.L.T. 187=11 Cr. L.J. 383=5 Ind. Cas. 933. The test which should be applied to decide whether a committal might or might not be made on the facts is this assuming that the whole of the evidence against the accused is true, is there a case fit to go to the jury? If the answer is 'No,' then a committal is improper and ought not to be made, 9 C.W.N. 529. There is a conflict of opinion among the different High Courts as to its powers to quash a commitment on the ground that there is no evidence (apart from the question of credibility) to support a conviction. But there is a clear consensus of opinion in the High Courts that they have no power to quash a commitment merely because of doubts as to the credibility of the evidence for the prosecution if there is, in fact some evidence which would justify the Sessions Judge in leaving the decision of guilt or innocence to the jury. The High Court in such cases has no concern with the question of credibility of the evidence when there is in fact some evidence on record, 1 Ran. 526; 30 Cr. L.J. 519=115 Ind. Cas. 692; 25 Cr. L.J. 261=76 Ind. Cas. 821. The real test in deciding as to whether there is evidence which could fairly be acted upon, is to see whether a Judge at a trial held with the aid of jurymen could say that there was no evidence to go to the jury. Whether a witness is to be believed or an accomplice's evidence is corroborated is a matter for decision at the trial. The High Court as a Court of Revision is not to decide whether a particular piece of evidence is to be believed or not and its function as a Court of Revision is not to sit on judgment over the order of the Magistrate committing the case to the Court of Session, 49 A. 181. A commitment made without exercising a judicial discretion but merely acting on the suggestion of the District Magistrate was quashed by the High Court, 15 M. 39. A commitment made to the High Court when the Magistrate himself could try the offence but thinks it is a proper case to be dealt with by the Sessions Court is good, 42 M. 83, when a Magistrate commits holding that he cannot adequately punish the accused, the commitment is legal and cannot be quashed, 11 A.L.J. 439=14 Cr. L.J. 304=19 Ind. Cas. 959 but see 26 Cr. L.J. 148=53 Ind. Cas. 708. A commitment made when the Magistrate has been satisfied that there are sufficient reasons for doing so in spite of his disbelief of the prosecution evidence is valid and cannot be quashed, 30 Bom. L.R. 639 following 1 Ran. 526 and distinguishing 35 B. 163 and 17 Bom. L.R. 910. A distinction must be made between a case under S. 209, *supra*, where the Magistrate refuses to commit a case and one in which he commits, although he has disbelieved the prosecution evidence in the main. In the former case undoubtedly there is strong authority in favour of the High Court not interfering with the order of discharge but in the latter case where the Magistrate in spite of his disbelieving the prosecution evidence thought fit to commit, he has exercised his discretion and it cannot be said therefore he has by so committing, committed an error of law, which would justify the High Court's interference by quashing the commitment, 30 Bom. L.R. 639=29 Cr. L.J. 957=112 Ind. Cas. 107, but a commitment made by a Presidency Magistrate to the High Court Sessions, of a case which is triable by the

Under the Code a Court of Session has no power to withdraw a case from the jury. The power of quashing commitment, in other words, withdrawing the case from the jury is specially given to the High Court which has to consider whether there is a point of law, 5 C.W.N. 411 at 413. But if the Sessions Court finds the commitment illegal the procedure to be followed is to make a reference to the High Court under S. 438, *infra*. The words "on a point of law" occurring in this section have been the subject of a liberal as well as a narrow and literal construction by various High Courts. In the case of offences either exclusively or not at all triable by the Court of Session under Col. 8 of Sch. II of the Code no difficulty arises. But in the case of offences triable either by the Court of Session or by a first class Magistrate whether an improper exercise of judicial discretion in committing is not a point of law, is a question on which there is difference of opinion. The Madras High Court in 42 M. 83 is in favour of a narrow and literal construction of the words as also the Bombay High Court in 13 Bom. L.R. 201=12 Cr. L.J. 256=10 Ind. Cas. 802. If this interpretation is adopted it is difficult to say how any point of law can possibly arise in the case of offences triable either by a Court of Session or Magistrate. In 4 Bom. L.R. 85; 38 B. 115; 42 B. 172; 24 C. 429 the broader interpretation was adopted, 28 Bom. L.R. 293=27 Cr. L.J. 479=93 Ind. Cas. 703.

Or by a civil or revenue court under S. 478.—The words were introduced in the Code of 1898.

Can be quashed by the High Court only on a point of law.—The expression "The High Court" occurring herein is to be construed as defined in S. 266, *infra*, and so the Judge presiding over the Criminal Sessions of the High Court and exercising ordinary original criminal jurisdiction can quash a commitment made to the High Court Sessions on a point of law, 56 C. 785 following 36 C. 48, but in 42 M. 83 the Criminal Bench dealt with the objection. The use of the word "only" is significant and imposes an important restriction on the powers of the High Court. The High Court alone is competent to quash a commitment once made. The High Court when acting under this section has no concern with the credibility of the evidence when there is in fact, some evidence on the committal record which would justify the Sessions Judge leaving the question of guilt or innocence to the jury. If the Committing Magistrate says he has some doubt about the evidence but he thinks it better that the case should go before the jury, it cannot possibly be said that in so doing he committed an error of law which could justify the High Court in quashing the commitment under this section. The High Court must be satisfied from the record that there was an illegality in the committal order. The test in a matter of this nature is to see from the order what the Magistrate's findings are on the evidence and whether those findings are capable *prima facie* of sustaining the charges he has framed and on which the committal is made. A question of misjoinder is for the Sessions Court to determine and may be urged in that Court and not in the High Court in an application under this section to quash commitment, 31 Bom. L.R. 523 at 524. In 4 A. 150, it was held that even in a compoundable case, *vis.*, adultery, a Magistrate who had committed the accused to the Court of Session had no power to discharge the accused subsequently when the offence was compounded and the fact made known to the Magistrate. See also 16 M.L.J. 525; Weir II, 262. A doubt was raised in 36 C. 43 at 50 whether the High Court in exercising its ordinary appellate jurisdiction could quash a commitment made to it by a Presidency Magistrate for trial under its ordinary original criminal jurisdiction and it was suggested that the practice in somewhat similar cases had been to apply to the Judge exercising ordinary original criminal jurisdiction of the Court, but the Court did not decide the point but dealt with the case on the merits as the application was urgent, See 42 M. 83. Commitment can be quashed at any stage of the case, 6 C. 584. But where the prisoner is put on his trial and has pleaded to the charge the commitment is not to be quashed, 12 C.L.R. 120.

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Magistrate as a warrant case and punishable with rigorous imprisonment for 2 years was held illegal and the commitment so made by the Magistrate was quashed under this section by the Judge exercising ordinary original criminal jurisdiction, 36 C. 735 where 24 C. 429 1906 A.W.N. 28 and 41 A. 454 are referred to. But in 42 M. 83 the Criminal Bench of the High Court decided the objection and not the Judge who presided over the Criminal Sessions of the High Court before whom the objection was raised as to the legality of the commitment. If he gives no reason whatever for committing to the Sessions a case which he himself is competent to try as in 38 B. 114 or if he gives reasons which are bad in law as in 15 Bom. L. R. 998=14 Cr. L. J. 657=21 Ind. Cas. 897; or on the ground that the case created a sensation in a particular community, 28 Bom. L.R. 293=27 Cr. L. J. 479=93 Ind. Cas. 703. See also 31 Bom. L.R. 523, or the fact that there was undue delay in the trial of the case 28 Cr. L.J. 164 (1)=99 Ind. Cas. 556 (1), or a commitment made at the request of the parties and relying on a Government resolution which he could not take into consideration as reasons, 42 B. 172, the High Court has power to quash the commitment as being bad in law. A commitment made without the complaint of a Court was quashed, 6 A. 98; 24 M. 121. A commitment made without affording the accused an opportunity to cross-examine the prosecution witnesses with regard to the statements made by them to the police under S. 162, *supra*, is illegal and must be quashed, 28 Cr. L.J. 703=103 Ind. Cas. 897. A commitment made on evidence recorded in the absence of the accused was held bad, Weir II, 259; 5 C.W.N. 110, but discovery of fresh evidence after commitment is no ground for quashing a commitment already made, 1885 A.W.N. 53, or that the Committing Magistrate had no territorial jurisdiction, 17 M. 402; 3 Cr. L. Rev. 167. A Magistrate is bound to state reasons for commitment, 38 B. 114; 11 Bom. L. R. 18=9 Cr. L.J. 163=1 Ind. Cas. 104=5 M.L.T. 225.

When an order of committal made by a District Magistrate under S. 437, *infra*, is illegal because the offence is not triable exclusively by the Court of Session, is referred to the High Court for orders the best course for the High Court is to set aside the order of committal and take up the case in revision, set aside the order of discharge by the first Court, direct the Magistrate to frame a charge and then commit the accused to the Court of Session, 3 Cr. L. Rev. 117. A commitment made is liable to be quashed when an alteration in the charge was made by the Magistrate at a very late stage in the inquiry and the accused committed to the sessions without affording him an opportunity to cross-examine the prosecution witnesses and to adduce his defence evidence in respect of the altered charge, 22 A.L.J. 239=25 Cr. L.J. 798=81 Ind. Cas. 318.

See S. 532 which validates irregular commitments made. The principle of S. 537, *infra*, applies to orders of commitment which ought not to be quashed unless prejudice is clearly shown, 12 Cr. L. J. 320=10 Ind. Cas. 616; no appeal lies against an order of commitment under S. 478 by a Judge sitting on the Original Side of High Court in the course of the trial of a suit. The provisions of this section control the general provisions of S. 15 of the Letters Patent of the High Court. The remedy is under this section to apply to quash the commitment 43 M. 361.

216. When the accused has given in any list of witnesses under

Summons to witnesses for defence when accused is committed.

section 211 and has been committed for trial, the Magistrate shall summon such of the witnesses included in the list, as have not appeared before himself, to appear before the Court to which the accused has been committed :

Provided that, where the accused has been committed to the High Court, the Magistrate may, in his discretion, leave such witnesses to be summoned by the Clerk of the Crown, and such witnesses may be summoned accordingly :

Provided, also, that if the Magistrate thinks that any witness is included in the list for the purpose of vexation or delay, or of defeating the ends of justice, the Magistrate may require the accused to satisfy him that there are reasonable grounds for believing that the evidence of such witness is material, and if he is not so satisfied, may refuse to summon the witness (recording his reasons for such refusal), or may before summoning him require such sum to be deposited as such Magistrate thinks necessary to defray the expense of obtaining the attendance of the witness and all other proper expenses.

Refusal to summon unnecessary witness unless deposit made.
The Magistrate shall summon.—An accused is entitled as a matter of right to have any witness named in the list he delivers, summoned and examined, 23 W.R. (Cr.) 56; 6 B.L.R., Appx. 88; 2 W.R. (Cr.) 6; 3 W.R. (Cr.) 36. A Magistrate cannot refuse to summon the witnesses on the ground that the evidence appears to him not to be material or reliable, Weir II, 263. It is not open to a Magistrate to decide on the credit to be attached to the evidence of a witness before he had an opportunity of hearing him. By so doing he exceeds the discretion given to him by law, 19 M 375; 6 B L.R. (Ap.) 65=15 W.R. Cr. 7.

As have not appeared before himself.—The next section provides for the procedure to be followed when the witnesses had appeared before the Magistrate; the witnesses shall execute before the Magistrate bonds binding themselves to be in attendance when called upon at the Court of Session or High Court.

First Proviso—The summoning of witnesses in cases of commitment to the High Court may be left at the discretion of the Magistrate to the Clerk of the Crown.

Second Proviso.—This proviso is not intended to enable a Magistrate to inquire generally into what the defence of the accused person is to be, and to consider whether, on learning the nature of the defence he is absolutely to abstain from summoning all the witnesses cited by the accused. There is no warrant for the exercise of such sweeping authority, 3 C. 373. This proviso is clearly inapplicable where a witness though once summoned failed to appear on the day fixed on account of some delay in the service of the summons. In such a case the Magistrate was bound to make a further attempt to secure the attendance of the absent witness, 4 A. 53.

For the purpose of vexation or delay or defeating ends of justice.—The same words occur in S. 257 (1), *infra*, which refers to summoning of witnesses in warrant-cases. It is only on these grounds the Magistrate is entitled to refuse to summon the witnesses tendered by the accused and if he refuses on these grounds then he is further required to ask the accused to satisfy him that there are reasonable grounds for believing that the evidence of such witnesses is material and if he is not satisfied, then he may refuse to summon, 16 C. 714; when a Magistrate asked the accused who was about to be committed why he desired to summon the witnesses named in the list and the accused refused to give reasons, the Magistrate was at liberty to refuse to summon these witnesses, 4 M.H.C.R. 81; 16 W.R. (Cr.) 14.

Record his reasons for such refusal.—When a Magistrate refuses to summon witnesses for the defence, he is bound to record his reason for such refusal. The power should not be lightly exercised. He must show in his order of refusal that he had satisfactory ground that the evidence was not material, 8 A. 665. When an accused gives a list of witnesses he wishes to summon after the case is committed to the Court of Session, it is incumbent upon the Magistrate to exercise his discretion on the point. By returning the list of witnesses filed by the accused and passing no orders upon it he acted illegally. He was bound distinctly to state whether he would summon the witnesses or not and he ought to state his reasons for so doing. He should consider the reasons given by the accused for the delay in giving the list and whether they were sufficient or not, 15 W.R. (Cr.) 14.

Before summoning require such sum to be deposited.—Even in a case the Magistrate refused to summon the witnesses on the ground that the accused when called upon to state his reasons for summoning the persons named in his list, the Magistrate was bound to have fixed the amount which he considered necessary to defray the cost of attendance of the witnesses and intimated to the accused his readiness to issue summons on the amount being deposited, 4 M.H.C.R. 81. Although a Magistrate is entitled to refuse summoning witnesses for the defence unless the expenses for their attendance is deposited by the accused, yet such orders should be made very sparingly. It is an improper order in a case where the accused is unable or unwilling to deposit the expenses and the result is that he is convicted without his witnesses being examined especially when a severe sentence is passed on him, 1893 P.R. (Gr.J.) 7.

And all other Expenses.—These words were introduced in the Code of 1893.

217. (1) Complainants and witnesses for the prosecution and defence, whose attendance before the Court of Session or High Court is necessary, and who appear before the Magistrate, shall execute before him bonds binding themselves to be in attendance when called upon at the Court of Session or High Court to prosecute or to give evidence, as the case may be.

Bond of complainants and witnesses.

(2) If any complainant or witness refuses to attend before the Court of Session or High Court, or execute the bond above directed, the Magistrate may detain him in custody until he executes such bond, or until his attendance at the Court of Session or High Court is required, when the Magistrate shall send him in custody to the Court of Session or High Court, as the case may be.

Whose attendance is necessary.—These words are important. It is not every witness whom the Magistrate is required to bind over but only these witnesses whose evidence is material to the case. It is always open to the accused or to the Sessions Judge to secure the attendance of the prosecution witnesses who had been examined at the preliminary inquiry when they fail to appear at the trial in the Sessions Court, 1883 A.W.N. 37. See S. 509 *infra*, as to medical witnesses whose deposition taken and attested by a Magistrate in the presence of the accused or taken on commission may be used as evidence without calling them as witnesses in the Sessions Court.

A complainant is not at liberty to withdraw from the prosecution after commitment. If he does so, he will forfeit his recognizance, 2 W.R. (Gr.) 57.

218. (1) When the accused is committed for trial, the Magistrate shall issue an order to such person as may be appointed by the Local Government, in this behalf, notifying the commitment, and stating the offence in the same form as the charge, unless the Magistrate is satisfied that such person is already aware of the commitment and the form of the charge;

Commitment when to be notified.

obviously in order that the Jury may not be prejudiced by the multitude of charges and the inconvenience of having together of such a number of instances of culpability and the consequent embarrassment both to the Judge and accused. It is likely to cause confusion and to interfere with the definite proof of a distinct offence which it is the object of all Criminal Procedure to obtain. The policy of such a provision is manifest and the necessity of a system of written accusation specifying a definite criminal offence is of the essence of Criminal Procedure. When the mischief sought to be averted by the statute has been done as evident from the verdict of the Jury and the acceptance of it by the learned Judge the effect cannot be averted by dissecting the verdict and appropriating the verdict of guilty only to such parts of the written accusation as ought to have been submitted to the Jury. 52 C. 253 at 269-69. Young and inexperienced Judges and Magistrates get so excited at the evidence of roguery that they miss the main consideration at the trial which is to prove the specific charge against an accused person, 27 A.L.J. 592.

Charge to state offence.

221. (1) Every charge under this Code shall state the offence with which the accused is charged.

Specific name of offence sufficient description.

(2) If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.

How stated where offence has no specific name.

(3) If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

What implied in charge.

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

Language of charge.

(6) In the presidency-towns the charge shall be written in English; elsewhere it shall be written either in English or in the language of the Court.

Previous conviction when to be set out.

(7) If the accused *having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence*, the fact, date and place of the previous conviction, shall be stated in the charge. If such statement *has been omitted*, the Court may add it at any time before sentence is passed.

Illustrations.

(a) A is charged with the murder of B. This is equivalent to a statement that A's act fell within the definition of murder given in *Ss. 299 and 300 of the Indian Penal Code*; that it did not fall within any of the general exceptions of *that it did not*

Sessions trial, he is empowered by this section before the commencement of the Sessions trial to examine supplementary witnesses and bind them over to appear at the Sessions trial. See *Rafanlal* 842.

If he thinks fit.—These words were introduced in the Code of 1893.

After commitment and before commencement of trial.—Power is given to the Magistrate to record evidence after commitment and before the commencement of the trial, S. C. 713. and with the commencement of the trial the Magistrate's authority ceases. 1893 P.R. (Cr. J.) 29. If additional evidence is recorded under this section, it goes without saying that the accused should be given an opportunity of meeting such evidence if he so desires.

Copy of evidence shall be given to accused free of Cost.—See notification under S. 95 of the Court Fees Act VII of 1870 which exempts from Court fees copies of evidence of witnesses given to the accused under this section.

220. Until and during the trial, the Magistrate shall, subject to the provisions of this Code, regarding the taking of
Custody of accused pending trial. the provisions of this Code, regarding the taking of
bail, commit the accused, by warrant, to custody.

See S. 541 as to place of custody of accused pending trial.

Provisions regarding the taking of bail.—See Chapter XXXIX dealing with bail. If the offence is bailable the Magistrate should admit the accused to bail; if the offence is non-bailable the accused should not be released on bail if there are reasonable grounds for believing that the accused is guilty of an offence punishable with death or transportation for life and in other cases of non-bailable offences the Magistrate is to use his discretion in granting bail. By the new amendment the power to grant bail is further extended in the case of any person under 15 years of age or any woman or any sick or infirm person accused of non-bailable offences. The High Court or Court of Session may however direct that any person may be released on bail in any case under S. 498, *infra*.

Commit by warrant to custody.—The warrant referred to herein is a written order to a Jailor to receive the accused who is refused bail in a non-bailable offence or who fails to offer bail in a bailable offence, into his custody and produce him before the Court for trial when required. This presupposes that the accused is present before the Magistrate.

CHAPTER XIX.

OF THE CHARGE.

The provisions of this Chapter relating to charge are intended to provide that the charge shall give the accused full notice of the offences charged against him, but that the only result of any defect in the charge shall be an amendment in terms as to delay, or a new trial if the accused seems to have been misled, S. B. 200 at 213. The charge corresponds to the English indictment and it is very much more than a mere form. An accused person is entitled to know with the greatest precision what acts he is said to have committed and under what sections of the Penal Code these acts fall, 27 Cr. L.J. 62-91 Ind. Cas. 238. The charge is a notice to the prisoner of the matter whereof he is accused and it must convey to him with sufficient clearness and certainty that which the prosecution intends to prove against him and of which he will have to clear himself. It is also an information to the Court which is to try the accused of the matters to which evidence is to be directed, 21 W.R. (Cr.) 72; 19 C.W.N. 972. The validity of an indictment depends not upon the facts found at the trial but on the circumstances alleged before the trial commences, 85 C. 838. The importance and necessity of precision in the framing of a charge was pointed out in the following passage in the judgment in 23 M. 61 (P.C.) at 97 by their Lordships of the Privy Council. "The reason for such a provision, is

obviously in order that the Jury may not be prejudiced by the multitude of charges and the inconvenience of having together of such a number of instances of culpability and the consequent embarrassment both to the Judge and accused. It is likely to cause confusion and to interfere with the definite proof of a distinct offence which it is the object of all Criminal Procedure to obtain. The policy of such a provision is manifest and the necessity of a system of written accusation specifying a definite criminal offence is of the essence of Criminal Procedure." When the mischief sought to be averted by the statute has been done as evident from the verdict of the Jury and the acceptance of it by the learned Judge the effect cannot be averted by dissecting the verdict and appropriating the verdict of guilty only to such parts of the written accusation as ought to have been submitted to the Jury. 52 C. 253 at 263 69. Young and inexperienced Judges and Magistrates get so excited at the evidence of roguery that they miss the main consideration at the trial which is to prove the specific charge against an accused person, 27 A.L.J. 592.

Charge to state offence.

221. (1) Every charge under this Code shall state the offence with which the accused is charged.

Specific name of offence sufficient description.

(2) If the law which creates the offence gives it any specific name, the offence may be described in the charge by that name only.

How stated where offence has no specific name.

(3) If the law which creates the offence does not give it any specific name, so much of the definition of the offence must be stated as to give the accused notice of the matter with which he is charged.

(4) The law and section of the law against which the offence is said to have been committed shall be mentioned in the charge.

What implied in charge.

(5) The fact that the charge is made is equivalent to a statement that every legal condition required by law to constitute the offence charged was fulfilled in the particular case.

Language of charge.

(6) In the presidency-towns the charge shall be written in English; elsewhere it shall be written either in English or in the language of the Court.

Previous conviction when to be set out.

(7) If the accused *having been previously convicted of any offence, is liable, by reason of such previous conviction, to enhanced punishment, or to punishment of a different kind, for a subsequent offence, and it is intended to prove such previous conviction for the purpose of affecting the punishment which the Court may think fit to award for the subsequent offence*, the fact, date and place of the previous conviction, shall be stated in the charge. If such statement *has been omitted*, the Court may add it at any time before sentence is passed.

Illustrations.

(a) A is charged with the murder of B. This is equivalent to a statement that A's act fell within the definition of murder given in Ss. 299 and 300 of the Indian Penal Code; that it did not fall within any of the general exceptions of the same Code; and that it did not

fall within any of the five exceptions to section 800, or that, if it did fall within Exception J, one or other of the three provisos to that exception apply to it.

(b) A is charged, under section 326 of the Indian Penal Code, with voluntarily causing grievous hurt to B by means of an instrument for shooting. This is equivalent to a statement that the case was not provided for by section 335 of the Penal Code, and that the general exceptions did not apply to it.

(c) A is accused of murder, cheating, theft, extortion, adultery or criminal intimidation, or using a false property-mark. The charge may state that A committed murder, or cheating, or theft, or extortion, or adultery, or criminal intimidation, or that he used a false property-mark, without reference to the definitions of those crimes contained in the Indian Penal Code; but the sections under which the offence is punishable must, in each instance be referred to in the charge.

(d) A is charged, under section 184 of the Indian Penal Code, with intentionally obstructing a sale of property offered for sale by the lawful authority of a public servant. The charge should be in those words.

Amendment.—The words in *italics* are newly added in sub-section (7). By the amendment it was intended to remove the doubt which existed before whether evidence of previous conviction may be given when enhanced punishment sought to be awarded was beyond the competence of the Court. Now such evidence can be adduced.

Object of the section.—The object of this and the following Ss. 222 and 223 is clearly to enable the accused to know the substantive charges which he will have to meet and to be ready for them before the evidence is given. Where the offence charged involves consequences which may be stated in general form such as may arise in a case of arson where a man may by committing one act of arson set fire and destroy several stacks of several persons, no particular is required, the offence being sufficiently stated by the date, time and place of setting fire but in a case of extortion or obtaining money from several persons by unlawful means, involves stating with some approach of accuracy the approximate amounts alleged to have been obtained from each person and the nature of the extortion used against each person. It is not sufficient to say at the close of the evidence that the accused person knows what is alleged against him. The irregularity is not one which can be cured by appearance without objection, 17 Cr. L.J. 411=35 Ind. Cas. 971. See in this connection 55 C. 838. When the accused is charged under S. 120A, I.P.C. of having agreed to do or cause to be done a series of illegal acts, there is no authority for holding that the charge should state all details of specific acts which the conspirators are alleged to have agreed or caused to be done, 6 Ran. 6.

Charge.—For definition of charge see S. (1) (c), *supra*, which was inserted in the Code of 1898; a charge is a first notice to the prisoner of the matter whereof he is accused and must convey to him with sufficient clearness and certainty that which the prosecution intends to prove against him of which he will have to clear himself, 19 C.W.N. 972 at 988, and it is also an information to the Court which is to try the accused of the matter to which evidence is to be directed, 21 W.R. (Cr.) 72 at 82. An accused person is entitled to know with certainty and accuracy the exact nature of the charge against him, 42 C. 937; 29 C.W.N. 403=26 Cr. L.J. 849=65 Ind. Cas. 703, and unless he has this knowledge he must be seriously prejudiced in his defence, 11 C. 106 22 C. 278 and 391; 1893 A.W.N. 70; 4 C.W.N. 196. Unnecessary allegations in a charge may be treated as surplusage, 4 B.H.C.R. 17. When the accused fully understood the nature of the offence with which they are charged they had clearly not been prejudiced by the omission of the words "*unlawfully and maliciously*" and "*in British India*" occurring in S. 4 (b) of the Explosive Substances Act VI of 1903; such omission can be cured by the verdict. Moreover, where the illegal act charged under S. 120B, I.P.C., is the unlawful and malicious possession of explosive substances within the meaning of S. 4 of that Act, it is essential to specify in the charge the explosive substance which the accused had conspired to have in their possession or control. It is a wholesome rule that the Courts should adhere to the language of the statute as far as practicable when a charge is drawn up.

as nothing is to be gained by a paraphrase, while opportunity is afforded to the accused to take exception to the form of the charge, 42 C. 937. The models of charge given in Sch. V of the Code contain or imply the setting forth with reasonable particularity of the matters alleged to constitute the offence, 2 B. 142 at 144. The validity of an indictment depends not upon the facts found at the trial but on the circumstances alleged before the trial commences, 55 C. 858.

Sub-section (2).—In cases where the description with the particulars required to be specified by S. 222, *infra*, is found insufficient then further particulars may be stated as permitted by S. 218, *infra*, see illustration (c) to this section. It is not necessary in a charge of rioting to set out allegations that there were 5 or more persons actuated by a common object. Rioting is an offence with a specific name and it is sufficient to describe the offence by that name. The sub-section was enacted to meet a case of this kind, 55 C. 879 at 886.

Sub-section (3).—The law does not give the offences under Ss. 124A and 153A I.P.O. any specific names, and therefore under this sub-section so much of the definition of the offence must be stated to give the accused notice of the matter with which he is charged. If the charge is in English and the words uttered are in vernacular, there is nothing in the Indian Law requiring that the actual words should be set out in the vernacular, 32 M. 334. The descriptions of crimes in the Penal Code must of necessity be expressed in abstract terms, but the very object of a trial is to determine whether particular acts or omission on the part of an accused fall or do not fall within the rule thus abstractedly stated. Conformably to this principle all the models of charges in Sch. V to the code contain or imply the setting forth with reasonable particularity of the matters alleged to constitute the offence, 2 B. 142 at 144. See illustration (d) to the section. When the publication of the seditious is in a newspaper and the whole article is relied upon, no particular passages need be specified, 33 B. 77 and 221. A charge of house-breaking and theft must specify the particular house broken into and the specific article stolen; merely naming the village is not sufficient, 28 M.L.J. 381. A charge under this section should specify the office held by the accused so as to make him liable as a public servant, 5 W.R. (Cr. Let) 6. Where the accused was charged as being a public servant knowingly having disobeyed the direction of law as to the way in which he had to conduct himself as such public servant, what the direction of law was, what the conduct was, which contravened it, should be stated in the charge. A charge under S. 211, I.P.C., should specify the words, knowing that there was no just or lawful ground for such charge, 2 W.R. (Cr. Let) 2. A charge under S. 461, I.P.C., should set out the intention of the accused, 17 C.W.N. 354. But see 6 M.L.T. 266. When a charge of attempt at cheating did not specify both the person upon whom the attempt was made and also the manner in which he was induced, and the defect was not remedied till the close of the prosecution case, it was held that the accused was prejudiced, 8 C.W.N. 278. Similarly under S. 217, I.P.C., the omission to specify the direction of law which was disobeyed was held fatal to the conviction, 2 B. 142. A charge of perjury should specify the actual words used by the person charged in his deposition and not merely the substance, Ratanlal 55; 7 N.W.P.H.C.R. 137; 7 B.L.R. Appx. 66. A charge for rioting should specify the common object of the unlawful assembly, 33 C. 233; 42 C. 937; 39 C. 781; 36 C. 865; 11 C. 106; 22 C. 276; 35 C. 384 and 718 though in simple cases the omission might not have prejudiced the accused, 21 C. 827; 12 C.W.N. 944. When a charge as laid in a case of rioting was to assault the complainant but the common object found was to set fire to the complainant's hut, it was held that the conviction was bad as the charge laid against the accused had not been established. In all cases the principal and paramount common object should form the subject of the charge and not the incidental happenings, 29 Cr. L.J. 390=108 Ind. Cas. 421. In a charge of cheating it should be set out the manner in which the offence was committed, and the question whether the charge was reasonably sufficient to give notice to the accused of the accusation he has to meet depends on the circumstances of the each case, 26 Cr. L.J. 849=85 Ind. Cas. 705.

Sub-section (4).—The law and the section of the law under which the offence is punishable should be stated. See Form No. 23 of Sch. V, *infra*.

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been committed, without specifying particular items or exact date the charge so framed shall be deemed to be a charge of one offence the meaning of section 234 :

Provided that the time included between the first and last o dates shall not exceed one year.

Object of the section.—By this section a slight departure from the law as is in Ss. 233 to 235, *infra*, is intended. It provides that when an accused person is with breach of trust or criminal misappropriation of money, it shall be sufficient to the gross sum misappropriated and the dates between which the offence is alleged to have been committed, without the specifying in the charge each item misappropriated, or exact date of misappropriation which in most cases may not be possible and sometimes misapprehended. The proviso to the section is important and it shows that it was not the intention of the Legislature to make any further departure and so the period is restricted to one year between the first and last of such dates as in S. 234, *infra*. The charge thus framed will be deemed to be a charge of one single offence and not a series of acts constituting a transaction. If the charge relates to items exceeding one year the trial and the conviction will be illegal, (P.C.). The procedural law was altered to meet two difficulties. Under the law as it was before, there was very great difficulty in convicting a person charged where there was no running account and where the prosecution was unable to point out a specific item out of the particular item was embezzled or to which it is attributable. The other difficulty was what was experienced in 24 C. 193, where the charge was embezzlement of a large sum, Rs. 9,000 and odd made up of so many hundreds of items under S. 234, *infra*, it was not possible to have more than three offences of the same kind and so the charge could not legally be framed. The law on these two points was altered and altered for the better. It was not intended either to throw the onus on the accused by bringing a charge against him of a deficiency in his accounts or to do away with the necessity of proving the elements of the offence as laid down in the Indian Penal Code. An indictment of embezzlement might be supposed to be proof of a general deficiency of any particular sum received and not accounted for, L.J. 531=85 Ind. Cas. 731.

Sub-section (1).—A person against whom an offence is alleged to have been committed shall be described in the charge by his name and not by his accidental position in the case, as prosecutor or witness, *Mad Cr. Rules of Pr. Rule 167*. A charge was held bad as being too general when it did not specify the article stolen, or the name of the person whose house was entered; and the place of offence was given only at village T, whereas the trial was for an offence committed both at villages T and N, 23 M.L.J. 331 at 333; 7 B.L.R. Appx. 66; 25 W. 46. It is not right to charge generally under any section of the Penal Code, but the facts should be specifically set out in the charge giving the accused sufficient particulars of time, place, person and circumstance as would give them notice of the matter with which they are charged, 15 B 491; 17 Cr. L.J. 411=35 Ind. Cas. 971; 25 M.L.T. 379. Where the charge of assault mentions a certain date and place of occurrence and the prosecution fails to prove the same, the Court is not entitled to convict the accused of an assault at a different place or time, 25 Cr. L.J. 471=77 Ind. Cas. 823. Where a person was tried and convicted of an unnatural offence on a charge which did not specify the time when, place where, or by what person with whom, the offence was committed, the only fact being that the accused habitually wore women's clothes and exhibited physical characteristics having committed the offence, it was held that the conviction was bad in law, 6 A. 1. A charge of adultery alleging commission of offences between two dates is illegal if it is not possible in the circumstances of the case to assign particular dates on which sexual intercourse took place, 51 C. 433 at 432.

Reasonably sufficient to give notice to accused.—The reasonableness of the notice is the criterion by which the validity of the charge must be judged and this depends upon the facts and circumstances of each particular case. No hard and fast rule can be laid down. The requirements of law are satisfied if the charge gives such a de-

assembly should be stated in the charge, 22 C. 276; 11 C. 106; 26 C. 630; 33 C. 295; 39 C. 781; 3 C.W.N. 605; 35 C. 718 and 384; 32 M. 3; 14 C.W.N. 422. When a charge has been expressed in very vague terms, the prosecution on appeal should be limited to the particular sense in which the charge was understood at the trial, 2 B. 152.

224. In every charge words used in describing an offence shall be deemed to have been used in the sense attached to them respectively by the law under which such offence is punishable.

Words in charge taken in sense of law under which offence is punishable.

The description of crimes in the Penal Code must of necessity be expressed in abstract terms. But the very object of a trial is to determine whether particular acts or omissions on the part of the accused fall or do not fall within the rule thus abstractedly stated. Conformably to this principle all the model charges in Sch. V of the Code contain or imply the setting forth with reasonable particularity of the matters alleged to constitute the offence, 2 B. 152 at 153. Where the common object of the unlawful assembly was stated to be to commit assault, i. e., to do violence to person, it is immaterial whether the offence to commit which there was a common object was assault simple or grievous hurt and it is not necessary to alter the charge stating the common object into one to cause grievous hurt, 6 Pat. 832.

225. No error in stating either the offence or the particulars required to be stated in the charge, and no omission to state the offence or those particulars, shall be regarded at any stage of the case as material, unless the accused was in fact misled by such error or omission, and it has occasioned a failure of justice.

Effect of errors.

Illustrations.

(a) A is charged, under S. 242 of the Indian Penal Code, with "having been in possession of counterfeit coin, having known at the time when he became possessed thereof that such coin was counterfeit," the word "fraudulently" being omitted in the charge. Unless it appears that A was in fact misled by this omission the error shall not be regarded as material.

(b) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge, or is set out incorrectly. A defends himself, calls witnesses, and gives his own account of the transaction. The Court may infer from this that the omission to set out the manner of the cheating is not material.

(c) A is charged with cheating B, and the manner in which he cheated B is not set out in the charge. There were many transactions between A and B, and A had no means of knowing to which of them the charge referred, and offered no defence. The Court may infer from such facts that the omission to set out the manner of the cheating was, in the case, a material error.

(d) A is charged with the murder of Khoda Baksh, on the 21st January, 1892. In fact, the murdered person's name was Haidar Baksh, and the date of the murder was the 20th January, 1892. A was never charged with any murder but one, and had heard the inquiry before the Magistrate, which referred exclusively to the case of Haidar Baksh. The Court may infer from these facts that A was not misled, and that the error in the charge was immaterial.

(e) A was charged with murdering Haidar Baksh on the 20th January, 1892, and Khoda Baksh (who tried to arrest him for that murder) on the 21st January, 1892. When charged for the murder of Haidar Baksh, he was tried for the murder of Khoda Baksh, the witnesses

present in his defence were witnesses in the case of Haidar Baksh. The Court may infer from this that A was misled, and that the error was material.

Scope of the Section.—This section is designed to prevent miscarriage of justice by reason of failure to comply with technical provision of law unless the accused has been misled. This section refers to error in framing the charge at any stage of the case and provides that such error or omission in a charge will not vitiate proceedings, 10 B.H.C.R. 373; 32 M. 3. It refers only to errors in framing the charge and does not specifically deal with a case of absence of charge. See also S. 232, *infra*, which deals with absence of charge or an error in the charge, and S. 535, *infra*, refers only to an error or omission in the charge and does not cover the case of absence of charge. If the accused was in fact prejudiced, his consent to such an illegal procedure is perfectly immaterial, for there can be no waiver in a criminal trial, 46 M. 117 at 120; 18 M.L.J. 330; 6 C.W.N. 202; 21 A.L.J. 89=24 Cr. L.J. 656=73 Ind. Cas. 576. It is a well established principle of criminal law that a prisoner can consent to nothing which is not authorised by law nor can the consent of counsel for the accused person validate a course of procedure which the law does not authorise, 25 Cr. L.J. 68=75 Ind. Cas. 990; 46 M. 117 at 120; 18 M.L.J. 330; 28 M.L.J. 329=(1915) M.W.N. 229; 2 C. 23; 12 W.R. (Cr.) 59; 16 W.R. (Cr.) 69; 23 W.R. (Cr.) 59; 2 Pat. 793 at 795; 5 Ran. 53 (P.C.), where a criminal trial takes place under a procedure not authorised by law, even the consent of the accused and their counsel will not validate the proceeding. No consent by counsel whether for his own convenience or that of his client, or for the convenience of the Court can by itself create jurisdiction in the Court to commit irregularities substantially affecting the conduct of the trial and prejudicing the accused, 50 A. 457 at 462. When no charge has been framed or a defective one has been framed, there is no justification for a *de novo* trial. But the trial is to be proceeded with from the stage at which the illegality occurred, 25 Cr. L.J. 1152=81 Ind. Cas. 976. When the common object of an unlawful assembly is stated in the complaint and found by the Court, mere omission of it in the charge, will not vitiate the trial, 28 Bom. L.R. 497=27 Cr. L.J. 744=95 Ind. Cas. 72 where 21 G. 827 is followed and 22 G. 276 is distinguished. See also 36 C. 865 and 158. An accused person charged with rioting with a specified common object cannot be convicted finding a different common object of which he had no opportunity to meet and defend himself, 27 C. 990. Where the charge mentioned several alternative common objects, it is for the Appellate Court to find which of the common object has been made out, 35 C. 718.

At any stage of the case.—If the mistake is found out after the conclusion of the trial but before pronouncing judgment, the Court is entitled to proceed in accordance with the provisions contained in Ss. 226 to 231, *infra*. Ss. 255 and 271, *infra*, require that where an accused is called on to plead to a charge it should be read and explained to him. If this direction of law is complied with there can be no reasonable objection at any subsequent stage of the case to regard the charge to be indefinite. See 41 C. 743.

Unless accused was in fact misled.—The words "*in fact*" and "*it has occasioned a failure of justice*" were introduced in the Code of 1898. If the charge is drawn up in a somewhat informal manner but is sufficiently explicit to give the accused notice of the charge, the irregularity is cured by this section, 33 B. 77, see also 8 A. 665. The words "*a failure of justice has in fact occasioned*" occur in S. 535, *infra*. Also see the explanation to S. 537, *infra*, as to what determines whether an error, omission or irregularity has occasioned a failure of justice. Where in a charge of cheating, the exact date when the offence alleged to have been committed is not stated but the time is approximately indicated, the omission will not affect the legality of the trial if the accused has not been materially prejudiced, 27 Cr. L.J. 909=96 Ind. Cas. 221. Where the accused was charged with criminal breach of trust in respect of certain documents and convicted of embezzling not the documents but the amounts obtained by means of those documents, it was held that the conviction was unsustainable, 12 C.W.N. 577=7 Cr. L.J. 372. See also 2 Luck. 430. It is for the Court to decide whether the accused has been in fact misled, 10 B.H.C.R. 373; 42 C. 957. See also 32 M. 3 and 384; 25 B. 90. See also 30 Cr. L.J. 891=118 Ind. Cas. 323.

226. When any person is committed for trial without a charge, or with an imperfect or erroneous charge, the Court, or, in the case of a High Court, the Clerk of the Crown may frame a charge, or add to or otherwise alter the charge, as the case may be, having regard to the rules contained in this Code as to the form of charges.

Illustrations.

(1). A is charged with the murder of C. A charge of abetting the murder of C may be added or substituted.

(2). A is charged with forging a valuable security under S. 467 of the Indian Penal Code. A charge of fabricating false evidence under S. 193 may be added.

(3). A is charged with receiving stolen property knowing it to be stolen. During the trial it incidentally appears that he has in his possession instruments for the purpose of counterfeiting coin. A charge under S. 235 of the Indian Penal Code cannot be added.

Scope of the section.—The combined effect of Ss. 226 to 231 is to confer a wide jurisdiction on the Sessions Court with regard to the charge. At the beginning of the trial if the Judge finds that the Magistrate has omitted to frame a charge, he may supply the omission and frame a proper charge made out by the evidence on record. If the charge framed is imperfect or erroneous the judge may alter or add to the charge or if he is of opinion that other offences have been committed he may include those offences so disclosed in the charge. The material on which the judge acts under this section is the evidence recorded at the preliminary inquiry and under the next section the evidence received by himself in the course of the trial. Provision is also made for adjourning the trial for ordering a new trial, for recalling witnesses and for obtaining, if necessary, sanction for the prosecution; all these indicate very clearly that there need not necessarily have any connection between the added charge and the original charge but the added charge must be for an offence disclosed by the evidence on record and the accused must not be prejudiced and the added charge must not contravene the provisions of Ss. 233 to 236, *infra*, 16 Cr. L.J. 573=30 Ind. Cas. 125 where 8 B. 200 and 11 B.H.C.R. 278 are approved and 3 M. 351 is distinguished and 8 A. 665; 32 C. 22 are not followed.

Committed without a charge.—The words "without a charge" do not warrant a Magistrate from committing the accused without framing a charge. The words were intended to cover cases where through inadvertence no charge was framed. The words "without charge" will apply not only to a case in which there is no charge but also to a case in respect of such offence as the Sessions Judge or Clerk of the Crown may think the accused ought to be tried, 8 B. 200; 12 C.W.N. 577=7 Cr. L.J. 372. A Court of Session may add charges under Ss. 497 and 498, I.P.C., under this section when the complaint of the husband also involved offences committed under those sections, 34 C.L.J. 81. But the addition of a charge which is not supported by the evidence before the Committing Magistrate is *ultra vires* and not merely an error of procedure, 3 M. 351; 32 C. 22; 11 B.H.C.R. 278; 16 Cr. L.J. 573=30 Ind. Cas. 125. Under S. 437 and 8 526 Cl. (1) (iv), *infra*, a commitment may be made without a charge against the accused, 27 M. 54 at 55. The illustrations to the section were added in the Code of 1829 to make the meaning of the section clear.

With an imperfect charge.—Imperfect implies defect in form. A Judge's power to alter a charge after commitment is limited by this section to imperfect or erroneous charges, 25 Cr. L.J. 1162=81 Ind. Cas. 958; 8 A. 665.

Court may frame a charge, etc.—A Sessions Judge can proceed under this section only on the facts appearing from the magisterial inquiry, 24 Cr. L.J. 177=71 Ind. Cas. 593.

May frame, add to or alter the charge.—A Sessions Judge ought to scrutinise the charges upon which accused persons are committed to his Court in the light of the fact disclosed in the Preliminary Register in order that additions or alterations may, if necessary, be made under this section before the accused are called upon to plead to the charge under S. 271, *infra*, 18 Cr. L.J. 346=38 Ind. Cas. 730; 11 A.L.J. 189. The ultimate responsibility of settling the charge against the accused person committed to the Sessions Court rests on the Sessions Judge who can alter or change the same, 16 Bom. L.R. 80=15 Cr. L.J. 292=23 Ind. Cas. 500. Where an accused person is committed to the High Court Sessions for kidnapping a minor girl in Bombay and also of abetting rape on her committed at Ahmedabad under S. 376 and 114, I.P.C., and it was sought by the prosecution to amend the second charge of abetment of rape by omitting S. 114, I.P.C., and by substituting in its place S. 109, I.P.C., leave to amend the charge was refused on the ground that the proposed amendment would materially alter the nature of the case the accused had to meet at a late stage of the case and the second charge was therefore withdrawn from the jury, 30 Bom. L.R. 1233=30 Cr. L.J. 191. A Sessions Court is not a Court of original jurisdiction and though vested with large powers for amending and adding to charges can only do so with reference to the immediate subject of the prosecution and committal and not with regard to matters not covered by the indictment. It has full discretionary power under this section to amend the charge, 32 C. 22; 26 Cr. L.J. 5=83 Ind. Cas. 435; 1920 M.W.N. 149=11 L.W. 317=21 Cr. L.J. 57=54 Ind. Cas. 409 or add a completely new charge. See S. 227, *infra*. But the power to alter should be used with great caution, 6 B.H.C.R. (Cr. Ca.) 75. But under proper circumstances a Sessions Judge has power to add a charge distinct from the charges framed by the Committing Magistrate, 23 C.W.N. 561. Any action under this section can be taken by the Sessions Judge only on the facts disclosed by the Magisterial inquiry and where the facts show there is any omission by the Magistrate, an additional charge may be framed by the Sessions Judge, 24 Cr. L.J. 177=71 Ind. Cas. 593. A Sessions Judge has no power under this section to expunge a charge before calling upon the accused to plead to it, 7 C.L.R. 143.

Having regard to the rules in the code as to framing of charges.—See Schedule V, Form No 28, *infra*, and the provisions contained in this Chapter.

Revision.—A Court of Appeal or revision should be very slow to interfere with the discretion of the trial Court in the exercise of its powers under this section of altering or adding a charge if the discretion has not been exercised in a perverse or arbitrary manner. In 26 A. 238 (P.C.) this Lordships of the Privy Council observed that they are always slow to reverse decisions of Courts below in the deliberate exercise of a discretion entrusted to them by law. See also 42 B. 380 (P.C.) *relied on* in 27 Cr. L.J. 1217=97 Ind. Cas. 1041.

227. (1) Any Court may alter or add to any charge at any time before judgment is pronounced or, in the case of trials before the Court of Session or High Court, before the verdict of the Jury is returned, or the opinions of the assessors are expressed.

(2) Every such alteration or addition shall be read and explained to the accused.

Scope of the section.—This section provides for amendment of the charge at a late stage, while S. 226, *supra*, provides for amendment of the charge at the commencement of the trial. This and S. 237 necessarily go together and it is not the intention of the Legislature to convict an accused person of an offence of which he has not been told anything, 23 A.L.J. 436=26 Cr. L.J. 1057=83 Ind. Cas. 1. An application for amendment of the charge should be made immediately the charge is read out and explained to the accused by the Court, 27 C. 839; 18 Cr. L.J. 346=38 Ind. Cas. 730. The accused must know what he is charged with and what offence he has to answer. S. 237, *infra*, must be read with this section. A court cannot convict an accused person of an offence of which he has not been

226. When any person is committed for trial without a charge, or with an imperfect or erroneous charge, the Court, or, in the case of a High Court, the Clerk of the Crown may frame a charge, or add to or otherwise alter the charge, as the case may be, having regard to the rules contained in this Code as to the form of charges.

Procedure on commitment without charge or with imperfect charge.

Illustrations.

(1). A is charged with the murder of C. A charge of abetting the murder of C may be added or substituted.

(2). A is charged with forging a valuable security under S. 467 of the Indian Penal Code. A charge of fabricating false evidence under S. 193 may be added.

(3). A is charged with receiving stolen property knowing it to be stolen. During the trial it incidentally appears that he has in his possession instruments for the purpose of counterfeiting coin. A charge under S. 235 of the Indian Penal Code cannot be added.

Scope of the section.—The combined effect of Ss. 226 to 231 is to confer a wide jurisdiction on the Sessions Court with regard to the charge. At the beginning of the trial if the Judge finds that the Magistrate has omitted to frame a charge, he may supply the omission and frame a proper charge made out by the evidence on record. If the charge framed is imperfect or erroneous the judge may alter or add to the charge or if he is of opinion that other offences have been committed he may include those offences so disclosed in the charge. The material on which the judge acts under this section is the evidence recorded at the preliminary inquiry and under the next section the evidence received by himself in the course of the trial. Provision is also made for adjourning the trial for ordering a new trial, for recalling witnesses and for obtaining, if necessary, sanction for the prosecution; all these indicate very clearly that there need not necessarily have any connection between the added charge and the original charge but the added charge must be for an offence disclosed by the evidence on record and the accused must not be prejudiced and the added charge must not contravene the provisions of Ss. 233 to 236, *infra*, 16 Cr. L.J. 573—30 Ind. Cas. 125 where 8 B. 200 and 11 B.H.C.R. 278 are approved and 3 M. 331 is distinguished and 8 A. 665; 32 C. 22 are not followed.

Committed without a charge.—The words "without a charge" do not warrant a Magistrate from committing the accused without framing a charge. The words were intended to cover cases where through inadvertence no charge was framed. The words "without charge" will apply not only to a case in which there is no charge but also to a case in respect of such offence as the Sessions Judge or Clerk of the Crown may think the accused ought to be tried, 8 B. 200; 12 C.W.N. 577=7 Cr. L.J. 372. A Court of Session may add charges under Ss. 497 and 499, I.P.C., under this section when the complaint of the husband also involved offences committed under those sections, 31 C.L.J. 51. But the addition of a charge which is not supported by the evidence before the Committing Magistrate is *ultra vires* and not merely an error of procedure, 3 M. 331; 32 C. 22; 11 B.H.C.R. 278; 16 Cr. L.J. 573=30 Ind. Cas. 125. Under S. 437 and S. 525 Cl. (1) (iv), *infra*, a commitment may be made without a charge against the accused, 27 M. 54 at 56. The illustrations to the section were added in the Code of 1893 to make the meaning of the section clear.

With an imperfect charge.—Imperfect implies defect in form. A Judge's power to alter a charge after commitment is limited by this section to imperfect or erroneous charges, 23 Cr. L.J. 1162=51 Ind. Cas. 936, 8 A. 665.

Court may frame a charge, etc.—A Sessions Judge can proceed under this section only on the facts appearing from the magisterial inquiry, 23 Cr. L.J. 177=71 Ind. Cas. 593.

May frame, add to or alter the charge.—A Sessions Judge ought to scrutinise the charges upon which accused persons are committed to his Court in the light of the fact disclosed in the Preliminary Register in order that additions or alterations may, if necessary, be made under this section before the accused are called upon to plead to the charge under S. 271, *infra*, 18 Cr. L.J. 346=38 Ind. Cas. 730; 11 A.L.J. 188. The ultimate responsibility of settling the charge against the accused person committed to the Sessions Court rests on the Sessions Judge who can alter or change the same, 16 Bom. L.R. 89=15 Cr. L.J. 292=23 Ind. Cas. 500. Where an accused person is committed to the High Court Sessions for kidnapping a minor girl in Bombay and also of abetting rape on her committed at Ahmedabad under S. 376 and 114, I.P.C., and it was sought by the prosecution to amend the second charge of abetment of rape by omitting S. 114, I.P.C., and by substituting in its place S. 109, I.P.C., leave to amend the charge was refused on the ground that the proposed amendment would materially alter the nature of the case the accused had to meet at a late stage of the case and the second charge was therefore withdrawn from the jury, 30 Bom. L.R. 1233=30 Cr. L.J. 191. A Sessions Court is not a Court of original jurisdiction and though vested with large powers for amending and adding to charges can only do so with reference to the immediate subject of the prosecution and committal and not with regard to matters not covered by the indictment. It has full discretionary power under this section to amend the charge, 32 C. 22; 26 Cr. L.J. 5=83 Ind. Cas. 435; 1920 M.W.N. 149=11 L.W. 317=21 Cr. L.J. 57=54 Ind. Cas. 409 or add a completely new charge. See S. 227, *infra*. But the power to alter should be used with great caution, 6 B.H.C.R. (Cr. Ca.) 76. But under proper circumstances a Sessions Judge has power to add a charge distinct from the charges framed by the Committing Magistrate, 23 C.W.N. 561. Any action under this section can be taken by the Sessions Judge only on the facts disclosed by the Magisterial inquiry and where the facts show there is any omission by the Magistrate, an additional charge may be framed by the Sessions Judge, 24 Cr. L.J. 177=71 Ind. Cas. 593. A Sessions Judge has no power under this section to expunge a charge before calling upon the accused to plead to it, 7 C.L.R. 143.

Having regard to the rules in the code as to framing of charges.—See Schedule V, Form No 28, *infra*, and the provisions contained in this Chapter.

Revision.—A Court of Appeal or revision should be very slow to interfere with the discretion of the trial Court in the exercise of its powers under this section of altering or adding a charge if the discretion has not been exercised in a perverse or arbitrary manner. In 26 A. 238 (P.C.) the Lordships of the Privy Council observed that they are always slow to reverse decisions of Courts below in the deliberate exercise of a discretion entrusted to them by law. See also 42 B. 389 (P.C.) *relied on* in 27 Cr. L.J. 1217=97 Ind. Cas. 1041.

227. (1) Any Court may alter or add to any charge at any time before judgment is pronounced or, in the case of trials before the Court of Session or High Court, before the verdict of the Jury is returned, or the opinions of the assessors are expressed.

(2) Every such alteration or addition shall be read and explained to the accused.

Scope of the section.—This section provides for amendment of the charge at a late stage, while S. 226, *supra*, provides for amendment of the charge at the commencement of the trial. This and S. 237 necessarily go together and it is not the intention of the Legislature to convict an accused person of an offence of which he has not been told anything, 23 A.L.J. 436=26 Cr. L.J. 1057=88 Ind. Cas. 1. An application for amendment of the charge should be made immediately the charge is read out and explained to the accused by the Court, 27 C. 839; 18 Cr. L.J. 316=33 Ind. Cas. 730. The accused must know what he is charged with and what offences he has to answer. S. 237, *infra*, must be read with this section. A Court cannot convict an accused person of an offence of which he has not been

told anything. It is not just to convict a man without telling him his offence, 24 A.L.J. 168=27 Cr. L.J. 152=91 Ind. Cas. 888; see also 23 A.L.J. 436. An application under S. 226, *supra*, should be considered and decided at once and not postponed till the conclusion of the trial, 16 B. 414 at 425; 16 Cr. L.J. 573=30 Ind. Cas. 125.

Court may alter or add to any charge.—These words were added in the Code of 1898 to meet the conflicting rulings in Bombay and Allahabad, 8 B. 200; 9 A. 525. A Sessions Judge cannot add to alter or amend the charge in such a way as to produce a charge in support of which evidence was not given before the Magistrate. A Sessions Judge should not alter a charge of dacoity into one of robbery without assigning a reason and before hearing the evidence, 16 C.W.N. 238=13 Cr. L.J. 127=13 Ind. Cas. 783. The Sessions Judge could without impropriety send the case down to the Magistrate and suggest that he should consider whether there were or were not grounds for inquiring into a more serious charge and the course adopted by the judge by adding a new charge and culling evidence in support of the same was not merely an error of procedure but an improper assumption of jurisdiction and the conviction was quashed by the High Court, 3 M. 351. A Court of Session is not a Court of original jurisdiction and though vested with large powers of amending and altering the charges it can only do so with reference to the immediate subject of the prosecution and not with regard to a matter not covered by the indictment, (1920) M.W.N. 149=11 L.W. 317=21 Cr. L.J. 57=54 Ind. Cas. 409; although the law empowers a Sessions Judge to add a charge at any time before pronouncing judgment he must in doing so exercise a sound and wise discretion. When the Court drew up a charge of a compoundable offence read out and pleaded by the accused and on the day fixed for argument the parties put in a petition compounding the offence the Court should accept the compounding and has no power to alter the charge to a non-compoundable offence, 15 Cr. L.J. 540=24 Ind. Cas. 948. A grave charge like dacoity should not be suddenly added and the trial proceeded with at once and the accused called upon his defence immediately, 6 C.W.N. 73; 16 Cr. L.J. 573=30 Ind. Cas. 125, see also 31 B. 218; 29 C. 415, *following* 5 A. 233. When an application for amendment of a charge is made it should be decided immediately and not postponed, 16 B. 414 at 425; 16 Cr. L.J. 573=30 Ind. Cas. 125. An amendment of a charge at a very late stage to cure an illegality in the trial is not permitted by law. Where the charge originally framed was for more than three offences and after the case had been tried the illegality was brought to the notice of the Magistrate in the course of arguments of counsel and he amended the charge immediately as to include only three offences, held as the charge was bad on the face of it, it could not be cured by amending it by striking out one charge as the mischief which the Legislature intended to safeguard against by enacting the provision of law may already have been done, 29 M. 569, *followed* in 49 M.L.J. 93, see also 25 M. 61 (P.O.); 27 Cr. L.J. 793=95 Ind. Cas. 393. It was held in 12 A. 351 that the power to alter in this section may be taken to include the power to *withdraw* a charge. The word "alter" ought not to be taken as tantamount to *expungo*, "7 C.L.R. 143.

Before the verdict of the jury.—On a trial by jury the Sessions Judge has no power to alter the charge after the jury returned their verdict, 5 B.H.C.R. (Cr. Ca.) 9. "Returning verdict" means return of the final verdict which the Judge was bound to accept, 8 B. 200. Under S. 203, *infra*, the Judge is entitled to ask the jury such questions as are necessary to ascertain what the verdict is and when those questions are answered by the jury and accepted by the Judge the final verdict which the Judge is bound to record cannot be said to have been delivered.

Or opinion of assessors are expressed.—In making the alteration of a charge, the limitations in which it is clearly laid down in this section should not be overlooked. The alteration is only permitted up to the time of taking the opinion of the assessors and not after such opinions are expressed, 17 Cr. L.J. 454=36 Ind. Cas. 134.

Sub-section (2).—This sub-section makes it imperative on the Judge to read and explain to the accused every altered and added charge so that he may understand thoroughly the nature of the new charge which he is called upon to plead, 5 C. 826; 7 C. 95; 9 M. 61; 9 B. 200.

228. If the charge framed or alteration or addition made under section 226 or section 227 is such that proceeding

When trial may proceed immediately after alteration.

immediately with the trial is not likely, in the opinion of the Court to prejudice the accused in his defence, or the prosecutor in the conduct of the case, the Court may, in its discretion, after such charge or alteration or addition has been framed or made, proceed with the trial as if the new or altered charge had been the original charge.

Object of the section.—This section lays down the procedure to be adopted after the charge is amended or altered or added to. The intention of the Legislature is, that whenever an amendment of the charge in any way tends to the prejudice of the prisoner, steps should be taken to prevent the consequences arising by ordering a new trial or suspending the trial going on, to enable him to make his defence, or to examine any material witness or to recall any witness already examined. It is only in the case of charges clearly related that a trial goes on forthwith after an amendment, 11 B.H.C.R. 278 at 280. Where there is a doubt as to whether the alteration or addition of a charge will or will not prejudice an accused person, the leaning of the Court should be in favour of the accused, 6 B.H.C.R. (Cr. Ca.) 76. When a new grave charge like dacoity was added, the Judge will not be exercising a sound and judicial discretion in proceeding with the case immediately, 6 C.W.N. 73. A Sessions Court also cannot add a charge so as to take cognizance of an offence without a commitment to it by the Magistrate, 3 M. 351; 32 C. 22; 1920 M.W.N. 143 = 11 L.W. 317 = 21 Cr. L.J. 57 = 54 Ind. Cas. 409.

Not likely to prejudice the accused in his defence.—It is difficult in all cases to say whether an amendment will prejudice a prisoner in his defence upon the merits; in some cases it is clear that an amendment will not have that effect; in others it is equally clear it will; and where it is doubtful whether an amendment will or will not prejudice the prisoner the leaning of the Court should be in favour of the prisoner, 6 B.H.C.R. (Cr. Ca.) 76 at 81.

Proceed with the trial.—The procedure allowed by this section will, generally be adopted only where the charges are so closely related that they are only different ways of looking at the same facts so that the accused who has come prepared to meet the charge on which he was committed to stand his trial at the Sessions Court will be under no disadvantage in meeting the amended or new charge, 7 B.H.C.R. 278 at 280; where however the new charge will raise different questions of law or would admit of a different defence upon the facts, the Court is bound to act under S. 229, *infra*.

Magistrate did not cover the gravity of the offence and any addition or alteration of the charge by him would not be supported by the evidence on record the Sessions Judge is to send back the records to the Magistrate to consider whether grounds exist for inquiring into a grave charge, 6 B 200. When a new trial is directed under this section the Court holding the new trial is not justified in referring to the former record as a whole, but only such portions of it as have been specially put in evidence before it, 7 C L.R. 193.

230. If the offence stated in the new or altered or added charge

is one for the prosecution of which previous sanction is necessary, the case shall not be proceeded with until such sanction is obtained, unless sanction has been already obtained for a prosecution on the same facts as those on which the new or altered charge is founded.

Stay of proceeding if prosecution of offence in altered charge requires previous sanction.

The word "sanction" in S. 195 is now omitted and "complaint" of Court or public servant in writing is the expression used. In S. 197 the expression "previous sanction" is used. Is this section confined to offences referred to in S. 197 only? This seems to be a case of oversight as the section clearly referred to S. 195 also. The words "complaint of Court", it is submitted, should be added after the word sanction to make the provisions of this section applicable to S. 195, *supra* as well. The expression "on the same facts" occurring in the section is to be carefully noted when once sanction is obtained for prosecution for the substantive offence, no fresh sanction is necessary to prosecute for abetment of the offence under this section as the new charge is founded on any but the same facts as those on which the sanction was originally obtained, 30 C. 103; 21 Cr. L. J. 230=55 Ind. Cas. 102; 12 Cr. L.J. 217=10 Ind. Cas. 156. A prosecution once started without the requisite sanction cannot be cured by obtaining the necessary sanction subsequently and that cannot cure the defect in the initiation of proceedings. The absence of the sanction is fatal in the initiation of proceedings and conviction, 28 Cr. L. J. 780=104 Ind. Cas. 108 following 9 B. 27 and 289; 37 C. 467, 16 Cr. L.J. 787=31 Ind. Cas. 613; 17 Cr. L.J. 454=36 Ind. Cas. 134.

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231. Whenever a charge is altered or added to by the Court

after the commencement of the trial, the prosecutor and the accused shall be allowed to recall or re-summon and examine with reference to such alteration or addition, any witness who may have been examined, and also to call any further witness whom the Court may think to be material.

Recall of witnesses when charge altered.

This section requires that when a charge is altered by the Court after the commencement of the trial, the prosecutor and the accused shall be allowed to recall or re-summon and examine the witnesses with reference to such altered or added charge and also examine further witnesses when the charge was altered at a very late stage and no commitment should be made without giving the accused an opportunity of re-examining the witnesses and adducing defence evidence, 22 A.L.J. 239=23 Cr. L.J. 708=81 Ind. Cas. 318; 26 Cr. L.J. 1497=90 Ind. Cas. 153. Once a charge is altered or added to, the provisions of this section apply. The Court is bound to recall any witness which the prosecution or the accused desire to examine with reference to the alteration or addition. It may be difficult to see what further questions could have been asked but the provisions of the section are peremptory, 6 Pat. 832. Similarly the accused has under this section the right to recall prosecution witnesses after the alteration of the charge even if that alteration could not affect his defence and the Court has no discretion in the matter. The provisions of this section are not inapplicable to cases to which S. 228 *supra* applies, 32 M. 345=56 M. L. J. 600=1925 M.W.N. 833=29 L.W. 111=30 Cr. L.J. 223=113 Ind. Cas. 672. When the charge is altered, the alteration should be entered formally in the record of the trial, 22 M.L.J. (3d. n) 1. Though this section does not require the grounds to

after the commencement of the trial, the prosecutor and the accused shall be allowed to recall or re-summon and examine the witnesses with reference to such altered or added charge and also examine further witnesses when the charge was altered at a very late stage and no commitment should be made without giving the accused an opportunity of re-examining the witnesses and adducing defence evidence, 22 A.L.J. 239=23 Cr. L.J. 708=81 Ind. Cas. 318; 26 Cr. L.J. 1497=90 Ind. Cas. 153. Once a charge is altered or added to, the provisions of this section apply. The Court is bound to recall any witness which the prosecution or the accused desire to examine with reference to the alteration or addition. It may be difficult to see what further questions could have been asked but the provisions of the section are peremptory, 6 Pat. 832. Similarly the accused has under this section the right to recall prosecution witnesses after the alteration of the charge even if that alteration could not affect his defence and the Court has no discretion in the matter. The provisions of this section are not inapplicable to cases to which S. 228 *supra* applies, 32 M. 345=56 M. L. J. 600=1925 M.W.N. 833=29 L.W. 111=30 Cr. L.J. 223=113 Ind. Cas. 672. When the charge is altered, the alteration should be entered formally in the record of the trial, 22 M.L.J. (3d. n) 1. Though this section does not require the grounds to

be mentioned for refusing to summon new witnesses on the altered charge, the fact that the Appellate Court might have to consider whether the evidence of new witnesses on the altered charge would be material or not it is essential that grounds should be recorded. This section and S. 237, *infra*, have to be read together having regard to the principles underlying these two sections, 57 M.L.J. 478—1929 M.W.N. 530.

232. (1) If any Appellate Court or the High Court in the exercise of its powers of revision or of its powers under Chapter XXVII, is of opinion that any person convicted of an offence was misled in his defence by the absence of charge or by an error in the charge, it shall direct a new trial to be had upon a charge framed in whatever manner it thinks fit.

(2) If the Court is of opinion that the facts of the case are such that no valid charge could be preferred against the accused in respect of the facts proved, it shall quash the conviction.

Illustration.

A is convicted of an offence under S. 196 of the Indian Penal Code, upon a charge which omits to state that he knew the evidence, which he corruptly used or attempted to use as true or genuine, was false or fabricated. If the Court thinks it probable that A had such knowledge, and that he was misled in his defence by the omission from the charge of the statement that he had, it shall direct a new trial upon an amended charge; but, if it appears probable from the proceedings that A had no such knowledge, it shall quash the conviction.

Scope of the section.—This section covers a case of absence of charge or error in the framing of a charge while S. 535, *infra*, deals only with absence of charge and the procedure to be followed when prejudice to the accused has been made out, is more clearly expressed in S. 535 *infra* than in this section. This section empowers the Appellate Court or the High Court to direct a new trial on the ground that an accused person convicted of an offence was misled in his defence by the absence of a charge or an error in the charge. This is quite apart from the general powers of an Appellate Court to order a retrial when hearing an appeal under S. 423 (1) (b), *infra*. When the Court is of opinion that on the facts no valid charge could be sustained against the accused, it shall quash the conviction. Where certain owners of land were convicted under Ss. 164 and 165, I.P.C., for acts or omissions on the part of their agents but the charge framed referred only to the knowledge or belief and acts or omissions of the owners themselves and not of their agents, and on appeal the Sessions Judge held that the omission in the charge "or their agents or managers" was material and seriously prejudiced their defence, it was held that the conviction was unsustainable and a re-trial was ordered, 7 C.W.N. 301. When an accused person was summoned to appear for trial for two offences, under Ss. 143 and 379, I.P.C., and he was charged only with one of these offences, *vis.*, S. 379, I.P.C., he would have good reason to suppose that the other offence had been dropped by the Magistrate, and when he is convicted of the offence not charged under S. 143, I.P.C., he must have been misled in his defence by the absence of the charge under this section, 27 C. 660. But when there was nothing on the record to show that any valid charge could be preferred against an accused person, the conviction shall be quashed and further proceedings in the matter should be stopped, 28 C. 63. An Appellate Court is not entitled to convict an accused person for an entirely different offence while acquitting him of the offence charged by the lower Court, 30 C. 288; 9 Cr. L.J. 406—1 Ind. Cas. 867. Nor can an accused person be convicted of grievous hurt when he was originally charged of that offence read with S. 149, I.P.C., 16 C.W.N. 1077; 41 C. 662, but in 47 M. 746 (F.B.), it was pointed out that these decisions do not consider the effect of S. 537, *infra*, upon omissions in the charge and the general statement that it was now settled law that when a person is under S. 149, I.P.C., he cannot be convicted of the substantive legality of the conviction had, depends upon whether

materially prejudiced by the form of the charge. When a charge is amended, the accused is entitled to recall and cross-examine any of the prosecution witnesses and not merely those witnesses on whose evidence the charge was amended, 25 Cr. L.J. 1437=60 Ind. Cas. 153.

Misled in his defence.—Where the accused was charged with storing wool but convicted of storing loose cotton, and where the accused was charged with causing hurt with a *dao* but convicted of using a *lathi* the convictions were set aside as the accused were misled in their defence, Ratanlal 529; 17 C.W.N. 419=14 Cr. L.J. 212=19 Ind. Cas. 308; 4 C.W.N. cxxix. It is the duty of the Court in all cases to satisfy itself that the accused has been misled in his defence by the absence or by an error in the charge. This applies as well to cases in which the conviction was in compliance with the terms of the law as well to cases in which the conviction was irregular 30 Cr. L.J. 891=118 Ind. Cas. 323 following 29 C. 481 and 40 C. 155. If the High Court is of opinion that in consequence of material errors in a charge the accused had been misled, it is bound to direct a new trial to be held on a proper charge being framed, 17 Cr. L.J. 454=36 Ind. Cas. 134.

In respect of the facts proved.—In criminal cases it is for the prosecution to prove its case and an accused person cannot be convicted merely because he has set up a false defence. But where evidence is purely circumstantial and the facts proved by the prosecution unless explained by the accused would justify an inference of his guilt it is lawful for the Court to consider the accused's explanation which he has put forward in his defence, 17 Cr. L.J. 23=32 Ind. Cas. 151.

Joinder of Charges.

233. For every distinct offence of which any person is accused there shall be a separate charge, and every such charge shall be tried separately, except in the cases mentioned in sections 234, 235, 236 and 239.

Separate charges
for distinct offences.

Illustration.

A is accused of a theft on one occasion, and of causing grievous hurt on another occasion. A must be separately charged and separately tried for the theft and causing grievous hurt.

Object of the section.—The general rule in criminal trials is that there should be a separate trial with respect to each distinct offence except in cases mentioned in Ss. 234, 235, 236 and 239, *infra*. The object evidently is that the attention of the Court should be directed to the evidence relating to the charge under inquiry and all irrelevant matter should be excluded. This object is not achieved but defeated by placing on the record copies of statements of witnesses recorded during the course of the trial relating to another charge, 29 Cr. L.J. 521=109 Ind. Cas. 343. In 49 B. 892 at 901, the High Court while setting aside a conviction for misjoinder of charges (accused being tried for three breaches of trust and three falsifications of accounts in respect of the same three amounts) at one trial, made the following suggestion as to the desirability of amending this section; "We wish to add that we think the attention of the Government should be drawn to this case with a view to its being considered whether the Government of India should not be moved to amend the Code in the form of an illustration to S. 231 or otherwise to obviate difficulties of the kind that have arisen in the present case. We think that obviously in this case (and probably in all such cases) there is no prejudice to the accused if he is allowed to be tried in one trial for three separate offences of breach of trust committed within one year and also three separate but unconnected offences of falsification of accounts in regard to those breaches of trust. Regrettable delay and expenditure are entailed by the present law as interpreted by the Courts which frequently necessitate the upsetting of trials and in consequence either retrial of the accused or his getting off scot-free." This section contains the general law, and the reason for it is, that the mind of the Court might be prejudiced against the prisoner if he were tried in one trial upon different charges resting on different evidence. It might be difficult for the Court trying him on one of the charges not to be unfairly influenced by the evidence against him on the other charges, T.A. 174 at 177; 19 C.W.N. 972. An accused also is likely to be bewildered in his defence by having to meet many disconnected charges and a fair

trial is to be endangered by the production of a mass of evidence of different matters tending to create undue suspicion against the accused, 13 B. 431; 29 M. 589; 49 M. L. J. 93; 27 Cr. L. J. 793=95 Ind. Cas. 393. The general rule is that there should be a separate trial for every distinct offence. The exceptions are the cases mentioned in Ss. 231 to 236 and 239, *infra*. These exceptions must be strictly construed so as not to defeat the right of independent trial conferred by the general law, 5 Pat. L. J. 11 at 13; non-compliance with the provisions of this section is not a mere irregularity but an illegality which vitiates the trial. Where two offences are quite distinct and separate and there is also an interval of time between their commission, they cannot be said to form the same transaction and a joint trial is illegal, 21 A. L. J. 859=23 Cr. L. J. 964=81 Ind. Cas. 612. A trial in contravention of the section unless justified by the exceptional sections is not an irregularity but an illegality, 11 A. L. J. 185=14 Cr. L. J. 116=18 Ind. Cas. 676. The validity of an indictment depends not upon the facts found at the trial but upon the circumstances alleged before the trial commences, 33 C. 833.

For every distinct offence there shall be a separate charge.—Where a charge has been framed under Ss. 970 and 149, I.P.C., a conviction under S. 326, I.P.C., is not necessarily bad, but it depends on whether the accused has or has not been prejudiced by the form of the charge. The omission of S. 149 from the charge does not create an illegality by reason of this section which provides that for each distinct offence there shall be a separate charge. S. 149, I.P.C., creates no offence but like S. 34, I.P.C., is merely declaratory of the principle of common law; its object being to make it clear that the accused who comes within that section cannot put forward as a defence, that it was not his hand that committed the offence and a person cannot be tried and sentenced under S. 149, I.P.C., alone as no punishment is provided for under that section, 47 M. 745 (F.B.). The provisions of this section are mandatory, 40 C. 168; 28 M. L. J. 331; 33 A. 42. When a person is charged with criminal breach of trust with regard to certain necklaces between February 1922 and January 1924, the transaction with regard to each necklace being apparently a separate offence it would be necessary to charge the accused separately with each offence and every such offence must be tried separately; otherwise the trial is bad for misjoinder, 28 Cr. L. J. 171=99 Ind. Cas. 603. This section must be strictly followed save and except, where the law itself provides an exception, 41 C. 722 at 725; 39 M. 327. This section equally applies even to summons cases where it is not necessary to have a written charge, 41 C. 694. Every act in breach of the conditions of the license or permit under the Opium Act is a distinct offence and under this section should be made the subject of a separate charge and tried separately, 16 Cr. L. J. 717=30 Ind. Cas. 1005. When there are two distinct offences for each offence a separate charge ought to be made under this section. Though certain provisions of the Code provide that more than one charge may in certain circumstances be tried together, that does not justify the inclusion in one charge of several distinct offences which is an illegality, 40 C. 848 at 843. A joinder of two offences in a single charge is only an irregularity and not an illegality, 31 C. W. N. 337=45 C. L. J. 591=28 Cr. L. J. 347=100 Ind. Cas. 827 where 11 C. W. N. 54; 19 C. W. N. 972; 50 C. 84 are referred to. See also 45 C. L. J. 438=39 Cr. L. J. 793, where all the previous decisions are discussed and the proposition re-affirmed but distinct offences under S. 807, I.P.C., and S. 20 of the Arms Act ought not to be tried together, 29 Cr. L. J. 521=109 Ind. Cas. 345. A joinder in one charge of two distinct offences though arising out of the same transaction is an illegality fatal to the trial, 10 C. W. N. 53 and 520 followed in 13 C. W. N. 1067=10 Cr. L. J. 469=4 Ind. Cas. 16. The exceptions to this section are Ss. 234, 235, 236 and 239 *infra*; where the acts imputed to the accused namely of manufacturing the excisable article, seized and brought into Court and of possessing the same, and of selling from time to time various other and similar articles not before the Court and of attempting to render denatured spirit unfit for human consumption, do not constitute the same transaction; a trial in respect of all such acts is bad for misjoinder under this section, 41 C. 694. A joinder of three charges relating to different transactions is not warranted by this section and does not come under any of the exceptions provided in the Code and is therefore illegal, and such a misjoinder is absolutely fatal to the trial, 41 C. 722; 28 Cr. L. J. 347=100 Ind. Cas. 827. S. 537, *infra* will not cure such an illegality. The disobedience of an express provision of law as to a mode of trial is not a mere irregularity; such a phrase as *irregularity*

is not appropriate to the illegality of trying an accused person for many different offences at the same time. The remedying of mere irregularity is familiar to most systems of jurisprudence, but it would be an extraordinary extension of such a branch of administering the criminal law to say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted, that this contravention of the Code comes within the description of error, omission or irregularity, 23 M. 61 at 87-93 (P.C.). These observations were made by their Lordships of the Judicial Committee with regard to S. 234, *infra*, but they apply equally to cases falling under this section, also. In 39 M. 527 the principle of the decision of the Privy Council was applied to a case falling under this section. See also 41 C. 722 and 17 C.W.N. 479. The decision of the Privy Council in 23 M. 61 has overruled the following decisions, 27 C. 839; 23 C. 10 at 11; 20 C. 537; 22 C. 276; 14 C. 395; 21 A. 127; 14 A. 502; 11 M. 441; 12 M. 273 and 10 M.L.J. 147. If the joinder of the charge was in violation of the law, the accused must have been considerably embarrassed in their defence on the remaining charges, and their acquittal on the charges which the prosecution failed to prove cannot make valid the trial held, as it was illegal *ab initio*, 33 M. 502 at 505. See also 20 M.L.J. 220; 39 M. 527; 29 M. 553 49 M.L.J. 93; 27 Cr. L.J. 793=93 Ind. Cas. 393; 1 M. L.T. 409; 14 C. 128, 5 Pat. L.J. 11, 21 A.L.J. 853=25 Cr. L.J. 964=81 Ind. Cas. 612. The joinder of two distinct offences under one charge is an illegality fatal to the proceedings, 14 Cr. L.J. 459=20 Ind. Cas. 609. The following offences are held to be distinct offences within this section—(1) Public servant framing incorrect record, S. 166, and forgery of a record of Court or register, S. 465, I.P.C., 8 C. 450; (2) dishonestly receiving stolen property, S. 411, and habitually dealing in stolen property, S. 413, I.P.C., 8 C. 634; (3) theft in a building, S. 380, and dishonestly receiving stolen property S. 411, I.P.C., 28 M.L.J. 381; 28 C. 10; 1 C.W.N. 33. Theft under S. 379 cannot be charged with an offence under S. 315, I.P.C. 12 Cr. L.J. 72=9 Ind. Cas. 421; (4) dishonestly receiving stolen property S. 411 and using a false trade mark, S. 480, I.P.C., 6 C.W.N. 559; (5) three offences of breach of trust by a servant, S. 409, and three falsification of accounts, S. 477 A I.P.C., 30 M. 328, 41 C. 722; 26 C. 560; 43 B. 692; (6) kidnapping a boy under S. 365, I.P.C., and assaulting his mother when she went to get back the child, S. 352, I.P.C., 26 M. 454; (7) obstruction to a Railway line, S. 125, Railways Act, and resistance to lawful apprehension, S. 225, I.P.C., 29 C. 395; (8) theft in a building, S. 380 and resistance to lawful apprehension, S. 224, I.P.C., 4 Cr. L.J. 389; (9) offences under Ss. 372 and 373 of buying and selling a minor girl, 12 M. 273; (10) two attempts to cheat on different days are distinct offences requiring the drawing up of two charges, 2 C.L.J. 618. See also 24 A.L.J. 239 where 20 A.L.J. 320 and 32 A. 219 are referred to (11) forgery and using as genuine a forged document, 30 C. 822; (12) murder and causing disappearance of its evidence, 25 Bom. L.R. 231=25 Cr. L.J. 1349=82 Ind. Cas. 709. But see the recent Privy Council decision reported in 6 Lah. 226 where it was held that persons charged with murder under S. 302, I.P.C., can be convicted under S. 201, I.P.C., of making away with the evidence of murder by assisting in the taking away of the dead body even though there was no formal charge under S. 201, I.P.C., there was evidence on record to establish the charge. Joinder of two charges one under S. 20 of the Cattle Trespass Act, and another under S. 504, I.P.C., is not illegal where no objection was taken to such joinder in the trial Court, 50 M. 841. In two cross cases arising out of the same occurrence although two separate records are prepared, but in reality one joint trial in which the prosecution evidence in one case was treated as the defence evidence in the other, it was held that the procedure adopted was illegal and trials were set aside, 24 Cr. L.J. 551=81 Ind. Cas. 39. Joinder of two distinct offences in a single charge is only an irregularity and cannot vitiate the trial unless the accused is really prejudiced, 31 C.W.N. 337=43 C.L.J. 591=28 Cr. L.J. 347=100 Ind. Cas. 827, but distinct offences such as attempt to murder under S. 307, I.P.C., and S. 20 of the Arms Act ought not to be tried together, 29 Cr. L.J. 521=109 Ind. Cas. 345.

Such charge shall be tried separately.—This and the following sections relating to joinder of charges refer to the trial of the accused. The provisions contained in this section relate only to trials and not to inquiries into the guilt of the accused and as, in a warrant case the trial proper does not begin until the accused is charged and called upon to answer, No question of illegality of a joint trial arises when the accused are discharged under

S. 253, *infra*, 30 Cr. L.J. 404=115 Ind. Cas. 164 following 14 Cr. L.J. 230=19 Ind. Cas. 326 and distinguishing 18 Cr. L.J. 339=38 Ind. Cas. 723. The definite rule of law enacted herein cannot be disregarded to facilitate the disposal of a case against several accused, 39 M. 527; 41 C. 722; 40 C. 816. The Privy Council ruling in 25 M. 61 cannot be extended to preliminary inquiries held by Magistrates with a view to commit the accused to the Sessions and thus render a commitment made illegal for mis-joinder of offences in the preliminary inquiry. It is open to the Sessions Court to frame separate charges and try separately as if there had been two commitments, 26 M. 592; 7 Bom. L.R. 457; 35 M.L.J. 259. But see the suggestion in 39 M. 527 at 533, that though the procedure is not obnoxious to this section, yet the procedure is not calculated to advance justice as the accused is practically on his trial the moment the prosecution starts the case. Two offences of being in possession of stolen properties belonging to different persons stolen on different days cannot be tried together in one trial, 13 C.W.N. 418=9 Cr. L.J. 277=1 Ind. Cas. 333 where 11 C.W.N. 1128 and 25 M. 61 (P.C.) are followed and 9 C. 371 not followed. Where a Magistrate framed separate charges and numbered them as distinct cases but when the witnesses were cross-examined he lost the necessity of keeping the two trials separate and allowed the witnesses to be cross-examined promiscuously in respect of both the cases, it was held the trial was illegal and the illegality cannot be cured by S. 537, *infra*, 29 M.L.J. 101 (F.B.)=(1915) M.W.N. 501=15 M.L.T. 93=16 Cr. L.J. 93=30 Ind. Cas. 143.

234. (1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences *whether in respect of the same person or not* he may be charged with, and tried at one trial for, any number of them not exceeding three-

Three offences of same kind within a year may be charged together

(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code or of any special or local law :

Provided that, for the purpose of this section, an offence punishable under section 379 of the Indian Penal Code shall be deemed to be an offence of the same kind as an offence punishable under section 380 of the said Code, and that an offence punishable under any section of the Indian Penal Code, or of any special or local law, shall be deemed to be an offence of the same kind as an attempt to commit such offence, when such an attempt is an offence.

Amendment.—In sub-section (1) the words 'whether in respect of the same person or not' have been added with the object of making it clear that offences of the same kind may be tried even if they were committed against different persons. The proviso is also new.

Scope and object of the section.—This section is the first exception to the previous section which requires a separate charge and separate trial for every distinct offence and allows three charges of three distinct offences of the same kind and committed within the space of one year of each other to be tried at the same time, but this does not mean that if at one time or within one year a man commits fifty distinct offences of the same kind he shall not in one day be prosecuted for more than three of such offences. See illustration (d) to S. 235, *infra*. This section merely places a statutory limit on the number of charges which may legally form part of a single trial. There is nothing in this section however to prevent an accused from being separately charged and tried on the same occasion for any number of distinct offences of the same kind committed within one year, 3 C. 540. The reason for such a

is not appropriate to the *illegality* of trying an accused person for many different offences at the same time. The remedying of mere irregularity is familiar to most systems of jurisprudence, but it would be an extraordinary extension of such a branch of administering the criminal law to say that when the Code positively enacts that such a trial as that which has taken place here shall not be permitted, that this contravention of the Code comes within the description of error, omission or irregularity. 25 M. 61 at 97-98 (P.C.). These observations were made by their Lordships of the Judicial Committee with regard to S. 234, *infra*, but they apply equally to cases falling under this section, also. In 39 M. 527 the principle of the decision of the Privy Council was applied to a case falling under this section. See also 41 C. 722 and 17 C.W.N. 479. The decision of the Privy Council in 25 M. 61 has overruled the following decisions, 27 C. 839; 28 C. 10 at 14; 20 C. 537; 22 C. 276; 14 C. 395; 21 A. 127; 14 A. 502; 11 M. 441; 12 M. 273 and 10 M.L.J. 147. If the joinder of the charge was in violation of the law, the accused must have been considerably embarrassed in their defence on the remaining charges, and their acquittal on the charges which the prosecution failed to prove cannot make valid the trial held, as it was illegal *ab initio*, 33 M. 502 at 505. See also 20 M.L.J. 220; 39 M. 527; 29 M. 563. 49 M.L.J. 93; 27 Cr. L.J. 793=93 Ind. Cas. 393; 1 M. L.T. 409; 14 C. 128; 5 Pat. L.J. 11; 21 A.L.J. 853=25 Cr. L.J. 954=81 Ind. Cas. 612. The joinder of two distinct offences under one charge is an illegality fatal to the proceedings, 14 Cr. L.J. 449=20 Ind. Cas. 609. The following offences are held to be distinct offences within this section:—(1) Public servant framing incorrect record, S. 166, and forgery of a record of Court or register, S. 466, I.P.C., 8 C. 450; (2) dishonestly receiving stolen property, S. 411, and habitually dealing in stolen property, S. 413, I.P.C., 8 C. 634; (3) theft in a building, S. 380, and dishonestly receiving stolen property, S. 411, I.P.C., 28 M.L.J. 381; 28 C. 10; 1 C.W.N. 35. Theft under S. 379 cannot be charged with an offence under S. 315, I.P.C. 12 Cr. L.J. 72=9 Ind. Cas. 421; (4) dishonestly receiving stolen property S. 411 and using a false trade mark, S. 480, I.P.C., 6 C.W.N. 559; (5) three offences of breach of trust by a servant, S. 409, and three falsification of accounts, S. 477 A I.P.C., 30 M. 328; 41 C. 722; 26 C. 560; 49 B. 892; (6) kidnapping a boy under S. 305, I.P.C., and assaulting his mother when she went to get back the child, S. 352, I.P.C., 25 M. 454; (7) obstruction to a Railway line, S. 125, Railways Act, and resistance to lawful apprehension, S. 225, I.P.C., 29 C. 395; (8) theft in a building, S. 380 and resistance to lawful apprehension, S. 224, I.P.C., 4 Cr. L.J. 389; (9) offences under Ss. 372 and 373 of buying and selling a minor girl, 12 M. 273; (10) two attempts to cheat on different days are distinct offences requiring the drawing up of two charges, 2 C.L.J. 618. See also 24 A.L.J. 239 where 20 A.L.J. 320 and 32 A. 219 are referred to (11) forgery and using as genuine a forged document, 30 C. 822; (12) murder and causing disappearance of its evidence, 25 Bom. L.R. 231=25 Cr. L.J. 1349=82 Ind. Cas. 709. But see the recent Privy Council decision reported in 6 Lah. 226 where it was held that persons charged with murder under S. 302, I.P.C., can be convicted under S. 201, I.P.C., of making away with the evidence of murder by assisting in the taking away of the dead body even though there was no formal charge under S. 201, I.P.C., there was evidence on record to establish the charge. Joinder of two charges one under S. 20 of the Cattle Trespass Act, and another under S. 504, I.P.C., is not illegal where no objection was taken to such joinder in the trial Court, 50 M. 841. In two cross cases arising out of the same occurrence although two separate records are prepared, but in reality one joint trial in which the prosecution evidence in one case was treated as the defence evidence in the other, it was held that the procedure adopted was illegal and trials were set aside, 24 Cr. L.J. 551=81 Ind. Cas. 39. Joinder of two distinct offences in a single charge is only an irregularity and cannot vitiate the trial unless the accused is really prejudiced, 31 C.W.N. 337=45 C.L.J. 591=28 Cr. L.J. 347=100 Ind. Cas. 827, but distinct offences such as attempt to murder under S. 307, I.P.C., and S. 20 of the Arms Act ought not to be tried together, 29 Cr. L.J. 521=109 Ind. Cas. 345.

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234. (1) When a person is accused of more offences than one of the same kind committed within the space of twelve months from the first to the last of such offences *whether in respect of the same person or not* he may be charged with, and tried at one trial for, any number of them not exceeding three.

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(2) Offences are of the same kind when they are punishable with the same amount of punishment under the same section of the Indian Penal Code or of any special or local law :

Provided that, for the purpose of this section, an offence punishable under section 379 of the Indian Penal Code shall be deemed to be an offence of the same kind as an offence punishable under section 380 of the said Code, and that an offence punishable under any section of the Indian Penal Code, or of any special or local law, shall be deemed to be an offence of the same kind as an attempt to commit such offence, when such an attempt is an offence.

Amendment.—In sub-section (1) the words 'whether in respect of the same person or not' have been added with the object of making it clear that offences of the same kind may be tried even if they were committed against different persons. The proviso is also new.

Scope and object of the section.—This section is the first exception to the previous section which requires a separate charge and separate trial for every distinct offence and allows three charges of three distinct offences of the same kind and committed within the space of one year of each other to be tried at the same time, but this does not mean that if at one time or within one year a man commits fifty distinct offences of the same kind he shall not in one day be prosecuted for more than three of such offences. See illustration (d) to S. 235, *infra*. This section merely places a statutory limit on the number of charges which may legally form part of a single trial. There is nothing in this section however to prevent an accused from being separately charged and tried on the same occasion for any number of distinct offences of the same kind committed within one year, 3 C. 540. The reason for such a

provision is to see that the Jury may not be prejudiced by the multitude of charges and the inconvenience of hearing together such a number of instances of culpability and the consequent embarrassment both to the Judge and the accused. It is likely to cause confusion and interfere with the definite proof of a distinct offence which it is the object of the Code to obtain. The policy of such a provision is manifest and the necessity of a system of written accusation specifying a definite criminal offence is the essence of Criminal Procedure, 23 M. 61 at 97. The exceptions to S. 233 are not mutually exclusive. The language of that section does not favour this view. If it had been intended that S. 235 (2) or S. 236, *infra*, could not be made use of in co-operation with this section, this intention could have been easily expressed. If the exceptions are mutually exclusive, the provisions of S. 236 or 237, *infra*, could never be invoked to prevent a miscarriage of justice arising from a failure to make good all the details of a charge joined with two other charges under this section. It is difficult to believe that the Legislature intended that a joint trial of three offences under this section should prevent the prosecutor from establishing at the same trial the minor alternative degree of criminality involved in the acts complained of and therefore the exceptions are not mutually exclusive and Ss. 235 (2) and 236, *infra*, may be resorted to in framing additional charges where the trial is of three offences of the same kind committed within one year, 33 B. 221 at 237-238. This section is not limited to cases where the offence has been committed against the same person; it applies also to cases where the complainants are different persons, 23 Cr. L.J. 740=69 Ind. Cas. 628 following 43 C. 13. This section refers only to the case of a single accused and is not applicable where more persons than one are tried jointly under S. 239, *infra*, 21 Cr. L.J. 794=58 Ind. Cas. 522. According to the General Clauses Act words in the singular include the plural only when there is nothing repugnant in the subject or context. Here it would be repugnant to the context to read the word "a person" as including several persons, 33 C. 292; 12 Cr. L.J. 266=10 Ind. Cas. 331. To the general and broad rule contained in S. 233, *supra*, which, applies to all trials for offences under the Criminal Law there are four exceptions, and a Court cannot and ought not to treat a case before it as an exception to the general and broad rule, unless it is satisfied that in the case before it, the charge should be brought within one of the four exceptions and it would be safer if the Magistrate or Sessions Judge would in the charge-sheet or in his judgment state that he had reasons for bringing the case under one of those separate sections. The four exceptions are contained in Ss. 234 to 239, *infra*, 11 A.L.J. 168 at 190.

Offences of the same kind within twelve months.—An accused person can be tried for three offences when they are of the same kind and committed within the space of twelve months, 29 Cr. L.J. 287=107 Ind. Cas. 826 where 40 C. 846 is not followed and 27 Cr. L.J. 909=96 Ind. Cas. 221 is followed. Offences are of the same kind when they are punishable under the same section and with the same amount of punishment, and when this is not the case neither S. 236 nor S. 237, *infra*, can be read with this section, 23 Cr. L.J. 751=53 Ind. Cas. 159; 33 B. 77. When the appellant was tried on an indictment in which he was charged with no less than forty-one acts, these acts extending over a period of two years, it was held by the Privy Council that this was plainly in contravention of this section which provided that a person may only be tried for three offences of the same kind if committed within a period of twelve months and the course pursued was plainly illegal and cannot be amended by arranging afterwards what might or might not have been properly submitted to the jury, 23 M. 61 at 96-97. The word "offences" in this section can be held to mean not only the three offences mentioned there but also every act in itself an offence which is so connected with each of these offences as to form part of the same transaction. See 30 M. 328; 13 Cr. L.J. 21=13 Ind. Cas. 213; 4 Bom. L.R. 433; 41 C. 722 at 726; 21 Bom. L.R. 732 but see 33 B. 77 and 14 Bom. L.R. 306; 49 B. 892; which distinguished 33 B. 221. The words "of the same kind" are not limited to offences against the same person. Where an accused was charged under one charge, four counts: (1) house-breaking by night with intent to commit theft in A's house, (2) theft in A's house,

(3) theft in B's house and where he
(4) theft in B's house and where he
at the words "offences of the same
section, but includes a case like the

present where a man has within one year committed two offences of house-breaking, 9 C. 371 dissenting from 4 A. 147, where it was held that a single trial is allowed only where the offences are committed in respect of one and the same person not against different complainants, within a period of one year. See also 19 C.W.N. 537 where it was held that this section is not limited to cases where the offences have been committed against the same person and it applies equally where the complainants are different persons. But Fletcher, J., remarked that the power given by this section is however one that requires to be used with great care and caution when there are different complainants. Two acts of cheating by the same gang though against different individuals can be charged and tried at one trial, 2 Cr. L. Rev. 299 where 7 A. 174 is followed and 4 A. 147 not followed. Two persons cannot jointly be tried for cheating, each having cheated a different person on a different date as the three acts of cheating were wholly distinct as there was no continuity between the three acts each being a completed act in itself, 12 Cr. L.J. 293=10 Ind. Cas. 63, where 33 M. 502 and 33 C. 292 are followed. This section must be read subject to the special provision contained in S. 222 (2), *supra*. Embezzlement of two separate sums on two different occasions in regard to the same individual is one offence and could be included in one charge, 14 C. 123; 29 M. 559; 31 C. 928; 32 C., 1083; 27 A. 69; 33 A. 36, but see 12 Bom. L.R. 226. Offences of criminal breach of trust and falsification of accounts under Ss. 409 and 477A, I.P.C., are not offences of the same kind within the meaning of this section. Where three defalcations are committed on three different occasions, the false entries connected with one defalcation cannot be said to form part of the same transaction with the other defalcations or falsifications connected with them, within the meaning of this section, 49 B. 892; 30 M. 325; 41 C. 722. Waging war being a continuing offence a charge under S. 171, I.P.C., specifying more than three offences committed in the course of the same war and spread over more than one year does not contravene the provisions of this section and is not illegal. The question whether the various incidents formed parts of the same transaction or not must be judged by the facts of each case, 49 M. 74. The making of any number of false statements in the same deposition is one aggregate case of giving false evidence and such charges of false evidence cannot be multiplied according to the number of false statements contained in the deposition and so could not be separately charged under this section, 35 C. 808; 23 Cr. L.J. 373=100 Ind. Cas. 981. Where there are two false statements on different subjects in the same deposition the accused may be tried separately and convicted of the two false statements, 51 B. 310, but once the provisions of this section are contravened the defect cannot be cured by merely striking out the offending charge after the mischief which the Legislature intended to safeguard by enacting the imperative provision, has been done, 29 M. 569; 49 M.L.J. 93; 27 Cr. L.J. 793=93 Ind. Cas. 393. See also 49 C. 555. In 41 C. 66 it was held that when the accused engaged in collecting rent was complained against by three tenants of cheating them, a single charge for all the three offences was framed, that the defect was one of duplicity and not misjoinder and there being no prejudice to the accused the trial was not bad. Where a charge of breach of trust by a clerk under S. 409, I.P.C., consisted of a total amount made up by adding together the several amounts embezzled by the accused at different periods but not realized and misappropriated at different periods, there was no contravention of the provisions of this section, 45 C.L.J. 207=28 Cr. L.J. 469=101 Ind. Cas. 597. Where a person is charged of cheating three separate persons on three different occasions in the same month, it was held there was no misjoinder and the joint trial was justified by this section, 27 Cr. L.J. 909=96 Ind. Cas. 221, but the trial of an accused person on three charges under S. 408 and one under S. 477A, I.P.C., was held to be illegal having regard to the provisions of this and the next section, 41 A. 540 where 32 A. 219 is followed; 30 M. 328; 17 Cr. L.J. 369=33 Ind. Cas. 801; 40 C. 318. See 41 C. 722; 30 A. 351; 43 A. 276 is no longer law. See the amendment in S. 239 (e). Trial of six distinct and separate charges of falsification of six separate and distinct documents, to wit, three pay bills and three cash accounts is not in accordance with law and wholly bad, 43 C.L.J. 1=28 Cr. L.J. 291 (1)=100 Ind. Cas. 371 (1).

The proviso to sub-section (2).—This proviso explains what is meant by "offences of the same kind". The word "section" in sub-section (2) is not invariably to be read in the singular. It is not the intention of this Code, either express or implied, to exclude from the

operation of this section an offence because it is made the subject of more than one charge, 33 B. 77 at 86. The proper procedure in cases where the accused has committed numerous offences of the same kind is to select three typical cases and to confine the prosecution to them, 19 Cr. L.J. 161 and if the accused is acquitted then to proceed with the other charges. It was doubtful whether this section refers to the case of a single accused or to several accused also. In 33 C. 292, it was held that this section does not apply where several persons are jointly accused, S. 19 of the General Clauses Act was held not to apply. But in 25 M.L.T. 379 a different view was taken. See also 33 A. 457; 3 Pat L.J. 124. Now S. 239 (c) lends support to the view expressed in 25 M.L.T. 379; 33 A. 457; and 3 Pat. L.J. 124. See 8 Lah. 230 (P.C.), where it was held that there was no misjoinder when several persons were tried together upon several charges under S. 120B, I.P.C., (criminal conspiracy to murder) and specific instances of murder committed in pursuance of the conspiracy.

235. (1) If, in one series of acts so connected together as to form the same transaction, more offences than one are committed by the same person, he may be charged with and tried at one trial for, every such offence.

Trial for more than one offence.

(2) If the acts alleged constitute an offence falling within two or more separate definitions of any law in force for the time being by which offences are defined or punished, the person accused of them may be charged with, and tried at one trial for, each of such offences.

Offence falling within two definitions.

(3) If several acts, of which one or more than one would by itself or themselves constitute an offence, constitute when combined a different offence, the person accused of them may be charged with, and tried at one trial for, the offence constituted by such acts when combined, and for any offence constituted by any one, or more, of such acts.

Acts constituting one offence, but constituting when combined a different offence.

(4) Nothing contained in this section shall affect the Indian Penal Code, section 71.

Illustrations.

To sub-section (1)—(a) A rescues B, a person in lawful custody, and in so doing causes grievous hurt to C, a constable in whose custody B was. A may be charged with, and convicted of, offences under Ss. 225 and 333 of the Indian Penal Code.

(b) A commits house-breaking by day with intent to commit adultery, and commits, in the house so entered, adultery with B's wife. A may be separately charged with, and convicted of, offences under Ss. 454 and 497 of the Indian Penal Code.

(c) A entices B, the wife of C, away from C, with intent to commit adultery with B, and then commits adultery with her. A may be separately charged with, and convicted of offences under Ss. 498 and 497 of the Indian Penal Code.

(d) A has in his possession several seals, knowing them to be counterfeit and intending to use them for the purpose of committing several forgeries punishable under S. 466 of the Indian Penal Code. A may be separately charged with, and convicted of, the possession of each seal under S. 473 of the Indian Penal Code.

(e) With intent to cause injury to B, A institutes a criminal proceeding against him knowing that there is no just or lawful ground for such proceedings; and also falsely accuses B of having committed an offence, knowing that there is no just, or lawful ground, for such charge. A may be separately charged with, and convicted of, two offences under S. 211 of the Indian Penal Code.

(f) A, with intent to cause injury to B, falsely accuses him of having committed an offence, knowing that there is no just or lawful ground for such charge. On the trial, A gives false evidence against B, intending thereby to cause B to be convicted of a capital offence. A may be separately charged with, and convicted of, offences under Ss. 211 and 191 of the Indian Penal Code.

(g) A, with six others, commits the offences of rioting, grievous hurt and assaulting a public servant endeavouring in the discharge of his duty as such to suppress the riot. A may be separately charged with, and convicted of, offences under Ss. 147, 325 and 152 of the Indian Penal Code.

(h) A threatens B, C and D at the same time with injury to their persons with intent to cause alarm to them. A may be separately charged with, and convicted of, each of the three offences under S. 506 of the Indian Penal Code.

The separate charges referred to in Illustrations (a) to (h) respectively may be tried at the same time.

To sub-section (2)—(i) A wrongfully strikes B with a cane. A may be separately charged with, and convicted of, offences under Ss. 352 and 323 of the Indian Penal Code.

(j) Several stolen sacks of corn are made over to A and B, who know they are stolen property, for the purpose of concealing them. A and B, thereupon voluntarily assist each other to conceal the sacks at the bottom of a grain pit. A and B may be separately charged with, and convicted of, offences under Ss. 411 and 414 of the Indian Penal Code.

(k) A exposes her child with the knowledge that she is thereby likely to cause its death. The child dies in consequence of such exposure. A may be separately charged with, and convicted of, offences under Ss. 317 and 304 of the Indian Penal Code.

(l) A dishonestly uses a forged document as genuine evidence in order to convict B, a public servant, of an offence under S. 167 of the Indian Penal Code. A may be separately charged with, and convicted of offences under Ss. 471 (read with 466) and 196, of the same Code.

To sub-section (3)—A commits robbery on B, and in doing so voluntarily causes hurt to him. A may be separately charged with and convicted of, offences under Ss. 323, 392 and 394 of the Indian Penal Code.

Scope and object of the section—The object of the section is to prevent the accused from being bewildered in his defence by having to meet many disconnected charges. The prospect of a fair trial is likely to be impaired by the production of a mass of evidence directed to many different matters tending to induce an undue suspicion against the accused, 15 B. 491. This ruling enunciates a sound principle of universal application with regard to trials in criminal cases, 29 Cr. L.J. 801 at 802=111 Ind. Cas. 305, see also 16 B. 414. The provisions of this section and S. 239 *infra* are not imperative but merely enabling and if there is risk of embarrassing the defence such joinder of charges should not be resorted to, 52 C. 253 at 265. The language is "*he may be charged with.*" It is not illegal to try an accused person for different offences committed, *vis.*, rioting and causing hurt separately, 8 C. 491. In considering whether this section applies, the Court has to consider carefully whether the series of acts with which the accused is charged are so connected together as to form the same transaction, 11 A.L.J. 188. This section should be read along with S. 35, *supra*, and S. 71, I.P.C. This section is very much akin in phraseology with S. 239, *infra*; S. 239, *infra*, appears to be wider in scope than this section, but the main underlying principle governing these sections seems to be common, 5 Pat. L.J. 11 at 13;

while this section prescribes rules for criminal pleading and procedure to be followed in the trial of offences falling within its purview, S. 35, *supra*, and S. 71, I.P.O., deal with assessment of punishment for those offences. In cases falling under sub-section (1) the punishment is regulated by S. 35 *supra*, and in cases falling under sub-sections (2) and (3) of this section the punishment is regulated by S. 71, I.P.C. This section must be interpreted in a broad and common-sense way and not by a technical dissection of the language employed. There is a clear distinction between the three sub-sections of this section. Reading the whole section with S. 71, I.P.C., we get a *fourfold* result which may be stated thus:—

(1) A repetition in the same transaction of several acts of exactly the same character may constitute one crime, *e.g.*, a number of blows on one person, a number of lies in one continuous deposition, a number of articles stolen at one house-breaking. That is a case governed by S. 71, I.P.C.

(2) A single transaction may give rise to either—

(a) Several offences of different character each complete in itself and distinct from the other, *e.g.*, criminal breach of trust accompanied by falsification of accounts as a preliminary or a sequel to such breach; or,

(b) several offences of the same character affecting different persons, *e.g.*, a single gunshot fired with criminal intent which injures two or more persons

Such cases come within sub-section (1) of this section.

(3) The same series of acts may constitute different offences. All may be charged, but only one offence can be regarded as committed for the purpose of inflicting punishment, *e.g.*, a person who sets fire to a warehouse. Here his act is an offence under S. 435, I.P.C., and also under S. 433, I.P.C., and though he may be charged for both he cannot be punished for more than one of these offences. Here we have a case under sub-section (2) of this section and S. 71, I.P.C.

(4) An act in itself an offence may become either an aggravated form of that offence or a different offence when combined with some other acts, innocent or criminal. Here we have a compound offence which as well as its component minor offence may be charged under sub-section (3) of this section, but again S. 71, I.P.C., controls the punishment.

These provisions of law must not be confused with the provisions of S. 35, *supra*; separate offences which come under S. 71, I.P.C., and may be charged under sub-sections (2) and (3) of this section are not *distinct* offences within the purview of S. 35 *supra*; while sub-section (1) of this section seems to refer to distinct offences which are separately punishable, 14 Cr. L.J. 133=18 Ind. Cas. 837. See also 33 C. 453; 50 C. 94.

One series of acts so connected as to form the same transaction.—The Joint Committee remarked thus: "We think it will be dangerous, if not impossible to attempt any definition of the phrase 'in the course of the same transaction.' An exhaustive definition is not feasible and if the phrase is altered, the Courts will be deprived of the guidance of a long series of rulings and we do not find any pronounced conflict of opinion on the rulings." There is no definition of the expression "*the same transaction*." The meaning to be attached to it must be gathered from the context in which it occurs in various sections and illustrations. According to its etymological and dictionary meaning the word "*transaction*" means "*carrying through*" and suggests not necessarily proximity in time so much as continuity of action and purpose. The same metaphor implied by that word is continued in the illustrations, where the phrase used is "in the course of the same transaction." The Legislature though more than once invited has studiously and wisely refrained from attempting a definition of the phrase 'in the course of the same transaction' Each case must be considered on its merits and therefore, it is peculiarly true that no case can be an authority except upon its own facts, 51 B. 310; 45 C. L.J. 591=28 Cr. L.J. 357=100 Ind. Cas. 965. In this section the phrase is used in a connection which implies that there may be a series of acts; *illus. (f)* to the section indicates that the successive acts may be separated by an

interval of time and that the essential progressive action, all pointing to the same object. In S. 233, *infra*, a series of acts separated by intervals of time are not enclosed provided that those jointly tried have throughout been directed to one and the same object, 30 B. 49 at 54-55; 53 B. 479. Two acts of kidnapping may be tried together under this section but the operation of this and S. 35, *supra*, cannot be combined, as by doing so the rule laid down in S. 213, *supra*, would be frustrated. The main principle is, for every distinct offence there should be a separate trial and the two exceptions are enacted in this and S. 235, *infra*. Permitting a joint trial in respect of two acts of separate and independent transactions in which different offences have been committed would create such an amount of confusion as would in most cases end in a distraction of the minds of the Judges and Jury and the accused persons themselves, 43 A. 236. The real and substantial test for determining whether several offences are connected together so as to form the same transaction depends upon whether they are so related to one another in point of purpose, or as cause and effect or as principal and subsidiary acts as to constitute one continuous action. A mere interval of time between the commission of one offence and another does not by itself necessarily import want of continuity, though the length of the interval may be an important element in determining the question of connection between the two. For instance, proximity of time combined with the use as to intention and similarity of action and result was held to bring several offences as to fraudulent transfers of property within the meaning of the words "*the same transaction*" in this section, 27 B. 135 at 138; 3 Luck. 664. *following* 27 B. 135 and 15 B. 491; 31 Bom L.R. 545. See also 28 Cr. L.J. 357=100 Ind. Cas. 965; 29 Cr. L.J. 801=111 Ind. Cas. 305. The Bombay decisions were *approved* and *followed*, in 42 C. 762; 1 Lah. 562; 21 Cr. L.J. 456=93 Ind. Cas. 248. See also 7 M.L.T. 367; 4 Cr. L. Rev. 434; 28 M.L.J. 397= (1515) M.W.N. 231=17 M.L.T. 242=16 Cr. L.J. 323=28 Ind. Cas. 659; 33 M. 502; 21 Cr. L.J. 297; 42 C. 957; 27 C.W.N. 626; 5 Pat. L.J. 11; 50 C. 100; 13 C.W.N. 1113; 23 A. L.J. 5; 25 Cr. L.J. 533=77 Ind. Cas. 997; 28 Cr. L.J. 357=100 Ind. Cas. 965; 28 Cr. L.J. 347=100 Ind. Cas. 827; 31 C.W.N. 337=45 C.L.J. 591. The idea conveyed by the words "*same transaction*" seems to be obvious enough and it may be doubted whether it can be compendiously expressed in simple and clearer language. And generally speaking there can be very little difficulty in arriving at a proper conclusion in a concrete case. "For instance, in this case, what is said to connect the different acts charged into one transaction is the allegation that these acts were committed by the six persons in pursuance of a systematic scheme for defrauding those members of the public who might subscribe to the Fund. If this contention is sound then if the company was carried for ten or twenty years, and a hundred acts of embezzlement were committed during that period the accused would be liable to be tried at one trial for all these offences. Obviously this cannot be the scope of S. 235. No doubt proximity of time any more than unity of place is neither a necessary nor decisive test of what constitutes "*the same transaction*" though such proximity often furnishes good evidence of connection which unites several acts into one transaction." 33 M. 502. See 26 M. 125, 27 B. 135; 30 B. 49, 16 B. 491; 15 B. 491; 53 B. 479. *Community of purpose* or design and *continuity of action* are essential elements of the connection necessary to link together different acts into one and the same transaction. In such cases the acts alleged to be connected with each other must have been done in pursuance of a particular end in view and as accessory thereto or perhaps as suggested by the circumstances in which the acts in pursuance of the original design were done and in close proximity of time to these acts. For it may happen that an act is done with a particular object in view but the final aim is abandoned for some time and pursued afterwards. . . . As regards community of purpose it would be going too far to lay down that the mere existence of some general purpose or design is sufficient to make all acts done with that object in view, part of the same transaction. If that were so, the result would be startling. . . . the purpose in view must be something particular and definite such as where a man with the object of misappropriating a particular sum of money or of cheating a particular individual of a certain sum falsifies books of account or forges a number of documents, 33 M. 502 at 506-507; 33 C. 453; 19 C.W.N. 672; 16 Cr. L.J. 3=26 Ind. Cas. 307; 1 Lah. 562; 27 C.W.N. 626. Courts have not to concern themselves with the ultimate object of the offender

In determining the nature of the transaction. The object may be to cause injury in some way or other to the complainant but it is the immediate purpose that determines the character of the particular transaction. . . . The criterion is, what was it that the offenders had in view as their immediate object? Mere interval of days will not disturb the oneness of the transaction; nor necessarily the fact that different sets of persons were engaged on different occasions. But if the aim of the accused on different occasions is directed towards effecting different purposes, the transactions are different, 28 M.L.J. 397 at 402=(1915) M.W.N. 241=17 M.L.T. 242=16 Cr. L.J. 323=28 Ind. Cas. 659. In each case it is a question of fact whether the acts are so connected together as to form part of the same transaction and the word "transaction" as is evident from the illustrations to the section should be read in the ordinary sense of a completed act, 7 M.L.T. 367 followed in 28 M.L.J. 397; 15 Cr. L.J. 695=23 Ind. Cas. 143; 4 Cr. L. Rev. 484; 21 A.L.J. 820=25 Cr. L.J. 486=77 Ind. Cas. 818; 19 A.L.J. 392=22 Cr. L.J. 641=63 Ind. Cas. 401=49 M. 74=26 Cr. L.J. 1513=91 Ind. Cas. 297; 49 C. 573; 26 Cr. L.J. 1602=90 Ind. Cas. 706; 30 Cr. L.J. 619=116 Ind. Cas. 369 following 43 C. 573. Where an accused is charged with five murders in one day, three in one village in the forenoon and two in another village in the afternoon, one charge cannot be framed as the murders are not committed in the same transaction and the single charge is against the provisions of this section, 17 A.L.J. 614=20 Cr. L.J. 353=56 Ind. Cas. 833. It is not possible to frame a comprehensive formula of universal application to determine whether two or more acts constitute the same transaction; but circumstances which must bear on the determination of the question in an individual case may be easily indicated; they are—(1) *proximity of time*, (2) *unity or proximity of place* (3) *continuity of action*, and (4) *community of purpose or design* 42 C. 957. at 983 following, 21 C.L.J. 195 and 201; 31 C.W.N. 337=45 C.L.J. 591=28 Cr. L.J. 347=100 Ind. Cas. 827. This appears to be a good working test of what should or should not be regarded as the same transaction, 35 C.L.J. 527 at 529. The expression "same transaction" used in this and S. 239 *infra* has been the subject of discussion in numerous cases. It has been held in some cases that if a series of acts are so connected together by proximity of time, community of criminal intention and continuity of action and purpose, or from the relation of cause and effect, as to constitute, in the opinion of the Court one transaction, then the accused may be charged with and tried at one trial for every offence committed in such series of acts and if more persons than one are accused of different offences in a series of acts so connected, they may be tried together. In other cases it has been held the word "transaction" suggests not necessarily proximity in time so much as continuity of action and purpose *i.e.*, it is not necessary that the act should have been committed all on the same occasion but it is sufficient that though separated by a distinct interval of time they are closely connected by continuity of purpose or progressive action towards a single object. In accordance with the last mentioned view it has been held that, where the accusation against all the accused persons is that they carried out a single scheme by successive acts done at intervals and there was a complete unity of project and the whole series of acts were so linked together by one motive and design as to constitute one transaction within the meaning of S. 239, *infra*, a joint trial is not only legal but is demanded in the interests of public time and convenience. In all these cases, however the foundation for the procedure is the association of two or more persons concerning from start to finish to attain the same end, 80 C. 1004 at 1008-09. Joint trial for offences falling in two distinct transactions is not permitted, 42 A. 12; 21 Bom. L.R. 732; 31 C.W.N. 337=45 C.L.J. 591=28 Cr. L.J. 347=100 Ind. Cas. 827. The mere fact that complaints were made on the same day or that the motive of the commission of the offence was the same on all the four occurrences does not at all go to show that the offences were committed in the course of the same transaction, 18 Cr. L.J. 739=40 Ind. Cas. 739. The question whether certain offences specified in different charges were or were not so connected together that it might fairly be said that they had been committed in the course of the same transaction is substantially one of fact, 26 Cr. L.J. 29=83 Ind. Cas. 509; 31 C.W.N. 337=45 C.L.J. 591=23 Cr. L.J. 347=100 Ind. Cas. 827. The validity of an indictment depends not on the facts as found at the trial but on the circumstances alleged before the trial commences, 55 C. 853; 30 Cr. L.J. 619=116 Ind.

Cas. 369. Where the accused committed theft of sheep and on being remonstrated by the owner, threatened to use force to him, drove him into his house and confined him there till late at night and on the next morning went again to his house and renewed their threat and intimidation, it was held that all the above acts formed part of the same transaction and could be tried together as the purpose of the accused throughout was to demonstrate their power over the complainant to bully and intimidate him, 9 Cr. L.J. 367=1 Ind. Cas. 632.

Instances of clear misjoinder of charges.—(1) act of permitting cattle to trespass, subsequent rioting and rescue, 7 M.L.T. 367=(1910) M.W.N. 541=11 Cr. L.J. 293=6 Ind. Cas. 242; (2) obstructing an Amlin of a Civil Court in executing a decree and subsequent assault on the decree-holder's son, 13 C.W.N. 1113; (3) kidnapping a child, its wrongful confinement, and assault on its mother when she went to get back the child, 28 M. 454; (4) offences under S 302 and S. 201, I.P.C., causing disappearance of evidence of the same, Weir II, 301; 8 A. 252; 22 C. 638. But these rulings are now obsolete owing to the Privy Council decision in 6 Lah. 226 where it was held that a person though not charged under S. 201, I.P.C., can be convicted thereunder in a trial on a charge under S. 302, I.P.C. Therefore there could be no illegality in charging him under both sections in the alternative, 30 C.W. N. 816; (5) misappropriation of the proceeds of a cheque and cheating and thereby inducing delivery of property from a Railway goods shed without payment, 13 C.W.N. 1039=10 Cr. L.J. 476=4 Ind. Cas. 28; (6) theft of crops by A and subsequent rioting and hurt by A's friends in rescuing A from legal custody, 28 Cr. L.J. 357=100 Ind. Cas. 965; 4 Cr. L. Rev. 434=15 Cr. L.J. 695=26 Ind. Cas. 143 following 7 M.L.T. 367=1910 M.W.N. 541=11 Cr. L.J. 293=6 Ind. Cas. 242. See also 29 C. 385; 13 C.W.N. 804; 31 C. 1053.

Sub-section (2) deals with offences falling within two or more separate definitions of any law for the time being by which offences are punished, see S 71 (2) and (3), I.P.C. When the acts alleged against the accused, viz., of making a false report of an alleged offence fall within two definitions of the I.P.C. namely under Ss. 211 and 500, I.P.C., this sub-section applied; the accused could be charged with both the offences and tried at one trial for each of such offences but if he is convicted of one of such offences he cannot legally be tried over again for an offence under the other section, 27 A.L.J. 1056 at 1058 following 10 C.W.N. 518.

Sub-section (3)—This sub-section deals with acts constituting one offence but constituting when combined a different offence, see S. 71 (3), I.P.C., 19 C. 105; 12 C. 495; 16 C. 442; 7 A. 414 and 29; 9 A. 645; 17 B. 280.

Sub-section (4).—As a matter of adjective law this section confines itself to the question of trial till the stage of conviction while S. 71, I.P.C., as a matter of substantive law deals with the question of punishment, the necessary result of a conviction. A person tried and convicted of several offences under this section is liable to be punished for each of such offences unless the case falls within the provisions of S. 71, I.P.C.

Illustrations.—The illustration to the various sub sections makes the meaning of the sub-sections quite clear. Illustrations (a) to (h) deal with cases of various acts committed in the course of one transaction where though the ultimate object is one, different acts are committed in the course of attaining it, and those acts form by themselves, or when combined with other different offences, causing grievous hurt for extorting information and making false entries to attribute another cause for the death of the injured person, for offences under Ss. 193, 218, 330 and 331, I.P.C., can be tried together and such a joinder of charges comes within illustration (f) to this section, 14 Bom. L.R. 41=13 Cr. L.J. 137=13 Ind. Cas. 825. Illustration (e). The heading shows that this is an illustration to sub-section (1) and it does not state whether the institution of criminal proceedings and the false accusation were on the same day or on different dates. But in either case distinct offences have been committed, 30 Bom. L.R. 342=29 Cr. L.J. 522=109 Ind. Cas. 346. Illustrations (i) to (l) deal with cases where though the act is one yet when viewed from different aspects it constitutes more offences than one. Illustration (j) to this section supplies a conclusive answer to the contention that a person who has dishonestly received stolen property cannot possibly be charged and convicted of voluntarily concealing or disposing of the

property. The illustration says as plainly as possible that both of them may be separately charged with, and convicted of offences under Ss. 411 and 414, I.P.O. This is an illustration to the general principle embodied in sub-section (2) of this section, that if the acts alleged, constitute an offence falling within two or more separate definitions of any law in force by which offences are defined or punished the person accused of them may be charged and tried at one trial for each of such offences 49 B. 878 at 887-88. Illustration (m) deals with a case where though the elements constituting the two offences are the same to some extent the result of their combination materially differs from its component parts.

236. If a single act or series of acts is of such a nature that it is doubtful which of several offences the facts which can be proved will constitute, the accused may be charged with having committed all or any of such offences, and any number of such charges may be tried at once; or he may be charged in the alternative with having committed some one of the said offences.

Where it is doubtful what offence has been committed.

Illustrations.

(a) A is accused of an act which may amount to theft, or receiving stolen property, or criminal breach of trust or cheating. He may be charged with theft, receiving stolen property, criminal breach of trust and cheating, or he may be charged with having committed theft, or receiving stolen property, or criminal breach of trust or cheating.

(b) A states on oath before the Magistrate that he saw B hit C with a club. Before the Sessions Court A states on oath that B never hit C. A may be charged in the alternative and convicted of intentionally giving false evidence, although it cannot be proved which of these contradictory statements was false.

Scope of the section.—This section refers to a series of acts which are of such a nature that it is doubtful which of the several offences the facts constitute, 40 C. 168. The essential difference between cumulative charges, alternative charges and charges in the alternative is, that under the first the Court is asked to convict of two or more offences, under the second of any one specified offence, under the third of one or other of two offences without specifying which. There is no limit whatever expressly imposed by the section in its application except that the doubt which arises must have a special origin. In practice, however, the use of a charge in the alternative is restricted to narrow limits, 12 Cr. L.J. 224 at 229 = 10 Ind. Cas. 168. This section is intended to apply to cases where there is no doubt that the accused person must have committed one of two or more offences punishable under either the same or different sections, but in which *without proof of further facts* it is not possible to say which offence has been committed. When on the prosecution evidence no doubt arises as to which of several offences the accused has committed, but it is only doubtful what part, if any, the accused has taken in the occurrence, this section can have no possible application, 18 C.L.J. 574 at 577 = 15 Cr. L.J. 41 = 22 Ind. Cas. 185; 40 B. 97; 21 C. 955. This section does not apply where there is any doubt as to the facts but applies only where there is a doubt as to the law applicable to a certain set of facts which have been proved. The Magistrate is not entitled to compromise his doubt as to the true facts of the case by convicting in the alternative. He is bound to come to a distinct finding as to the facts, 28 Cr. L.J. 759 = 103 Ind. Cas. 839. This section contemplates a state of facts constituting a single offence but it is doubtful whether the act or acts involved may amount to one or other of several cognate offences, 23 C. 174; 18 C.L.J. 574 = 15 Cr. L.J. 41 = 22 Ind. Cas. 185; 36 M. 308. This section only permits a charge in the alternative when it is doubtful which of several offences the facts which can be proved will constitute and not when there may be a doubt as to the facts which constitute one of the elements of the offence, 21 C. 955. But it is unsatisfactory to have an alternative indictment one Court charging the accused as principal and, the other as accessory after the fact, 20 C.W.N. 169 at 168; see 50 C. 564; 22 C.W.N. 199.

An accused may be charged in this alternative under this section with offences under S. 330, I.P.C., and S. 54A of the *Calcutta Police Act* (possession of or offering for sale or pawn, property believed to be stolen), and convicted under S. 237, *infra*, of the latter offence though not separately charged therewith, 53 C. 564 where 22 C.W.N. 199 is followed. So also an accused may be charged in the alternative with mischief and rioting and when not so charged an acquittal for one of the offences is a bar to the trial of the other offence by virtue of S. 403 (1), *infra*, 19 L.W. 31. A joinder of charges under S. 411 and S. 414, I.P.C., is bad unless the charges are framed in the alternative under this section. But when no such alternative charge is framed, a Magistrate cannot remedy the error at the conclusion of the trial by stating in his judgment that he would proceed only on the charges legally joined. If any charge is to be struck out, it should be done before concluding the trial thus giving the accused an opportunity to defend himself on the amended charge, 49 C. 555. A joint trial for offences under Ss. 330 and 414 I.P.C. is valid even though the charges are framed cumulatively and not in the alternative, 8 Pat. 731. A conviction in the alternative under s. 457 or 215, I.P.C., is bad in law.

Series of Acts.—These words imply two or more acts connected by some more intimate relation than that of consecutiveness in time. Two acts of swearing to certain facts before the Committing Magistrate and the Sessions Court occur in the preliminary and final stages of the same trial and therefore there is a clear connection between them other than mere temporal, and therefore two series acts of swearing would form a series, 23 Cr. L.J. 1195= 82 Ind. Cas. 59.

Which of several offences.—The expression "*several offences*" applies not only to two or more offences punishable under different sections of any law but also applies to two or more offences punishable under different parts of the same section. The offences mentioned in this section are not in fact offences of the same kind but offences of different kinds arising out of a single act or series of acts and combined at one and the same time, 9 C. 371. This section contemplates a state of facts constituting a single offence, but where it is doubtful whether the act or acts involved may amount to one or other of several offences the accused may be simultaneously charged with and tried for the commission of all or any of the charges and after an acquittal or conviction cannot be again tried on the same facts, either for the specific offence or offences for which he has already been tried or for any other offence for which he might have been tried under the provisions of this section, 23 C. 173 at 178, but if on a reversal of the conviction on one of two alternative charges, a retrial is ordered, then the retrial must be taken to be on all the charges originally framed and the acquittal by the Jury at the previous trial on some of the charges is no bar to the retrial on all the charges, 23 C. 377; 23 C. 975.

May be charged with all or any of such offences.—This section applies only to cases in which the prosecution is not in a position to establish conclusively any one offence but is able on the facts proved to exclude the innocence of the accused and to show that he must have committed one of two or more offences.

May be charged in the alternative, etc.—In the first place, this section is nothing more than a permissive rule of procedure. Whether it is expedient to frame a charge in the alternative or whether it will unfairly embarrass the accused in the conduct of his defence are two of the most important questions which should be answered satisfactorily before the procedure is followed. Secondly the cases in which a charge in the alternative can effectively be used must necessarily be rare. The prosecution is never relieved of its burden of proving the guilt of the accused and the prosecution case must be such that it is a fair inference from the facts of which direct evidence is offered that the accused committed one of two offences, otherwise the trial on a charge in the alternative must inevitably prove futile, 12 Cr. L. J. 223 at 230=10 Ind. Cas. 168. The word "*alternative*" means a choice between two things so that if one is taken out the other must remain. An accused cannot be charged alternatively in respect of distinct offences or even in respect of cognate offences when the difference is only one of degree, *i.e.*, as to the intention imputed to the

accused, or as to some circumstance of aggravation. An alternative charge is justified only when it is difficult to establish the falsity of one of the two statements and not otherwise, 28 Cr. L. J. 645=103 Ind. Cas. 101. An alternative charge cannot be framed in respect of an offence under the Indian Penal Code and one under a Special law, nor can a Court inflict a sentence on a person found guilty in the alternative of an offence under the Indian Penal Code and another under a Special Act, 12 Cr. L. J. 224 at 230=10 Ind. Cas. 168. Alternative charges under two sections cannot be combined together into one head of charge. If a Magistrate desires to charge the accused in the alternative he must frame two separate alternative charges. This section does not apply where there is any doubt as to the facts but applies only where there is a doubt as to the law applicable to a certain set of facts which have been proved, while the facts are in doubt there is no objection to the Magistrate framing alternative charges but at the conclusion of the case he is not entitled to compromise his doubts as to the true facts of the case by convicting in the alternative. He is therefore bound to come to a distinct finding as to the facts and then only if the law applicable to prove facts is doubtful he may convict in the alternative, 7 Ran. 96. Alternative charges may properly be framed against an accused person on the same set of facts but alternative charges which include offences which do not arise out of the same set of facts as those with which they are united even though tried in the same proceedings ought to be made clear to the accused before trial, and dealt with by the Court in its final decision, 25 Cr. L. J. 592=81 Ind. Cas. 80. When no such alternative charge is framed a Magistrate cannot remedy the error at the conclusion of the trial by stating in his judgment that he would proceed only on charges legally joined. If any charge is to be struck out it should be done before conclusion of trial thus affording the accused person an opportunity to defend himself on the amended charge, 49 C. 535. An accused person may be charged in the alternative of mischief and rioting; when not so charged an acquittal of one of the offences is a bar to the trial of the other offence by virtue of S. 403 (1), *infra*, 19 L.W. 31; see also, 50 C. 564. If two contradictory statements recorded in two utterly unconnected cases one, a deposition as an approver in a Sessions case and the second as a defendant in a civil suit, they cannot form the basis of an alternative charge for perjury, 25 Cr. L. J. 1195=82 Ind. Cas. 59. Where a person makes contradictory statements at the police investigation under S 164, *supra* and subsequently at the inquiry before a competent Magistrate, the two statements constitute a series of acts within the section on which an alternative charge for perjury can be framed, 26 Cr. L. 1437=89 Ind. Cas. 1025 where 45 B. 834 (F.B.) is followed. If a witness makes a statement and later in the course of the same deposition contradicts it and says it was untrue, the whole deposition amounts to no more than the second statement. He cannot be convicted of perjury in the alternative, in one or the other of the two statements and if the first can be proved to be false he cannot be convicted of more than an attempt to commit perjury, 28 Cr. L. J. 645=103 Ind. Cas. 101. When a conviction is in the alternative only, the sentence to be passed cannot be heavier than what is suitable for the less serious offence, 1903 P.R. (Cr. J.) 60 at p. 247. When no alternative charge had been framed against an accused in the trial Court, the appellate Court in hearing an appeal from the conviction ought not to order a re-trial or an alternative charge, 8 Lah. 496.

There is no limit whatever expressly imposed by the section in its application except that the doubt which arises must have a special origin. In practice, however, the use of a charge in the alternative is restricted to narrow limits, 12 Cr. L. J. 224 at 229=10 Ind. Cas. 168. Alternative charges are not only permissible but also legal, 30 C.W.N. 816 following 6 Lah. 226 (P.C.) Alternative charges under this section cannot be framed in respect of distinct offences, not even in respect of cognate offences when the difference is one of degree, *i.e.*, as to the intention imputed to the accused or as to some circumstance of aggravation. An alternative charge cannot be framed in respect of an offence under the Indian Penal Code and an offence under a Special law, nor can a Court inflict a sentence on a person found guilty in the alternative of an offence under the I.P.C. and another under a Special Act, 12 Cr. L. J. 224=10 Ind. Cas. 168. A joinder of charges of murder and causing disappearance of evidence of murder in the alternative is legal, 11 Cr. L. J. 731=8 Ind. Cas. 936; 30 C.W.N. 816. An alternative conviction is permissible only if on the facts found

the law is doubtful, 14 Cr. L.J. 664=21 Ind. Cas. 904; 7 Ran. 98. A person cannot be convicted in the alternative with having committed an offence under S. 182, I.P.C., and another under S. 211, I.P.C., 11 Cr. L.J. 420=6 Ind. Cas. 144 where 32 C. 130 and 31 B. 204 are followed. For form of charge in the alternative under S. 193, I.P.C., see Sch. V, Form No. XXVIII (1) (4), *infra*. A joint trial for offences under Ss. 390 and 414, I.P.C., is valid even though the charges are framed cumulatively and not in the alternative, 8 Pat. 731.

Illustrations (a) and (b) make the meaning of the section clear. Illustration (b) was added in the Code of 1893 to settle the law that contradictory statements by a witness which are irreconcilable constitute the offence of intentionally giving false evidence, though it can not be proved which of the two statements is false. The illustration adopts the view in 13 B.L.R. 324=21 W.R. (Cr) 72 (F.B.); see also 7 A. 44; Weir II, 300. Omission to frame an alternative charge comes within the expression "error or irregularity in any inquiry or other proceedings" in S. 537 *infra*, [1916] 2 M.W.N. 267; 26 B. 533.

237. (1) If, in the case mentioned in section 236, the accused is charged with one offence, and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of that section, he may be convicted of the offence which he is shown to have committed, although he was not charged with it.

When a person is charged with one offence, he can be convicted of another

(2) Omitted by Act XVIII of 1923, section 63.

Illustration.

A is charged with theft. It appears that he committed the offence of criminal breach of trust, or that of receiving stolen goods. He may be convicted of criminal breach of trust, or of receiving stolen goods as the case may be, though he was not charged with such offence.

Scope of the section.—This section and S. 227, *supra*, necessarily go together and it is not the intention of the Legislature to convict an accused person of an offence of which he has not been told anything, 26 Cr. L.J. 1057=88 Ind. Cas. 1; 24 A.L.J. 168=27 Cr. L.J. 152=91 Ind. Cas. 838. The application of this section is by its express terms restricted to the case mentioned in S. 236, *supra*, 18 C.L.J. 574 at 577=15 Cr. L.J. 41=22 Ind. Cas. 185. Where on the evidence there is no doubt as to the facts, although it may be doubtful what precise offence the accused has committed on the facts alleged, it was held to such a case the provisions of this section are applicable and the accused may therefore be convicted of the offence which he is shown to have committed although he is not charged with it, 41 C. 537 at 544. This section is to be read with S. 236, *supra*. If the facts of the case do not fall under that section, this section has got no application. It is open to a Magistrate to convict an accused for a lesser offence than that with which the accused was charged, *e.g.*, to convict the accused under S. 290, I.P.C., when charged under S. 278, I.P.C., 3 Luck. 680, but when a trial was begun as a warrant case the Court is not entitled to alter the charge into one triable as a summons case in the middle of the trial holding the evidence made out only an offence triable as a summons case and convict the accused of such an offence without a formal charge, 23 Cr. L.J. 227 (2)=93 Ind. Cas. 1027 (2). Where therefore the petitioners were convicted for rioting under S. 147, I.P.C., but in appeal the Judge while setting aside the conviction convicted them for causing hurt under S. 323, I.P.C., an offence for which they were not charged, it was held that the accused had no opportunity to defend themselves on the charge of hurt and the conviction was bad in law, 18 C.W.N. 1276, but a person charged constructively under S. 149, I.P.C., cannot be convicted of the substantive offence, 21 Cr. L.J. 439=56 Ind. Cas. 231; 34 C. 698; 6 C.W.N. 98; 50 C. 94. A person charged

accused, or as to some circumstance of aggravation. An alternative charge is justified only when it is difficult to establish the falsity of one of the two statements and not otherwise, 28 Cr. L.J. 645=103 Ind. Cas. 101. An alternative charge cannot be framed in respect of an offence under the Indian Penal Code and one under a Special law, nor can a Court inflict a sentence on a person found guilty in the alternative of an offence under the Indian Penal Code and another under a Special Act, 12 Cr. L.J. 224 at 230=10 Ind. Cas. 168. Alternative charges under two sections cannot be combined together into one head of charge. If a Magistrate desires to charge the accused in the alternative he must frame two separate alternative charges. This section does not apply where there is any doubt as to the facts but applies only where there is a doubt as to the law applicable to a certain set of facts which have been proved, while the facts are in doubt there is no objection to the Magistrate framing alternative charges but at the conclusion of the case he is not entitled to compromise his doubts as to the true facts of the case by convicting in the alternative. He is therefore bound to come to a distinct finding as to the facts and then only if the law applicable to prove facts is doubtful he may convict in the alternative, 7 Ran. 96. Alternative charges may properly be framed against an accused person on the same set of facts but alternative charges which include offences which do not arise out of the same set of facts as those with which they are united even though tried in the same proceedings ought to be made clear to the accused before trial, and dealt with by the Court in its final decision, 25 Cr. L.J. 592=81 Ind. Cas. 80. When no such alternative charge is framed a Magistrate cannot remedy the error at the conclusion of the trial by stating in his judgment that he would proceed only on charges equally joined. If any charge is to be struck out it should be done before conclusion of trial thus affording the accused person an opportunity to defend himself on the amended charge, 49 C. 555. An accused person may be charged in the alternative of mischief and rioting; when not so charged an acquittal of one of the offences is a bar to the trial of the other offence by virtue of S. 403 (1), *infra*, 19 L.W. 31; see also, 50 C. 564. Two contradictory statements recorded in two utterly unconnected cases one, a deposition as an approver in a Sessions case and the second as a defendant in a civil suit, they cannot form the basis of an alternative charge for perjury, 25 Cr. L.J. 1195=82 Ind. Cas. 59. Where a person makes contradictory statements at the police investigation under S. 164, *supra* and subsequently at the inquiry before a competent Magistrate, the two statements constitute a series of acts within the section on which an alternative charge for perjury can be framed, 26 Cr. L. 1457=89 Ind. Cas. 1025 where 45 B. 834 (F.B.) is followed. If a witness makes a statement and later in the course of the same deposition contradicts it and says it was untrue, the whole deposition amounts to no more than the second statement. He cannot be convicted of perjury in the alternative, in one or the other of the two statements and if the first can be proved to be false he cannot be convicted of more than an attempt to commit perjury, 28 Cr. L.J. 645=103 Ind. Cas. 101. When a conviction is in the alternative only, the sentence to be passed cannot be heavier than what is suitable for the less serious offence, 1903 P.R. (Cr. J.) 60 at p. 247. When no alternative charge had been framed against an accused in the trial Court, the appellate Court in hearing an appeal from the conviction ought not to order a re-trial or an alternative charge, 8 Lah. 496.

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the law is doubtful, 14 Cr. L.J. 664=21 Ind. Cas. 904; 7 Ran. 58. A person cannot be convicted in the alternative with having committed an offence under S. 187, I.P.C., and another under S. 211, I.P.C., 11 Cr. L.J. 420=8 Ind. Cas. 448 where 32 C. 130 and 31 B. 204 are followed. For form of charge in the alternative under S. 193, I.P.C., see Sch. V, Form No. XXVIII (1) (d), *infra*. A joint trial for offences under Ss. 330 and 414, I.P.C., is valid even though the charges are framed cumulatively and not in the alternative, 8 Pat. 731.

Illustrations (a) and (b) make the meaning of the section clear. Illustration (b) was added in the Code of 1893 to settle the law that contradictory statements by a witness which are irreconcilable constitute the offence of intentionally giving false evidence, though it can't not be proved which of the two statements is false. The illustration adopts the view in 13 B.L.R. 324=21 W.R. (Cr.) 72 (F.B.); see also 7 A. 44; Weir II, 300. Omission to frame an alternative charge comes within the expression "error or irregularity in any inquiry or other proceedings" in S. 537 *infra*, [1916] 2 M.W.N. 267; 26 B. 533.

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Illustration.

A is charged with theft. It appears that he committed the offence of criminal breach of trust, or that of receiving stolen goods. He may be convicted of criminal breach of trust or of receiving stolen goods as the case may be, though he was not charged with such offence.

Scope of the section.—This section and S. 227, *supra*, necessarily go together and it is not the intention of the Legislature to convict an accused person of an offence of which he has not been told anything, 26 Cr. L.J. 1057=88 Ind. Cas. 1; 24 A.L.J. 168=27 Cr. L.J. 152=91 Ind. Cas. 838. The application of this section is by its express terms restricted to the case mentioned in S. 236, *supra*, 18 C.L.J. 574 at 577=15 Cr. L.J. 41=22 Ind. Cas. 185. Where on the evidence there is no doubt as to the facts, although it may be doubtful what precise offence the accused has committed on the facts alleged, it was held to such a case the provisions of this section are applicable and the accused may therefore be convicted of the offence which he is shown to have committed although he is not charged with it, 41 C. 537 at 544. This section is to be read with S. 236, *supra*. If the facts of the case do not fall under that section, this section has got no application. It is open to a Magistrate to convict an accused for a lesser offence than that with which the accused was charged, *e.g.*, to convict the accused under S. 290, I.P.C., when charged under S. 278, I.P.C., 3 Luck. 680, but when a trial was begun as a warrant case the Court is not entitled to alter the charge into one triable as a summons case in the middle of the trial holding the evidence made out only an offence triable as a summons case and convict the accused of such an offence without a formal charge, 23 Cr. L.J. 227 (2)=93 Ind. Cas. 1027 (2). Where therefore the petitioners were convicted for rioting under S. 147, I.P.C., but in appeal the Judge while setting aside the conviction convicted them for causing hurt under S. 323, I.P.C., an offence for which they were not charged, it was held that the accused had no opportunity to defend themselves on the charge of hurt and the conviction was bad in law, 18 C.W.N. 1276, but a person charged constructively under S. 149, I.P.C., cannot be convicted of the substantive offence, 21 Cr. L.J. 439=58 Ind. Cas. 231; 34 C. 698; 6 C.W.N. 98; 50 C. 84. A person

under Ss. 147 and 323, I.P.C. cannot be convicted under S. 160, I.P.C. unless proper charge is framed and the accused tried on the latter charge, 47 M. 61. This section deals with a case where in the case mentioned in S. 236, *supra*, the accused is charged with one offence and it appears in evidence that he committed a different offence for which he might have been charged under the provisions of S. 236; but this does not apply, because S. 236 only refers to a series of acts which are of such a nature that it is doubtful which of the several offences the facts constitute. Where there was no doubt whatever about what was charged or on the evidence about hurt being caused to one person, the conviction for rioting and causing hurt to another person are questions totally different and independent and the trial should have been on a distinct and separate charge, 40 C. 183 at 172. Where a Court finds it necessary to make use of this section in order to convict an accused of an offence with which he has not been charged, the Court should be particularly careful to formulate to its own mind the charge it had duly framed, and on which it proposed to convict, 17 Cr. L.J. 4=32 Ind. Cas. 656. The operation of this section is limited to cognate offences but does not relate to offences of so distinct a character as murder and theft, 1883 A.W.N. 95. This section must necessarily be limited in its operation to cognate offences, offences under Ss. 376 and 366, I.P.C., involved different elements and different questions of fact but offences under Ss. 160 and 147 I.P.C. were obviously *ejusdem generis* and it is not illegal in convicting under S. 160 I.P.C. when charged with an offence under S. 147 I.P.C., 23 Cr. L.J. 189=99 Ind. Cas. 61 *distinguishing* 8 Bom. L.R. 120=5 Cr. L.J. 240. Persons tried for theft can be convicted as receivers if the acts proved lead to the inference that receipt rather than theft has been committed, 17 M.L.J. 219. So also a person charged with forgery may be convicted of user even though not charged, 21 Cr. L.J. 410=56 Ind. Cas. 581; see 33 M. 254; 11 B.H.C.R. 210; 15 L.W. 83=(1922) M.W.N. 182. If the prosecution establishes certain acts constituting an offence and the Court misapplies the law by charging and convicting the accused for an offence other than for which he should have been properly charged and if notwithstanding such error the accused by his defence endeavoured to meet the accusation of the commission of those acts, then an appellate Court may alter the charge or finding and convict him for an offence which those acts properly constitute provided the accused is not prejudiced by such alteration of charge or finding. Such an error is one of form rather than of substance. Thus when the conviction for theft was altered into one under S. 143, I.P.C., and the sentence maintained by the appellate Court, it was held that the accused were prejudiced and therefore the conviction bad because the defence in the two cases must be distinct. But having regard to the ruling of the Privy Council in 6 Lah. 226 (P.C.) such alteration may only be an irregularity cured under S. 537 *infra*, and a conviction even without a charge may be held good, 54 C. 476. An appellate Court can alter a conviction under S. 353 I.P.C. into one under S. 189, I.P.C. when the actual assault is found against, 2 Luck. 503 but the appellate Court is not empowered in setting aside a conviction under S. 453 I.P.C. to alter it into one under S. 19 (c) of the Arms Act as the accused person was not charged with that offence and had no opportunity of meeting it, 4 Ran. 355. Similarly when there was no alternative charge in the trial Court that it was open to the prosecution to do so, on a conviction for dacoity, it was not open to the appellate Court to find the accused guilty under S. 457 I.P.C. without a specific charge for that offence, 2 Luck. 444. A person may be convicted of an offence, although there has been no charge in respect of it, if the evidence is such as to establish a charge that might have been made. Three men were convicted of making away with the evidence of the crime of murder by assisting in taking away the body. They were not charged with that formally, but they were tried on evidence which brings the case under this section. Their Lordships of the Privy Council held that they entertained no doubt that the procedure was a proper procedure and one warranted by the Code of Criminal Procedure, 6 Lah. 226 (P.C.) *followed* in 30 Bom. L.R. 330 and 29 Cr. L.J. 459=103 Ind. Cas. 507 but in 29 Cr. L.J. 763=110 Ind. Cas. 795 it was held *distinguishing* 6 Lah. 226 (P.C.) that where a person is charged under S. 392 and 397 I.P.C. he cannot be convicted under S. 325 I.P.C. as dacoity is an offence against property, whereas causing hurt is an offence against person and it was therefore not open to the Court to convict under S. 325 I.P.C., when charged with S. 392 and 397, I.P.C.. It is now settled law that a person may be convicted under Ss. 201, I.P.C., even though he is charged only under S. 302, I.P.C. But an accused charged

under S. 302, I.P.O. cannot be convicted of an offence punishable under S. 191, I.P.O. (fabricating evidence of injury on the dead body after death), 27 Cr. L.J. 1351=98 Ind. Cas. 471. There cannot be an illegality in charging the accused under both Ss. 302 and 201 I.P.O., alternatively, 27 Cr. L.J. 1011=68 Ind. Cas. 887 where 6 Lah. 226 is followed. See 30 C.W.N. 816. When a person is charged with murder and convicted of that offence it is not open to the appellate Court to alter the conviction under S. 302, I.P.O., to one under one of the sections dealing with offences against property, 4 Lah. 373. See also 7 Lah. 261 where 4 Lah. 373 is followed and 6 Lah. 226 was distinguished on the ground that the observations of their Lordships of the Privy Council in the latter case must be read with the facts of that particular case and not to be taken as laying down any rule of general application. On a charge of abetment of forgery, the accused cannot be convicted of an offence of using as genuine a forged document. The offence of abetment of forgery is complete when the document is written and signed but the user is a distinct and different offence for which the accused is entitled to be charged separately, 53 C. 466. But it has been held in 29 Cr. L.J. 1093=112 Ind. Cas. 677, that no such universal rule can be laid down applicable to every case but the true rule seems to be whether in each particular case prejudice has been caused to the accused by reason of the conviction for abetment of the offence in the absence of charge for abetment. See also 30 Cr. L.J. 224=113 Ind. Cas. 891 following 41 C.L.J. 216=28 Cr. L.J. 2=99 Ind. Cas. 34 and 23 M.L.J. 722. -

Sub-section (2) which existed previously has been omitted here but is added to S. 238, where it is more appropriate. It was held in a number of decisions that when a person is charged with the principal offence the Court cannot convict him of abetment, as provision is made in sub-section (2A) of S. 238, *infra*, to attempts and not to abetments of offences, the only inference that abetment should be specifically charged and without which a conviction is illegal, 33 M. 264; 15 L.W. 583=(1922) M.W.N. 182; 13 Cr. L.J. 203=14 Ind. Cas. 203 13 Cr. L.J. 223; 1921 Pat 96; 26 Bom. L.R. 715=23 Cr. L.J. 1292=82 Ind. Cas. 362; 26 Bom. L.R. 323=25 Cr. L.J. 1135=81 Ind. Cas. 959; 44 C.L.J. 414; 49 A. 120, 28 Cr. L.J. 2=99 Ind. Cas. 34; 3 Ran. 11 at 27-28, takes a different view and holds that the conviction is not bad.

238. (1) When a person is charged with an offence consisting of several particulars, a combination of some only of which constitutes a complete minor offence, and such combination is proved, but the remaining particulars are not proved, he may be convicted of the minor offence, though he was not charged with it.

When offence proved included in offence charged.

(2) When a person is charged with an offence and facts are proved which reduce it to a minor offence, he may be convicted of the minor offence, although he is not charged with it.

(2A) When a person is charged with an offence, he may be convicted of an attempt to commit such offence although the attempt is not separately charged.

(3) Nothing in this section shall be deemed to authorize a conviction of any offence referred to in section 198 or section 199 when no complaint has been made as required by that section.

Illustrations.

(a) A is charged, under S. 407 of the Indian Penal Code, with Criminal breach of trust in respect of property entrusted to him as a carrier. It appears that he did commit criminal breach of trust under S. 406 in respect of the property, but that it was not entrusted to him as a carrier. He may be convicted of criminal breach of trust under S. 406.

(b) A is charged, under S. 325 of the Indian Penal Code, with causing grievous hurt. He proves that he acted on grave and sudden provocation. He may be convicted under S. 335 of the Code.

Amendment.—Sub-section (2A) is newly added: it was previously sub-section (2) to S. 237, *supra*.

Scope of the section—The principle, the greater includes the less and when more is done than ought to be done, the act is valid, for the part that ought to be done and is void as to the excess, is recognized by the Code as under this section a charge of a major offence will in some cases operate as a charge for a minor offence, 15 Cr. L.J. 804 at 805=21 Ind. Cas. 478. This section is an enabling provision and not an imperative one. So when an accused was charged and convicted under S. 454, I.P.C., the conviction was held good although the facts proved amounted to an offence under S. 380, I.P.C., and the accused could have been tried for both the charges, Ratanlal 307, 26 Bom. L.R. 323=25 Cr. L.J. 1135=81 Ind. Cas. 959. The powers given by this section to convict for a minor offence are not controlled by those sections which prescribe the procedure to be followed in trying the offence charged, 44 C.L.J. 239. So on the trial of an accused by a Sessions Judge for an offence so triable it is competent to the Judge to convict the accused of a minor offence though the minor offence is triable only by a jury, 22 Bom. L.R. 1241. This section applies to cases in which a charge is for an offence which consists of several particulars a combination of some only of which constitutes a complete minor offence. Though the Magistrate has power under this section to convict the accused of a different charge from what was originally formulated, this must be done only in cases where the accused is not prejudiced by a conviction on the new charge. The accused is entitled to know with certainty and accuracy the exact nature of the charge brought against him, and unless he knows this he must be seriously prejudiced, 23 Cr. L.J. 114=65 Ind. Cas. 346; 44 C. 358; 11 C. 106. Though an accused person may be charged in the alternative with either of two offences under S. 236, *supra*, and may be convicted under S. 237, *supra*, with the offence which is proved though not specially charged, these two sections must be read together, 13 Cr. L.J. 429=14 Ind. Cas. 973. The grave charge gives to the accused notice of all the circumstances going to constitute the minor one of which he may be convicted. The latter is arrived at by mere subtraction from the former, 11 B.H.C.R. 240 at 241. In such cases the only consideration is whether the accused has been prejudiced by being convicted for a minor offence. In determining this question, the nature of the case made at the trial against the accused, the evidence that was given and the line of defence set up are all matters to be considered, 20 C.W.N. 1075. An accused cannot be convicted of abetment when charged only with the substantive offence, 28 Cr. L.J. 2=99 Ind. Cas. 34 but see 3 Ran. 11. Sub section (2A) newly added expressly mentions an attempt to commit an offence and the inference is in the case of abetment, a charge should be framed and without which a conviction of abetment cannot stand, 44 C.L.J. 214; 33 M. 261; 1921 Pat. 96. See the decisions collected at pp. 447 and 450.

Constitute a complete minor offence.—What is regarded as a minor offence when compared with another has not been defined by law and the words "minor offence" may be taken in their ordinary sense, e.g., an offence under S. 365 would be a minor offence as compared with that punishable under S. 360, I.P.C. The words "minor offence" are to be taken not in any technical sense but in their ordinary sense, 22 C. 1006 at 1010. Conviction for minor offences though not expressly charged is allowed by this section, 44 C.L.J. 239. Where an accused person is charged with an offence under S. 412, I.P.C., an offence triable by a jury, the jury is entitled to return a verdict of guilty on the minor offence under S. 411, I.P.C., although such minor offence is triable with the aid of assessors, and under this section a conviction under S. 411, I.P.C., is legal and the accused cannot complain of the verdict being given by the jury for an offence triable with the aid of assessors when such a verdict is accepted by the Judge, 27 Bom. L.R. 1416=27 Cr. L.J. 650=94 Ind. Cas. 602 where 33 B. 423; 49 B. 619; 25 B. 680 and 26 M. 243 are referred to. The following are held to be minor offences.—(1) Offence under S. 304 when charged with an offence under S. 302, I.P.C., 20 B. 215;

(2) offence under S. 335 when charged with S. 305, 23 W.R. (Cr.) 61; (3) offence under S. 412 when charged with offence under S. 305, 1 B. 50.; and the following were held not minor offences—(1) Offence under S. 306 is not minor to an offence under S. 376, 1 P.C., 8 Bom. L.R. 120-3 Cr. L.J. 242. (2) offence of kidnapping from lawful guardianship, S. 363 is not minor to the offence of murder, S. 302, 1 P.C., Weir II, 302; (3) offence under S. 493 is not minor to the offences under Ss. 363 and 366, I.P.C., 31 B. 218, see also 20 A. 166 when a person is charged with robbery he cannot be convicted without the charge being altered, of an offence of house-breaking by night, as robbery cannot include the latter offence, but house breaking by night is a graver offence than one of robbery, 13 Cr. L.J. 429-14 Ind. Cas. 973. It has been held in 1 Bom. L.R. 513 that a conviction for a major offence is not necessarily bad when charged only with a minor offence.

Sub-section (2).—This sub-section invests the Court trying the offence (however constituted) with authority to find as an incident to such trial that certain facts only are proved in the trial, which facts constitute a minor offence though such minor offence is not triable by the Court as constituted, 23 Bom. L.R. 1211 at 1243. Ordinarily a charge ought to be framed under the provisions of the Code, but in the case of minor offence a conviction can be recorded without a charge being framed, *ibid* at 1245. The necessary implication of this section appears to be that there need not be a separate trial with reference to a minor offence, *ibid* at 1245, when a person was originally charged under S. 452, I.P.C., but the facts proved established a case under S. 426, I.P.C. a conviction under the latter section is justified under the provisions of this sub-section, 23 Cr. L.J. 1037=81 Ind. Cas. 911. When certain persons were charged under S. 147, I.P.C., with the common object of taking forcible possession of complainant's land and of assaulting him, and were convicted of criminal trespass under S. 417, I.P.C., without any charge being framed against them or without their being called upon to plead to such a charge and this sub-section was invoked to maintain the conviction it was held that inasmuch as the common object charged, was not to commit criminal trespass, the conviction was clearly bad, 18 C.W.N. 992=15 Cr. L.J. 188=22 Ind. Cas. 764. Similarly a person charged with dacoity and rioting cannot properly be convicted with criminal trespass as that offence is no part of the offence of dacoity or rioting, 23 W.R. (Cr.) 39. A person charged with rape on a married woman cannot be convicted of having committed adultery with the same woman on the same facts, 8 A. 233; 27 M. 61. But an accused charged under Ss. 304 and 325, I.P.C., can properly be convicted under S. 323, I.P.C., without any specific charge under that section; when certain persons are charged under Ss. 304 and 325 read with S. 149, I.P.C., with regard to an offence alleged to have been committed by another person and the evidence as to the riot is disbelieved, they cannot be convicted under S. 323, I.P.C., in respect of their individual acts with which they were not charged and which were not imputed to them in the Judge's charge to the Jury, 34 C. 325. Similarly where certain persons were charged with rioting, *culpable homicide* and causing grievous hurt not by themselves but through others constructively under S. 149, I.P.C., and they were convicted under S. 325, I.P.C., it was held that under no reasonable construction of Ss. 236 to 233 can it be said that the offences of causing grievous hurt is minor to, or included in a charge under S. 325 read with S. 149, I.P.C., 34 C. 693 at 703, where 6 C.W.N. 83 is followed. See 47 M. 745 (F.B.) which holds that the legality of the conviction depends upon whether the accused was materially prejudiced by the omission in the charge.

Sub-section (2A).—Sub-section (2) of S. 237 is omitted from that section and now added to this section as this is thought to be the proper place for it. This sub-section relates only to attempt and is in accordance with S. 9 of 14 and 15 *vict. ch.* 100. That section permits a conviction for attempt on an indictment for a complete offence and it was enacted as offenders often escape conviction by reason that such persons were not specifically charged with attempting to commit offences. 'If on the trial of any person charged with felony or misdemeanour it shall appear to the jury upon the evidence that the defendant did not complete the offence charged but he has been guilty of an attempt to commit the same, such person shall not by reason thereof be entitled to an acquittal but the jury shall be at liberty to return as their verdict . . . that the defendant is guilty of an attempt to commit the same and therefore such person shall be liable to be punished in the same manner

as if he had been convicted upon an indictment for attempt to commit the particular felony or misdemeanour charged'. Having regard to the manner in which this sub-section expressly makes mention of an attempt to convict an offence while it is silent with regard to abetment of the offence, the inference appears to be that, in the case of abetment, it is necessary that a charge should be framed on a charge for a substantive offence, the conviction for abetment of such offence is unsustainable, 44 C.L.J. 216=28 Cr. L.J. 2=99 Ind. Cas. 34 followed in 30 Cr. L.J. 224=113 Ind. Cas. 891, but in 3 Ran. 11 at 27-28, it was held that the appellate Court on appeal from a conviction for the substantive offence could alter the conviction to one of abetment of such offence although there was no charge of abetment in the trial Court and follows the decisions in 22 Cr. L.J. 161=59 Ind. Cas. 913; 15 Ind. Cas. 85 and 26 C. 863. In 29 Cr. L.J. 1093=112 Ind. Cas. 677 it was decided that could not be laid down as a universal rule that in no circumstances whatever can a person be convicted of abetment of an offence where he was only charged with the substantive offence and not with abetment. The cases on the point under Ss 236 and 237 and this section indicate a conflict of judicial opinion but the true rule seems to be that the answer to the question really depends on the facts of each case and what we have to find out in each case is whether or not prejudice has or has not been caused to the accused by reason of the conviction for abetment of the offence without a charge. See also 23 M.L.J. 722. The conviction was held bad in 33 M. 264; 15 L.W. 583=(1922) M.W.N. 182; 26 Bom. L.R. 323=25 Cr. L.J. 1135=81 Ind. Cas. 959; 13 Cr. L.J. 203 and 13 Cr. L.J. 223; 1921 Pat 96; 44 C.L.J. 216; 49 A. 120; 14 Ind. Cas. 203=14 Ind. Cas. 319. This sub-section allows an accused person charged with a substantive offence to be convicted of an attempt to commit that offence without a separate charge and trial when the lower Courts found that a person was not actually deceived by the accused and so the offence of cheating was not made out it was open to the High Court to convict of an attempt to cheat when such attempt to cheat was made out by the evidence and S. 439 (4), *infra*, has no application to such a case as there was no acquittal by the lower Court of any attempt to cheat, 48 M. 774.

What persons may be charged jointly.

239. *The following persons may be charged and tried together, namely:—*

(a) *persons accused of the same offence committed in the course of the same transaction;*

(b) *persons accused of an offence and persons accused of abetment, or of an attempt to commit such offence;*

(c) *persons accused of more than one offence of the same kind within the meaning of section 234 committed by them jointly within the period of twelve months;*

(d) *persons accused of different offences committed in the course of the same transaction;*

(e) *persons accused of an offence which includes theft, extortion, or criminal misappropriation, and persons accused of receiving or retaining, or assisting in the disposal or concealment of, property possession of which is alleged to have been transferred by any such offence committed by the first named persons, or of abetment of or attempting to commit any such last-named offence;*

(f) *persons accused of offences under sections 411 and 414 of the Indian Penal Code or either of those sections in respect of stolen property the possession of which has been transferred by one offence; and*

(g) persons accused of any offence under Chapter XII of the Indian Penal Code relating to counterfeit coin, and persons accused of any other offence under the said Chapter relating to the same coin, or of abetment of or attempting to commit any such offence ;

and the provisions contained in the former part of this chapter shall, so far as may be, apply to all such charges.

Amendment—This section which defines what persons may be charged jointly is re-drafted and the amendments are as follows :—(1) It is provided that when two or more persons are accused of offences of the same kind committed by them jointly during the space of one year they may be tried for the same at one trial. (2) It is directed that when one person is accused of any offence which includes theft, extortion or criminal misappropriation and another of receiving, retaining or disposing of the stolen property or abetment or attempt to commit the latter offences they may be tried jointly. (3) Provision is made for the joint trial of one person accused of counterfeiting coin and another of fraudulently possessing or uttering it. The illustrations have been repealed by the amendment.

Scope and object of the section.—This section is only an enabling provision. It is always open to the Court if it appears that a joint trial of accused persons or even the charges will embarrass the accused to try them separately, 30 Cr. L.J. 619=116 Ind. Cas 369. This section deals with the joint trial of accused persons. The provisions of Ss 234 to 236 *infra* are mutually exclusive and the provisions of this section stand by themselves and the scope of this section cannot be extended by the use of the provisions of sections not referred to herein. Where two persons are tried jointly, being charged with three offences and each offence being framed in the alternative either of criminal breach of trust or abetment thereof, the accused had to meet two distinct sets of circumstances which is against the spirit of the provisions of S 233, *supra*, and would not be covered by any of the exceptions detailed in the sections that follow S. 233, *supra*. The accused were therefore tried for six offences and the trial was therefore held to be illegal and prejudice must be presumed from the confusion arising from a man being called upon to face at a single trial six sets of circumstances, 51 A. 544 at 549-50. Jurisdiction is the foundation of every charge and must be imported into this section. Unless the subject of the inquiry comes within the territorial jurisdiction of the Magistrate he cannot invoke the powers under this section, say to try abetment along with the principal offence, 57 M.L.J. 518=1929 M.W.N. 578=30 L.W. 501. The foundation for the procedure sanctioned by this section is the association of two or more persons concurring from start to finish to attain the same end, 23 Cr. L.J. 268=66 Ind. Cas 392. A separate trial is the rule and a joint trial is the exception and it is always for the prosecution to justify a joint trial. Where the accused committed offences not of the same kind on two different dates, a joint trial is illegal, 45 A. 54 where 40 C. 318 and 30 A. 351 are followed; see also 9 A. 452; 43 A. 223. It should be remembered that the provisions of S 235, *supra*, and this section are merely enabling ones and if there is a risk of embarrassing the defence such joinder of charges should not be resorted to, 52 C. 253 at 265. To enable the Court in the same trial to try more persons than one, they must be accused of the same offence, or they must be related as principals and abettors or persons attempting to commit such offences, or persons accused of more than one offence of the same kind within S. 234, *supra*, or persons accused of different offences committed in the same transaction or persons accused of theft, extortion or misappropriation and persons receiving, retaining or disposing of the same stolen property or person accused of counterfeiting coins and person fraudulently possessing or uttering it except as provided by this section, the joint trial of several accused is not permitted by law and is an illegality which cannot be cured by S. 537, *infra*. A good working test of what should or should not be regarded as the same transaction within the meaning of this section is (1) proximity of time, (2) unity or proximity of place, (3) continuity of action, (4) community of purpose or design, 35 C.L.J. 527 where 42 C. 957 is followed. It is difficult to lay down any single test or criterion with

regard to joinder of charges. The cases divide themselves into three groups. (1) A case similar to one in 23 M. 61. (P.C.) not covered by S 235 or this section, in which case prejudice or no prejudice, the illegality vitiates the trial. (2) A case without any such illegality prejudice might nevertheless be caused to the accused even though the Crown may have the power of joinder, it might be fairer not to exercise that power. (3) A case where there is a common thread or purpose underlying the alleged offences of the accused even though separated by time and space that may form the same transaction in which a joint trial is permitted with numerous charges and numerous accused, 31 Bom. L.R. 148 at 150. S 234, *supra* will not control the provisions of this section, 26 Cr. L.J. 1202=60 Ind. Cas. 706. The question whether certain offences specified in different charges were or were not so connected together that it might fairly be said that they were committed in the same transaction is substantially one of fact and admissions on a question of fact made by accused persons may undoubtedly be received and acted upon by the trial Court. The law on the point is correctly laid down in 19 A.L.J. 392, 26 Cr. L.J. 29=63 Ind. Cas. 509. This section cannot give jurisdiction to a Magistrate who has not jurisdiction under the provisions of any of the sections in Chapter XV of the Code. The mere fact that the offences could have been tried jointly under this section if committed within the jurisdiction of the Magistrate to try the offences committed outside his jurisdiction, 28 C.W.N. 575 and 419. A trial which takes place in defiance of the express provisions of this section must be held to be void and a misjoinder of parties is not a mere irregularity which can be cured by applying the provisions of S. 537, *infra*. If a trial is illegal the question of prejudice or absence of prejudice does not arise, 15 Cr. L.J. 420=24 Ind. Cas. 156; 15 Cr. L.J. 472=24 Ind. Cas. 352.

May be charged and tried together.—This section is merely an enabling section and does not in any way trammel the discretion of the Court 19 C.W.N. 672 at 673; 26 M. 592; 11 W.R. (Cr.) 16; under this section a judicial discretion has been given to the Court to try a principal offender and the abettor either jointly or separately, and the manner in which this discretion should be exercised must depend on the facts of each case. A joint trial of the owner of a common gaming house with those found gaming therein or present for the purpose of gaming is permitted as the offences are committed in the same transaction, 24 Cr. L.J. 155=71 Ind. Cas. 567. But this section does not apply to preliminary inquiries, prior to commitment, 7 Bom. L.R. 457; 42 M. 561; 26 M. 592. The fact that all the accused under trial formed a gang and all the acts attributed were directed towards a common purpose and no objection as to joint trial was taken at the trial Court or in the Court of appeal, held that the trial under the circumstances was not illegal and did not prejudice the accused, 1927 M.W.N. 183 where 1925 M.W.N. 57, 27 C. 781 and 41 A. 109 are *distinguished* but when a trial is illegal, the whole trial is bad and no question of prejudice arises in such a case, 15 Cr. L.J. 420=24 Ind. Cas. 156; 15 Cr. L.J. 472=24 Ind. Cas. 352.

Clause (a)—The expression "same offence" refers not merely to the nature of the offence but to one and the same physical act of crime, 8 Cr. L.J. 11. If several witnesses summoned to appear to give evidence on the same day in a case and all of them fail to appear they cannot be tried together as each has committed a separate and distinct offence though punishable under the same section of the Penal Code, S. 174, 1 P.C., 1883 A.W.N. 25. So also if several witnesses on the same side give false evidence in the same case. The lie told by one witness is none the less his own particular lie because other witnesses at the same time have told similar lies. It is each man's own lie and not his neighbours that can alone be used against him. The perjury of one witness is a transaction complete in itself and cannot be connected with the false evidence given by another witness in the same case and on the same point, 3 M.H.C.R. Appx. 32; 2 N.W.P.H.C.R. 21; 1381 A.W.N. 83; 1282 A.W.N. 44 & 160; 1885 A.W.N. 24; 7 B.L.R. Appx. 66=16 W.R. (Cr.) 47; 13 Cr. L.J. 23=13 Ind. Cas. 215; 44 A. 293; 5 A. 17; 6 M. 252; 10 C. 405; 4 Bom. L.R. 53; 14 Bom. L.R. 972; 11 W.R. (Cr.) 16; 26 M. 592; 48 A. 325. The joint trial of four persons living separately, for offences under the Municipal Act contravened the provisions of this section as the accused cannot be said to have committed the same offence in the course of the same transaction, 7 L.A. 168. The expression "same offence" implies that persons jointly tried and acted in concert or association,

15 Cr. L.J. 695=26 Ind. Cas. 143; 17 Cr. L.J. 30=32 Ind. Cas. 158; 1 Patna L.J. 64; 42 C. 557 and 1153; 1 Pat. L.J. 64=17 Cr. L.J. 234=24 Ind. Cas. 650; 6 M.L.T. 17; 42 C. 760; 38 A. 457; 19 C.W.N. 672. Where two persons were charged and tried jointly for two separate acts but the facts alleged against them were identical viz. obtaining credit concealing their being undischarged insolvents, it was held that the two accused could be jointly tried under this section, 63 C. 929. It does not apply to a case in which the allegations against the two accused are mutually exclusive. It is not permissible for the prosecution at the same trial to adduce some evidence that A committed the act complained of and some evidence that it was not A but B that did the act. In such a case S. 233, *supra*, requires separate trial, 2 Cr. L. Rev. 237=14 Cr. L.J. 863=21 Ind. Cas. 163; there is no objection if A and B are concerned in a common enterprise though each in defending himself might try to throw the blame on the other, 12 Cr. L.J. 662; when one of the accused jointly tried with others makes a confession, it is improper to hold a joint trial, 5 C.W.N. 294; opposing factions in cases of rioting can not be brought under this clause or any other clauses of this section, though each party, uses force they are not guilty of the same offence within this clause as the common objects of the rioters on one side is necessarily different from that imputed to the other, 20 C. 537; 6 C. 96; 9 W.R. (Cr.) 93; 12 W.R. (Cr.) 75; 1 N.W.P.H.C.R. 293. When two factions opposed to each other fight and they are charged for their attacks on each other in the same occurrence and the charges were tried separately as two distinct cases but only one judgment was given even though there was separate evidence applicable to each case, it was held that although it would have been better to keep the evidence distinct and deliver separate judgments, no injustice has been occasioned by the procedure adopted, 3 Lah. 193 (P.C.) When in the course of a joint trial of the accused it is found to prejudice them in their defence it is the duty of the Court to stop the trial and to proceed to try them separately 3 Cr. L.J. 76, In 23 C.W.N. 437=26 Cr. L.J. 65=83 Ind. Cas. 625, it was held that counter cases should be tried simultaneously and contemporaneously and should be dealt with wholly separately from each other, each on its own merits and upon facts and circumstances appearing therein, and the judgment in both being pronounced if possible after both the trials are over. The Code is silent with regard to the procedure in the trial of counter criminal cases. It cannot be laid down as an absolute rule of law that a particular course must be adopted in such cases and each case has to be decided according to its requirements, 26 Cr. L.J. 1615=93 Ind. Cas. 719. See notes under S. 235 pp. 438 to 441 as to the exact significance of the expression "offences committed in the course of the same transaction." An offence cannot be treated necessarily as one transaction merely because it is a continuing offence. On the contrary this section implies a continuing offence and may embrace more than one transaction. But only so far as it is concerned with one transaction can more persons than one be tried together for it. The section allows the trial of several persons for the same continuing offence within the limits of one transaction only and under clause (d) several persons may be charged and tried together when accused of different offences committed in one transaction and the word "transaction" must have the same meaning as in clause (a). The provisions as to charges are designed to simplify and define the charges that may be tried at one trial and to avoid embarrassment to the accused. It is very desirable that Public Prosecutors and the Courts should give full effect to the spirit of the provisions of the Code instead of straining them to cover doubtful cases, 49 M. 74. See also 5 Pat. L.J. 11; 39 C.L.J. 331; 27 C.W.N. 700,=37 C.L.J. 410. Where in the course of a riot a person's death is caused and subsequently one of the rioters takes away and causes the disappearance of the dead body, a joint trial of that person for an offence under S. 201 I.P.C., along with a trial of all the rioters for offences under Ss. 145 and 304, I.P.C., is not warranted by law, as the offence under S. 201, I.P.C., cannot be said to have been committed in the same transaction in which the other offences charged were committed, 26 Cr. L.J. 467=85 Ind. Cas. 147; 48 A. 325. See in this connection, 6 Lah. 226 (P.C.) followed in 30 Cr. L.J. 851=118 Ind. Cas. 323, where conviction under S. 201, I.P.C., was upheld when charged only under S. 302, I.P.C. Where certain persons committed initial trespass into a factory and subsequently when ejected therefrom a body of men collected there to force an entry into the factory it cannot be said that the unlawful assembly formed subsequently and their acts as members of that assembly could not form part of any preconceived plan entertained at the time of the original tres-

pass and therefore the charges cannot form part of the same transaction within the meaning of this clause, 4 Cr. L. Rev. 481=15 Cr. L. J. 695=26 Ind. Cas. 143 following 7 M. L. T. 367=11 Cr. L. J. 293=1910 M. W. N. 541=6 Ind. Cas. 242; 29 C. 385; 25 M. 61 (P.C.).

Clause (b).—This clause empowers a joint trial of the principal offender, the abettor or one who attempts to commit the offence, 19 C. W. N. 121; 27 Cr. L. J. 391=93 Ind. Cas. 42. It is improper under this sub-section in a case of murder to allow the principal offender to remain untried and to proceed with the offenders who were abettors and who took a minor part in the occurrence, 50 M. 274; no one disputes the general principle enunciated in the above decision that ordinarily the correct course is to try the abettor with the primary offender and where no reason to the contrary appears, the enabling provisions of this section should be availed of, 1929 M. W. N. 796. This clause would equally apply to a joint trial of several abettors or of an abettor and one who makes an attempt to commit the offence, 33 C. 433. Where several persons conspiring to commit an offence and one of them achieves the object of the conspiracy, a joint trial is permitted by this clause although there are two offences or clause (d) may permit such a joint trial, 42 C. 937at933; 42 C. 1153, 19 C. W. N. 672 and 706 at 713; 21 C. L. J. 195=16 Cr. L. J. 3=23 Ind. Cas. 307. A keeper of a common gaming-house may be jointly tried with those found gaming therein as the keeper may be considered to abet those who were found gambling, under this clause, 14 Cr. L. J. 293=19 Ind. Cas. 919. A joint trial of the printer and the publisher of an alleged seditious pamphlet is not bad for misjoinder as both of them are concerned in the same transaction in regard to the publication and both of them are on very much the same footing with regard to their being able to raise their plea, 30 Bom. L. R. 320=23 Cr. L. J. 633=110 Ind. Cas. 235.

Clause (c).—This clause makes it clear that the exception embodied in S. 234, *infra*, is not confined to cases where there is only a single accused but is also applicable to cases where several persons are jointly tried. This clause refers to joint trial of different connected offences of the same kind as defined in S. 234 (2), *supra*, S. 234, *supra*, requires that the accused may be tried for three selected offences, but in the language of this clause there is no such limitation as regards the number of offences. Where there was no joint action or the part of the accused and each acted independently of the other and made separate defences, it was held that a joint trial of the charges against 62 persons in one trial was bad, *Weir II*, 333. Similarly, where fifteen persons in one trial were jointly tried and convicted of distinct offences of committing public nuisance in a village it was held that the trial was bad and the accused were really prejudiced in their defence, 5 M. 23. If several witnesses were summoned to give evidence in a case on the same day and all of them fail to attend they cannot be tried together for an offence under S. 174, I. P. C., 1893 A. W. N. 25. Where four persons were charged with giving false evidence in the same proceedings they cannot be tried together and it is an illegality vitiating the trial, 10 C. 403; 6 M. 232; 26 M. 592; 4 A. 293; 5 A. 17; 13 Cr. L. J. 23=13 Ind. Cas. 215, but see 48 A. 325. A lie by a witness is none the less his own particular lie and it is his own and not another's lie that can alone be used against him or be the subject of a prosecution on that account, 7 B. L. R. Appx. 66. Where several persons jointly filed a written statement signed by all and one of them gave evidence in support thereof, it was held a joint trial of all of them, the deponent under S. 193 and the others for abetting him was good, 1881 A. W. N. 52. The identity of the persons committing the offence must be the same on each occasion, 1 C. L. J. 475. Unless a case fell strictly within this clause the fact that the same body of men are concerned in two distinct offences of the same kind, it could not render them liable to be jointly tried, 14 C. W. N. 394. See 51 M. L. J. 692=39 M. L. T. 37=27 Cr. L. J. 133=93 Ind. Cas. 597, referring to 28 M. L. J. 381, 33 M. 502 and 48 A. 325.

Clause (d)—For the meaning of the expression 'offences committed in the same transaction,' see cases discussed under S. 235, *supra* at pages 439 to 441. The idea underlying the expression 'in the course of the same transaction' used herein is that there is a practical unity in men's actions which enable us to draw a mental circle round an act, or event, or a series of them and call it for practical purposes, a single transaction, though theoretically this must be a true description. The expression must be understood as including both the immediate cause and effect of an act or event and also its collocation or relevant circumstances the other necessary antecedents of its occurrence connected it, at a reasonable distance of

time, place and cause and effect, 31 Bom. L.R. 545 at 559. The Legislature though more than once invited to define the expression has studiously and wisely refrained from attempting a definition of this phrase. Each case must be considered on its merits and no case can be an authority except upon its own facts. The test is whether the two persons concerned are engaged in one transaction and to determine that it is necessary to regard facts from the point of view of these persons. If they are animated by a common purpose and there is a continuity in their action then surely there is one transaction so far as they are concerned. It may even be that community of purpose is not necessary, 51 B. 310. The real test whether several offences connected together to form the same transaction depends upon whether the, are so related to one another in point of purpose or as cause and effect or as principal and subsidiary acts as to constitute one continuous action. Mere interval of time between the commission of one offence and another does not by itself necessarily import want of continuity, though the length of the interval may be an important element in determining the connection between the two 3 Luck 664 following 27 B. 135 and 15 B. 491, offences are connected together either when they have been committed at the same time by several persons together, or when they have been committed by different persons or at different times and places, but pursuant to an understanding formed beforehand among them either when those guilty have committed one in order to procure the means with which to commit the other, to facilitate it, to carry out its execution, to assure its being unpunished. A striking illustration of this was the trial of the *automobile bandits* in France. "Twenty accused were arraigned several of whom were accused of murders but not the same person or at the same place; some of whom were accused of crimes punishable with imprisonment for life, some for 20 years and some for 10 years. Yet the long list of offences were so connected together and so inextricably woven together that they formed one continuous narration of crimes and it was a credit to any system of criminal procedure that enables the final hearing and disposal of such a series of crimes at one and the same trial. Every one of the prisoners had a fair and impartial trial and each offence was carefully and separately decided and evidence relating to the participation of each prisoner being strictly limited to his case." The fact that the complaints were presented the same day or that motive for the commission of the offences was the same in all the occurrences will not go to show that the offences to be committed in the course of the same transaction, 18 Cr. L.J. 739=40 Ind. Cas. 739. The circumstances in different cases may vary to an indefinite degree. Where three accused persons, viz., witnesses on the same side in a case of communal riot, all giving evidence on the same point and to the same effect to prove the same fact, viz., the manner in which a certain person met with his death, there is no hesitation in holding that the evidence of the three witnesses was given in the course of the same transaction. There was the most obvious identity of purpose. The phrase "community of purpose" is ambiguous inasmuch as it suggests a conspiracy which is not a necessary element supporting a finding whether the offences were committed in the same transaction. It is clear that the framers of the Code could never have had in mind the necessity for any proof of conspiracy before the terms of the section could be applied. The section has been in the Code for a very large number of years and long before Ss 120A and 120B I.P.C. were added. We have to look to this section and this section only. If the several acts of the accused are committed in the same transaction there is an end of the matter and they can legally and properly be tried together. Much confusion has arisen owing to failure to distinguish between different acts of the accused and different transactions. The act of one accused may be wholly independent of the act of the other and in that sense there may be no community, whatever but there may still be community of purpose in the sense of identity of purpose and acts committed in the same transaction, 43 A. 325. This sub-section enables all the offences committed by the accused whether substantive offences or abetment of those offences being tried together provided they were committed by the accused in the course of the same transaction. 30 Cr. L.J. 619=116 Ind. Cas. 369, but to justify a joint trial of persons concerned in two different offences, their act must constitute parts of the same transaction. The difficulty often arises only in applying the principles deducible from the volume of case law on the subject, to the particular facts of a case. Before different offences can be said to have been committed in the course of the same transaction by various persons charged with the same, we must see whether such

persons had a common purpose, resulting in actions which constituted a *concatena* of events ultimately leading to the commission of such offences. The test of unity of time and unity of place as regards the offences with which the various accused persons may be charged are not always safe criteria for the purpose of determining whether or not these offences were committed in the course of the same transaction. Cases might occur where such tests may be of very great help, but on the other hand there may be cases in which a Court of Justice cannot treat such tests as a proper guide in arriving at the same conclusion. Each case must depend on its own facts and circumstances, 23 Cr. L.J. 357=100 Ind. Cas. 963 where 29 C. 383; 30 B. 431 Lah. 562, 23 Cr. L.J. 268=66 Ind. Cas. 832 are referred. See also 31 Bom. L.R. 143 following 20 B. 49 and 42 C. 937. If the different offences were committed in different transactions a joint trial is wholly illegal, 42 A. 12; 23 M. L.J. 381; (1910) M.W.N. 541; 31 C. 1053; 13 C.W.N. 1113; 10 Cr. L.J. 452=3 Ind. Cas. 1, 21 Bom. L.R. 732; 11 A.L.J. 188; 17 C.W.N. 419; 35 C.L.J. 527; 20 A.L.J. 881; 43 M. 73; 26 Cr. L.J. 1602=93 Ind. Cas. 700. In considering the nature of the transaction Courts must have regard to the immediate and not to the ultimate object of the offenders. When certain persons were jointly tried for offences committed at two different points of time, the object for the commission of the offences at one point being to coerce the complainant to hand over certain valuable securities, etc., and at the other point to prevent the complainant's party from proceeding to the Magistrate to lodge a complaint in respect of the first occurrence, it was held that the two series of acts lacked the essential elements of community of purpose and continuity of action to make them parts of the same transaction within the meaning of this section, 28 M. L.J. 397. If it is established that the offences of the several accused do not form parts of the same transaction, the case is outside the scope of this clause and the joint trial is bad, 26 M. L.J. 593. Where the accused were engaged in a common design, their case falls within the sub-section, and a joint trial is permitted 26 A.L.J. 197; See also 31 A. 142, where two persons members of a firm gave false evidence as witnesses in support of a claim on a promissory note in favour of their firm, it was held that a joint trial of the accused was justified as the two acts of the accused in giving false evidence were committed in the course of the same transaction within this sub-section, 29 Bom. L.R. 170=28 Cr. L.J. 373=109 Ind. Cas. 931. When the offence of each of the accused is separate and there is no common offence in which all join, it is quite irregular to try them jointly, 11 M. 411. Joint trial of an offender and those who rescue him from custody is bad, 29 C. 385; 13 C.W.N. 604, 31 C. 1053, 28 Cr. L.J. 357=100 Ind. Cas. 965; 31 C.W.N. 337=28 Cr. L.J. 347=109 Ind. Cas. 827. Where several people commit different offences on their own account with a common intent, say, during a car festival, it cannot be said they committed offences in the same transaction. The expression same transaction implies oneness of purpose which is wanting here. If persons who are collected at a festival quarrel accidentally there among themselves and there happens to be a fight, injuries inflicted by some on others, without a common object they would be committing different offences of hurt, 23 A.L.J. 3=26 Cr. L.J. 734=66 Ind. Cas. 222. Where several persons abduct a girl and she was raped by one of the accused, the offence of rape constituted a separate transaction from that of abduction and the person who committed rape cannot be tried jointly with the others who had taken no part in it. But where a joint trial is held, a retrial is not necessary where the accused has not been prejudiced and does not wish to be retried, 23 Cr. L.J. 533=77 Ind. Cas. 997. The keeper of a common gaming house can be tried jointly with those found gaming therein as the offences though distinct are committed in the course of the same transaction, 28 Cr. L.J. 1001=105 Ind. Cas. 825 where 11 Cr. L.J. 211=5 Ind. Cas. 720 and 16 Cr. L.J. 220=27 Ind. Cas. 844 are followed.

Clause (e)—This clause permits a joint trial of persons accused of theft, extortion or criminal misappropriation only. This clause now permits joint trial of a thief or receiver or retainer of stolen property even though the offences are not committed in the same transaction; see 33 A. 311; 45 A. 223; 6 Bom. L.R. 517, 28 B. 312. If the thief and receiver could be jointly tried now, there is no reason why several receivers could not be jointly tried. It is clearly unnecessary for the Legislature to legislate for joint trial of persons to whom property had been transferred jointly i.e. when one receiver receives property as agent of another.

In such a case whether there is one or more than one theft, the receipt is the act of one person and a joint trial is permissible. Nor is it conceivable that the Legislature intended to enact a joint trial of receivers at different times of goods stolen at different thefts, there being no community of purpose between the receivers and therefore there is no reason for providing for joinder of parties in such a case but where there is one theft in which the property had passed to several receivers at different times Legislation was required because it had been held in several High Courts that a joint trial was illegal. It was thought a multiplicity of trials should be avoided and therefore this clause was newly enacted in 1923. The statute practically declares that the different acts of receipt are one and the same transaction if the transfer of possession from the owner to the thief was made by one and the same act. Whether the word 'transfer' is appropriate to the change of possession in such a case may be open to objection but that is the only construction which can reasonably be given to the statute, 6 Pat 593 at 585. The decisions in 29 B. 449; 23 C. 104; 33 C. 1256; 21 C.W.N. 111; 45 C. 741 are no longer law. When two persons were jointly tried under this clause and convicted of two distinct offences, it is open to the Appellate Court to convict one of them of some other offence on the same facts applying the general principles of Ss 236 to 238, 15 Cr. L. J. 680=25 Ind. Cas. 1008.

Clause (f).—This clause deals with joint trial of persons accused of counterfeiting coin and persons accused of fraudulently possessing or uttering it. A person who was in possession of 104 counterfeit coins, delivered 50 of them to another to pass them off from him. The two were jointly tried for offences under Ss. 240 and 243, I.P.C., it was held the joint trial was valid under this section read with S. 235 (1), *supra*, 31 C. 1007. This sub-section mentions only Ss. 411 and 414, I.P.C., and where definite sections are mentioned the provisions cannot be extended by analogy to other sections. Therefore a joint trial of persons accused under S. 412, I.P.C., is illegal, 26 Cr. L. J. 1291=89 Ind. Cas. 155 where 16 Cr. L. J. 270=28 Ind. Cas. 158 is followed; see also 26 Cr. L. J. 1361=89 Ind. Cas. 419. A trial is not bad for charges under sections 380 and 414, I.P.C., as they are cognate offences and the charges are really in the nature of alternative charges, 8 Pat 731.

Provisions in the former part of the Chapter apply to all such charges—By the expression 'by former part' is meant the part prior to the part headed 'joinder of charges.' Chapter XIX headed 'of the charge' is not divided into parts but different subjects have different headings. The first heading is 'form of charge' and this section falls under this heading. 'By the former part' is meant the part under the heading 'form of charge' prior to the part beginning with the heading 'joinder of charges.' S 234, *supra*, therefore will control the provisions of this section, 26 Cr. L. J. 1602=90 Ind. Cas. 706. This section cannot apply to a joint trial of accused unconcerned in acts which are independent of one another. Three persons each charged with cheating a separate individual cannot be tried together, 12 Cr. L. J. 208=10 Ind. Cas. 63. When three persons at a meeting of the caste passed a resolution defaming the complainant and a fourth sent a resolution of his own accord for publication in a newspaper, the joint trial of the four accused was held bad, 20 M.L.J. 423=7 M.L.T. 127=11 Cr. L. J. 135=5 Ind. Cas. 436. Where four persons were tried jointly, two of them being convicted under S. 168, I.P.C., and S. 8 of the Epidemic Diseases Act, while the other two were convicted under S. 419, I.P.C., for attempting to cheat by personation, an altogether distinct offence not connected with the former, it was held that the joint trial was illegal, 4 Cr. L. J. 479.

Objection as to misjoinder.—A trial that takes place in defiance of the express provisions of this section must be held to be void and a misjoinder of parties is not a mere irregularity which can be cured by, S. 537, *infra*. If a trial is illegal the question of prejudice or absence of prejudice does not arise, 15 Cr. L. J. 420=24 Ind. Cas. 156; 15 Cr. L. J. 472=24 Ind. Cas. 352. Where a joint trial is held contrary to law it is open to an accused person who has been convicted at such trial to raise the objection of misjoinder in revision, even if the objection was not taken in the Courts below. There is no obligation on the accused to prove prejudice in such a case. The trial is either good or bad and if it is bad no question of prejudice arises and the conviction could not be sustained, 25 Cr. L. J. 807=81 Ind.

Cas. 343. After the decision of the Privy Council in 23 M. 61, it cannot be contended that S. 537 *infra* could cure a defect as to misjoinder because it is a disobedience to an express provision as to the mode of trial which is not a mere irregularity but an illegality. See also 52 C. 159; 28 C.W.N. 119; 52 C. 1; 28 Cr. L.J. 357=100 Ind. Cas. 583. A joint trial of accused not permitted by law cannot be held to be an irregularity cured by S. 537, *infra*. Such misjoinder is not an irregularity in framing the charge but goes further than an irregularity in a trial prohibited by law and a disobedience to an express provision of law cannot be considered an irregularity. When a trial is prohibited by law it is more than an irregularity but an illegality, 30 Cr. L.J. 214=113 Ind. Cas. 721. Where criminal proceedings are substantially bad in themselves the defect cannot be cured by any waiver or consent on the part of the accused or their pleaders, 6 C. 95; 2 C. 23; 6 C.W.N. 202; 11 C.W.N. 1129; 12 W.R. (Cr.) 59; 16 W.R. (Cr.) 69; 23 W.R. (Cr.) 89; 48 M. 117; 28 M.L.J. 329=(1916) M.W.N. 229; 18 M.L.J. 330; 23 M. 123; 7 M.L.T. 229; 27 M. 127; 4 Bom. L.R. 53; 7 Bom. L.R. 527; 21 A.L.J. 80; 13 A.L.J. 343; 11 A.L.J. 183; 4 Lah. 376; 28 Cr. L.J. 63=75 Ind. Cas. 980; 2 Pat. 793 at 795; 5 Ran 83; 29 Cr. L.J. 521=109 Ind. Cas. 345 following 4 Lah. 376. An illegality affecting the jurisdiction of the Court cannot be cured by the fact that no objection was taken either in the trial Court or in the Court of appeal, 11 C.W.N. 1128. No consent by counsel, whether for his own convenience or that of his client or for the convenience of the Court can by itself create jurisdiction in the Court to commit irregularities; nor can the commission of irregularities of a serious nature substantially affecting the conduct of the trial and prejudicing the accused be waived merely by consent on the part of the accused's representative, 50 A. 457 at 462. In case of misjoinder of charges, the trial is wholly void and quashing the charges against one accused would not validate the trial of the other, 27 Cr. L.J. 1099=97 Ind. Cas. 383. Misjoinder of charges and of persons vitiates the whole proceedings, 28 Cr. L.J. 438=101 Ind. Cas. 491, but where several persons were tried together on several charges of criminal conspiracy to commit murder and other offences under S. 120B, I.P.C., and other charges being various specified offences committed in pursuance of the conspiracy as murder etc., it was held that there was no misjoinder of charges vitiating the trial, 8 Lah. 230 (P.C.)=54 Ind. App. 45 (P.C.).

Re-trial.—When a trial is set aside on account of misjoinder, the High Court is not bound to order a re-trial. It rests with the prosecution to consider whether a re-trial should be had, 12 C.W.N. 246.

240. When a charge containing more heads than one is framed against the same person, and when a conviction has been had on one or more of them, the complainant, or the officer conducting the prosecution, may, with the consent of the Court, withdraw the remaining charge or charges, or the Court of its own accord

Withdrawal of remaining charges on conviction on one of several charges.

may stay the inquiry into, or trial of such charge or charges. Such withdrawal shall have the effect of an acquittal on such charge or charges, unless the conviction be set aside, in which case the said Court (subject to the order of the Court setting aside the conviction) may proceed with the inquiry into or trial of the charge or charges so withdrawn.

Scope of the section.—This section deals with a case where a person is accused of several offences and also a case where there are a number of charges relating to distinct offences constituted by separate acts but it does not apply to cases where there are several charges founded on the same fact dealt with in Ss. 235 (2) and (3) and S. 236, *supra*; in the latter case there is only one charge with several heads and there can be only one trial. In the

former case the charges are distinct capable of being tried separately and a withdrawal of the remaining charges on a conviction had on one of the several charges is permitted by the section and such withdrawal has the effect of an acquittal, 1899 P.R. (Cr. J.) 24. The opening words of the section make it clear that it is only applicable to joinder of charges in the same case not to separate charges of distinct offences tried separately and an order by a Sessions Judge staying the trial of a sessions case pending appeal, if any, by the accused against his conviction in an earlier case is not warranted by this section. The Judge might have attained the desired object by adjourning the trial under S. 344, *infra*, pending the appeal or under S. 491, *infra*, the public prosecutor might with the consent of the Court have withdrawn the prosecution if so advised, 9 Cr. L.J. 495=2 Ind. Cas. 128=6 M.L.T. 90 following Ratanlal 362. The authorities responsible for the prosecution of offenders should not be compelled by the Court to reserve a prosecution which they have thought expedient to drop or to carry it out in any particular way, 8 Cr. L.J. 11.

A charge containing more heads than one is framed.—These words were substituted in the Code of 1893 for the then existing words "*more charges than one are made*" and the change is in accordance with the definition of "charge" in S. 4 (1) (c), *supra*. The opening words of the section make it clear that it is only applicable to joinder of charges in the same case and not to separate charges for distinct offences tried separately as distinct Sessions cases. In such a case the Judge might act under S. 344, *infra*, or ask the Public Prosecutor to withdraw from the prosecution under S. 491, *infra*, but he cannot act under this section, 6 M.L.T. 93=9 Cr. L.J. 495=2 Ind. Cas. 148, Ratanlal 977. A Criminal Court has power to permit the prosecution to withdraw charges the joinder of which is objected to as illegal, 16 C.W.N. 1103 (Sp. B.). Similarly it was held by the Madras High Court in 3 Cr. L. Rev. 148 that this section will not enable a Magistrate to stay the trial of a charge in cases with different offences committed in the same night and the order of the Magistrate staying the trial was set aside by the High Court.

May with the consent of the Court withdraw.—The provisions of this section apply to every grade of Court including the High Court and not to the Court of trial only when a party to a revision to the High Court withdraws the revision petition and the High Court accepts the withdrawal, it may be presumed that the High Court gave its consent for the withdrawal, 27 A.L.J. 1056.

Withdrawal of the remaining charges.—A charge cannot be permitted to be withdrawn after the Judge had summed up and the Jury had returned their verdict, Ratanlal 286, and the Judge is bound to sum up on all the charges, and the Jury should be required to return a verdict on all the charges when evidence had been let in on all the charges and pleaders heard on the whole evidence, Ratanlal 283. Where a Judge at the commencement of a trial himself framed an additional charge and subsequently on acquitting the accused of the charge for which he was committed to stand his trial considers the additional charge framed by him to be improper there is no express provision of law which prohibits such a course. To this extent the word "alter" occurring in S. 227 *supra* must be taken to include "withdraw," 12 A. 551 at 552, See Ss. 454 and 273 *infra*, which also provide for cases of withdrawal. Where an accused was charged with ten offences of the same nature under S. 408 I.P.C., and was convicted of three of them, the High Court in appeal from the conviction while upholding the conviction directed that further proceedings with regard to the remaining charges be withdrawn and dropped, 9 C.L.J. 237=10 Cr. L.J. 482=4 Ind. Cas. 48.

CHAPTER XX.

OF THE TRIAL OF SUMMONS-CASES BY MAGISTRATES.

241. The following procedure shall be observed by Magistrates in the trial of summons-cases.

Procedure in summons-cases.

For the definition of the word "summons cases" see S. 4 (1) (c) *supra*. This Chapter dealt with the procedure in summons-cases while the next Chapter deals with the trial of warrant

cases. The general provisions of the Code found in other Chapters apply equally to the procedure in summons and warrant cases, 43 M. 511 (F.B.) at 528. A warrant case being a graver offence cannot be tried under this Chapter, 7 M. 454. When of the two offences charged, one is a summons-case and the other warrant-case the procedure which the Magistrate ought to adopt is the one prescribed for a warrant-case, 11 C. 91 followed in 39 M. 503; 41 M. 727, and if he fails to follow the procedure prescribed for a warrant-case and convicts the accused of the offence triable as a warrant-case, the conviction is bad in law, 29 M. 372; 3 M.L.T. 204. When a summons case was committed to the Court of Sessions the commitment was quashed by the High Court on the ground that there was no warrant for such a commitment, as the Magistrate could adequately punish the offenders, 1906 A.W.N. 28=3 A.L.J. 14. When a complainant is absent, the proper course is to discharge the accused under S. 253, *infra*, and not to acquit the accused under S. 247, *infra*, 11 C. 91; 22 B. 711. When the accused is tried for two offences in the same trial, one being a summons-case and the other a warrant-case the proper procedure to be adopted is that prescribed for warrant-case, 39 M. 503; 41 M. 727; 11 C. 91; 29 C. 481; 22 B. 711.

242. When the accused appears or is brought before the Magis-

Substance of accusation to be stated.

trate, the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not be

convicted; but it shall not be necessary to frame a formal charge.

Particulars of the offences shall be stated.—It is necessary that the accused should have a clear statement made to him that he is about to be put on his trial and the facts constituting the offence with the commission of which he is accused, 4 C. 603=3 C.L.R. 87. In summons cases the statement to the accused of the particulars of the offence of which he is accused takes the place of the formal charge, 2 Cr. L.J. 739 at p. 744 and the answers which the accused gives to the questions put to him takes the place of the plea of the accused to a formal charge. This section applies to security proceedings and the Magistrate is bound to state to the person proceeded against particulars of the matter against him and ask him to show cause why he should not furnish security, 7 M.L.T. 304. See also 17 M.L.J. 338. Where a Court dispenses with the presence of the accused and allows a pleader to appear for him, the Court can act on the plea of the pleader under this section and the record must show the person appearing for the accused was duly instructed, 50 B. 250. A conviction based on an admission made by the counsel for the accused without examining or recording any evidence in a summons-case is illegal and cannot stand, 26 Cr. L.J. 179=83 Ind. Cas. 883. It is incumbent on a Magistrate to state the particulars of the offence charged to the accused when he appears, but when a Magistrate failed to do so especially when the accused was represented by a pleader it is only a technical irregularity and such omission is cured by S. 537, *infra*, 28 Cr. L.J. 511=101 Ind. Cas. 895 but in 54 C. 359 it was held that the omission to comply with the provisions of this section by failing to state to the accused the particulars of the offence charged is an omission to comply with an express provision of the Code as to the mode of trial and such omission vitiated the whole trial. See also 31 C.W.N. 167 and 48 C.L.J. 92 at 94 where the same view as in 54 C. 359 was taken.

Shall not be necessary to frame a charge.—These words indicate that in a summons-case there is a charge of an offence. Although it is not necessary to have a written charge in accordance with the provisions of Ss. 222, 223, *supra*, and the provision as to joinder of charges equally apply to summons-cases also, 41 C. 722 at 725. If commitment is made in a summons case it cannot be quashed as illegal, 1906 A.W.N. 28=3 A.L.J. 14. When a case is being tried as a warrant-case, if it is intended to proceed against the accused also for an offence triable as a summons case, that offence should also form part of the charge. Where therefore the accused who were summoned for an offence under Ss. 143 and 879, I.P.C., were tried on a charge drawn up only for an offence under S. 379, I.P.C., but were convicted of the offence under S. 143 the conviction was set aside as bad in law as the accused were misled in their defence by the absence of a charge under S. 143, I.P.C., 29 C. 481.

243. If the accused admits that he has committed the offence of which he is accused, his admission shall be recorded as nearly as possible in the words used by him; and, if he shows no sufficient cause why he should not be convicted, the Magistrate *may* convict him accordingly.

Conviction on admission of truth of accusation.

Amendment.—"Shall convict" has been altered into "may convict." This alteration gives the Magistrate a discretion which he did not possess before as to convicting an accused who pleads guilty in a summons-case, and the Court is thus able to refuse to accept a plea of guilty which it believes to be untrue. The Magistrate has an option now under this section similar to the one provided by Ss. 255 (2) and 271 (3), *infra*.

Admission shall be recorded as nearly as possible in the words used by him.—The plea of the accused has to be recorded at once by the Magistrate and not afterwards from rough notes taken from the Magistrate's memory, 15 M. 83, and it shall be recorded as nearly as possible in the words used by him so as to show whether the statement recorded by the Magistrate is really an admission by the accused that he has committed the offence charged. It is of the utmost importance that the terms of this section should be strictly complied with, because the accused's right of appeal depends on whether he has really pleaded guilty or not. It was no doubt for that reason that the Legislature required the exact words used by the accused in his plea to be as nearly as possible recorded, 1889 A.W.N. 81. To save all misapprehension and mistake, it is desirable that the plea of guilty should be recorded as far as possible in the words used by the accused, 5 Bom. L.R. 999. This section allows a conviction if the accused admits that he has committed the offence of which he is accused. But S. 204 *supra* says that a Magistrate taking cognizance of an offence in a case where summons should issue in the first instance, shall issue his summons for accused's attendance under form No. 1 in Sch. V; the person summoned is required to appear in person or by pleader. Of course the form cannot itself override any express provision of the Code. But in the absence of a clear provision that only accused's own plea should be accepted for the purpose of this section the Court must give due weight to the form of summons permitting appearance of the accused by pleader; moreover, S. 205, *supra*, permits a Magistrate to dispense with personal attendance of the accused and allow appearance by pleader whenever he issues a summons, and the words "or by pleader" in the form prescribed may have been inserted with reference to this provision. The Magistrate may also allow appearance by pleader even after the issue of summons. There is no sufficient ground for holding in spite of the fact that S. 312, *supra*, and this section speak of the accused only, that a pleader representing the accused may not make the necessary answers and plead 'guilty' or 'not guilty' on his behalf. This view is in accordance with provisions of the Summary Jurisdiction Acts XI and XII, *Fact*, Ch. 43, S. 14 on which the provisions of S. 242 and this section are based, 50 B. 250 where 14 Cr. L.J. 272—19 Ind. Cas. 314 is referred to. It is illegal for a Magistrate to decide a case in accordance with the statement of the father of an accused person consenting to the special oath of the complainant on Ganges water. Neither the accused's father or the complainant's son who was said to have been assaulted were parties to the case of assault before the Court and there is no provision of law and it is against common sense to decide on the special oath of the complainant, 28 Cr. L.J. 301—100 Ind. Cas. 381. When a Magistrate in a warrant-case without recording evidence called upon the accused to plead to the charge and convicted him on his own admission as under this section, *held* that the procedure was illegal and prejudiced the accused and the conviction was set aside, 29 M. 372. See 27 C.W.N. 923. This section applies to security proceedings also; the statement of the person expressing his willingness to furnish security should be duly recorded, otherwise the order passed is illegal, 17 M.L.J. 438.

May convict.—The alteration of "shall" into "may" is new and allows the Magistrate a discretion as the one allowed in the trial of Sessions cases by S. 271 (2), *infra*, and in the trial of warrant-cases by S. 255 (2) *infra*. By the amendment the Court is further empowered to refuse to accept a plea of guilty which is not accepted by the Court as true.

244. (1) *If the Magistrate does not convict the accused under the preceding section or if the accused does not make such admission, the Magistrate shall proceed to hear the complainant (if any), and take all such evidence as may be produced in support of the prosecution, and also to hear the accused and take all such evidence as he produces in his defence.*

Provided that the Magistrate shall not be bound to hear any person as complainant in any case in which the complaint has been made by a Court.

(2) The Magistrate may, if he thinks fit, on the application of the complainant or accused, issue a summons to any witness directing him to attend or to produce any document or other thing.

(3) The Magistrate may, before summoning any witness on such application, require that his reasonable expenses, incurred in attending for the purposes of the trial, be deposited in Court.

Amendment.—In sub-section (1) the words "if the Magistrate does not convict the accused under the preceding section" have been added and the proviso is also new, making it unnecessary to hear the complaint where a complain is made by a Court. In sub-section (2) the words "a summons to any witness directing him to attend or to produce" have been substituted for the words "process to compel the attendance of any witness or the production of," thus making it clear that a Magistrate is not bound to compel the attendance of a witness to give evidence on the application of the complainant. See 30 C. 121; 6 C.W.N. 513.

Shall proceed to hear complainant and take all such prosecution evidence.—Where a Special Act creates an offence within the definition of S. 4 (1) (c), *supra*, and nothing is said in the Act itself to regulate the manner of trying the offence, the offence is triable by virtue of S. 5, *supra*, according to the provisions of the Code and the trial must be held in accordance with this section by recording evidence and the magistrate cannot convict the accused upon the report of an Honorary Magistrate as to what accused had told him without any manner of investigation of the facts, 30 Cr. L.J. 517=115 Ind. Cas. 690. This section does not say that the complainant himself is to be examined but only says he shall be heard. Non-examination of the complainant will not vitiate proceedings, 21 Cr. L.J. 232=53 Ind. Cas. 204. When an accused does not admit the truth of the accusation against him, the Magistrate is bound under this section to hear the complainant and his witnesses in support of his complaint and also the accused and his witnesses in his defence, 6 W.R. (Cr) 75. It is the *prima facie* duty of the prosecution to call as witnesses all persons who must be able to give important information, and if they are not called sufficient explanation must be given for not doing so. If no satisfactory reasons are given, the Court may draw an inference adverse to the prosecution, 8 C. 121; 14 A. 521; 13 C. 235; 15 A. 6, but no such inference could be drawn as against the accused for not calling defence witnesses, 7 A. 904; 8 C. 121. Right to cross-examine is not expressly provided for in this section as in S. 208 (1), *supra*. When complainant's witnesses are summoned, a Magistrate is not justified in dismissing the complaint on a consideration of the statement of the complainant alone without examining his witnesses, 20 M. 368; Weir II, 305. Even when a complainant declined to be examined, it is the duty of the Court to proceed to take the evidence of the complainant's witnesses under S. 242, *supra*, before dismissing the complaint although a strong preliminary presumption against the truth of the complainant's case will arise from his contumacious refusal to allow himself to be examined, 23 Cr. L.J. 511=101 Ind. Cas. 695.

Hear accused and take all evidence he produces in his defence.—The Magistrate is bound to take down the evidence in open Court and he cannot rely on statements made to him out of Court, 14 B. 572. It is the duty of the accused to produce his witnesses on the day of trial, 14 W.R. (Cr.) 76. A Magistrate is bound to examine all the witnesses whom an accused person may produce for his defence, 13 W.R. (Cr.) 63; 18 A. 221; 4 M.H.C.R. Appx. 29; and a conviction had without such examination of witnesses is liable to be set aside, 4 B.L.R. Appx. 77=12 W.R. (Cr.) 77. No inference adverse to the accused ought to be drawn from his failure to call defence witnesses, 10 C. 130; 8 C. 121; Ratanlal 686; 7 A. 904.

Sub-section (1).—Under the old Code there was the phrase "compel the attendance of a witness," etc., but in the present Code the words used are "summon any witness directing him to attend," etc. Evidently now the Court cannot compel a witness to appear before it, if the witness refuses to appear, in which case he may be liable for disobedience of summons but the party is not entitled to ask the Court as a matter of right to compel the attendance of any witness who does not care to attend in obedience to summons. It is in the discretion of the Magistrate to issue fresh summons, but the Code does not compel him to issue fresh summons to a witness who has once been summoned, 27 Cr. L.J. 76=91 Ind. Cas. 252, where 30 C. 121 is distinguished and held to be no longer law. The new amendment which gives ample discretion to refuse to issue further process is already noted above. See 21 Cr. L.J. 335=55 Ind. Cas. 993. But a Magistrate has no such discretion to refuse to compel the attendance of a witness to whom he had already issued process, 30 C. 121.

Sub-section (3).—When the complainant fails to pay the necessary fee for summoning witnesses, the Magistrate cannot dismiss the case for default. He is bound to deal with the case on such evidence as he may have before him, 5 M. 160.

245. (1) If the Magistrate upon taking the evidence referred to in section 244 and such further evidence (if any, as he may, of his own motion, cause to be produced, and (if he thinks fit) examining the accused, finds the accused not guilty, he shall record an order of acquittal.

(2) *Where the Magistrate does not proceed in accordance with the provisions of section 349 or section 562, he shall if he finds the accused guilty, pass sentence upon him according to law.*

Amendment.—Sub-section (2) has been re-drafted. The words "unless he proceeds under S. 349 or S. 562" have been newly added.

If he thinks fit examining the accused.—The words "if he thinks fit" in this section do not necessarily mean more than that an accused can be acquitted without being examined. The language is similar to that used in Ss. 209 and 253 *infra*, but it has not quite the same purpose. The governing idea is that in summons-cases the matter shall be finally decided (save in the case under S. 249, *infra*). It should proceed to a conviction or acquittal, not merely end in a discharge. Apparently this section has been held to mean that an accused cannot be acquitted until he has been heard and after he has produced all his evidence. When the prosecution case breaks down hopelessly, the Magistrate can acquit the accused without taking defence evidence. An application under S. 488, *infra*, for maintenance is not a complaint of an offence as the neglect or refusal does not involve the question of any punishment to be awarded. That section is merely intended to enforce the legal obligation of the husband or father as the case may be in a summary manner. *Prima facie* this section does not apply. There is no accused in the case and his examination is therefore not necessary, 29 Cr. L.J. 1002=112 Ind. Cas. 218.

Shall record an order of acquittal.—An order of acquittal without a charge having been framed against an accused, is justified only in summons-cases by the operation of S. 248, *infra*, 24 Cr. L.J. 120=71 Ind. Cas. 248. It may be done also under S. 345, *infra* when there is a composition or when the Advocate-General withdraws the case under S. 333, *infra*. The term acquittal implies that there has been at least an inquiry to the extent required by S. 242, *supra*, 1891 A.W.N. 63. No acquittal can properly be recorded without examining the complainant and his witnesses, Ratanlal 539.

No order of discharge can be passed in a summons-case. The Magistrate is bound to record an order of acquittal, 24 C. 429, and an order of acquittal passed under this section will not operate as such with regard to an offence triable as a warrant-case, 1886 A.W.N. 260. If a Magistrate trying a summons-case, whatever procedure he adopts, finds no case is made out and let the accused go unconditionally he acquits him although he heads his order an order of discharge and mentions the section of the Code dealing with discharge, 8 M.L.T. 78= (1910) M.W.N. 414=11 Cr. L.J. 360=6 Ind. Cas. 385. A Magistrate has no power and no jurisdiction to record an order of acquittal under this section until he has heard the complainant and taken all the evidence that he produces in support of the prosecution and also heard the accused and taken all such evidence as he may produce, and an order of acquittal passed without complying with the provisions of law is not an acquittal within the meaning of the section and will be set aside, 18 A. 221 at 223. Again once a Magistrate issues process to complainant's witnesses he cannot acquit the accused under this section without examining them, 20 M. 388; 30 C. 121. A Sessions Judge has no power in a such a case to order further inquiry. The High Court cannot in revision convert an acquittal into a conviction, 8 M.L.T. 380.

Sub-section (2).—After the word "shall" the words "unless he proceeds under S. 349 or S. 562" have been newly added, S. 349 deals with a case in which a Magistrate cannot adequately punish; and S. 562 *infra* deals with the case of first offenders being released on probation of good conduct or on admonition. A finding of guilty must be followed by a sentence, 4 M.H.C.R. Appx. lxvi; 2 Bom. L.R. 611, unless the Magistrate acts under S. 562 *infra*. Every conviction must ordinarily be followed by a legal sentence. After the conviction of an accused person under the Municipal Act he cannot be warned and discharged as this is not a form or order that could legally be passed and is contrary to the provisions of this section. S. 562, *infra*, cannot apply to offences other than those punishable under the I.P.C., 52 B. 250.

Further Inquiry and revision.—The Sessions Judge or District Magistrate cannot order further inquiry under S. 436, *infra*, 8 M.L.T. 380, but the High Court in revision has power to direct a retrial in very exceptional cases, 15 M.L.J. 225, and generally without an order for re-trial no fresh complaint can be entertained, 22 Cr. L.J. 331=61 Ind. Cas. 59.

For form of warrant of commitment on a sentence of imprisonment or fine, see Sch. V, No. 29.

246. A Magistrate may, under section 243 or section 245, convict the accused of any offence triable under this Chapter which from the facts admitted or proved he appears to have committed, whatever may be the nature of the complaint or summons.

Finding not limited by complaint or summons.

This section does not mean that an accused in a summons-case can be convicted of an offence alleged to have been committed on a date to which reference has been made in the complaint or summons, 22 Cr. L.J. 559=62 Ind. Cas. 575. This section empowers a Magistrate to convict the accused in regard to any other offence *prima facie* established by the evidence adduced by the prosecution, but he is bound in such a case to proceed under S. 242, *supra*, and state the particulars of such offence to the accused so as to enable him to defend himself, 22 W.R. (Gr.) 40; where certain accused persons were summoned to answer a charge of criminal trespass, but the Magistrate convicted them under this section of the offence of

mischiefs and assault, it was objected that the Magistrate could not so convict the accused without re-opening the trial and following the procedure laid down in Ss. 213 and 214, *supra*, the High Court held that the conviction was legal, 36 C. 869. This section authorizes a Magistrate to convict an accused person of a non-cognizable offence like assault when he was sent by the police for trial under the City Municipal Act even without a formal complaint from the person assaulted when the police took action at the instance of the person assaulted and as a witness he evinced a desire that the accused should be proceeded against. S. 520 (c), *infra* also supports this view, 23 Bom. L.R. 231=27 Cr. L.J. 493=93 Ind. Cas. 896 following 36 C. 869. A conviction for an offence other than that shown in the complaint is illegal, 22 Cr. L.J. 331=61 Ind. Cas. 59.

247. If the summons has been issued on complaint, and upon the day appointed for the appearance of the accused, or any day subsequent thereto to which the hearing may be adjourned, the complainant does not appear the Magistrate shall, notwithstanding anything hereinbefore contained, acquit the accused, unless for some reason he thinks proper to adjourn the hearing of the case to some other day :

Non-appearance of complainant.

Provided that where the complainant is a public servant and his personal attendance is not required, the Magistrate may dispense with his attendance and proceed with the case.

Scope of the section.—This section lays down a general principle that a person charged with a summons-case offence is entitled to an acquittal if the complainant is absent without sufficient cause and there is no reason why the right should be denied when the Magistrate follows a particular procedure, 44 M.L.J. 119=17 L.W. 229. The Code contains no provision analogous to O. IX, r. 4, C.P.C., enabling the Court to set aside an order passed for default of appearance. Such default entails an acquittal which can only be reopened by the High Court, 52 M.L.J. 173=1927 M.W.N. 274=33 M.L.T. 203=28 Cr. L.J. 270=100 Ind. Cas. 233; when in a summons-case the complainant is absent the Magistrate is not entitled to strike off the complaint and such striking off is not the same as an acquittal nor can the Magistrate entertain a second complaint and acquit the accused as he cannot do so in a case which he had not tried and the most he could do on the second complaint would be to record an order of discharge, 10 Bom. L.R. 628=8 Cr. L.J. 133. This section merely authorizes a Magistrate to adjourn the case to enable the complainant to appear. It does not authorize him to dispense with the appearance of the complainant except when he is a public servant. In a summons-case where the complainant had gone to England and it was unfair to the accused to keep such a petty case pending till the complainant returned the Magistrate was right in acquitting the accused, 27 Cr. L.J. 1022=96 Ind. Cas. 878. Courts in the *Muffassal*, no doubt, take it as their right and privilege to sit at any time as they like, regardless of the convenience of the parties concerned. The parties being suitors before it do not boldly object to the prolonging of the Court hours or taking up of cases late in the day for fear of incurring the displeasure of the presiding officer of the Court. The Courts should not take advantage of the weakness of the parties, 29 Cr. L.J. 239=107 Ind. Cas. 827. This section lays down that if a summons has been issued on complaint and on a date to which the hearing is adjourned the complainant does not appear the Magistrate shall acquit the accused unless for some reason he thinks it proper to adjourn the hearing for some other day. The question is what is the legal consequence of the case not having been taken up on the day fixed for hearing at all. The right to an order of acquittal accrues to the accused upon two conditions and is dependent first on the absence of the complainant and secondly, on the Court not adjourning the case. If a case is not taken up at all it cannot be said that the second condition is fulfilled, for, there is no knowing in what way the Court's discretion would have been exercised if it had been taken up. To adopt any other view would result in

unnecessary hardship to the complainant and undue leniency to the accused. If therefore the complainant fails to appear on the date fixed for hearing and the Magistrate omits to take up the case, the accused is not entitled to an acquittal, 26 Cr. L.J. 1050=87 Ind. Cas. 970 where 23 Cr. L.J. 492=77 Ind. Cas. 892 is followed. A Magistrate is not bound to wait till the close of the day in the trial of a case. If the complainant is absent when the case is called on for hearing the Magistrate is justified in dealing with the case under this section and acquitting the accused. The presence of the complainant's vakil alone is not sufficient compliance with the requirements of the section. In criminal cases, unlike as in civil cases the presence of a party's vakil is not considered as the presence of the party. Except where the Court dispenses with the personal attendance of the accused and allows him to appear by pleader or agent his presence is essential. A complainant cannot be represented by a pleader in order to take away the jurisdiction of a Magistrate to proceed under this section. The object of the section is to prevent a complainant from being dilatory in the prosecution of the case and if he does not care to be present when the case is called on the accused is entitled to an acquittal unless the Magistrate chooses for reasons he thinks proper to adjourn the case, 49 M. 883 following 7 M. 213 and 356. This section is applicable only to a case where summons is issued to the accused on a complaint and not to a case taken, upon a police report. Appearance of the vakil for the complainant is not an appearance of the complainant within the meaning of this section, Weir II, 309. Where after the examination of the witnesses for the prosecution and the defence the Magistrate adjourned the case for argument for the purpose of the documentary and oral evidence being explained to him and on that adjourned date the complainant did not appear and the Magistrate dismissed the complaint and acquitted the accused under this section, it was held that the acquittal was proper, 18 C.W.N. 583=15 Cr. L.J. 731=22 Ind. Cas. 739. Where a case was called by mistake on a date not fixed for hearing and the complaint was dismissed and accused acquitted on account of the absence of the complainant under this section, and the Magistrate having found out the mistake on the date really fixed for hearing ignored the previous order wrongly passed, and proceeded with the case which ended in a conviction, it was held that the procedure of the Magistrate was proper and he had jurisdiction to ignore his previous order of acquittal which was a nullity, 47 C. 147 following Weir II, 307; 42 C. 363. When a party was summoned to appear on a particular day at a particular hour and "he appeared at that hour but the Court was not sitting then but sat only later on when the party was not present, it cannot be said that the party failed to appear within the meaning of this section, 25 L.W. 358=28 Cr. L.J. 208 (2)=99 Ind. Cas. 944 (2). An order of acquittal passed owing to the non-appearance of the complainant on the date fixed for disposal of the case is wholly without jurisdiction when to the knowledge of the Magistrate the complainant had died before such date, and such an order is no bar to the Magistrate taking cognizance of a fresh complaint made by another servant of the master, for mischief to whose property the deceased had preferred the first complaint, 18 C.W.N. 1211=13 Cr. L.J. 726=26 Ind. Cas. 174. Where a Magistrate adjourned a case for pronouncing judgment and on the adjourned date acquitted the accused on account of the absence of complainant to hear judgment, it was held that the case did not fall within the provisions of this section as the hearing of the case had already been concluded, 46 C. 867. When in a compoundable offence, after the death of the complainant, his nephew applied for substitution of his name in his place and the Magistrate directed the case to be proceeded with on the ground that the accused had been guilty of contempt of the process of the Court, it was held that the Magistrate ought to have passed an order of acquittal under this section on failure of complainant to appear at the hearing of the case unless he thinks proper to adjourn the case to some other day, and the ground on which the Magistrate chose to proceed with the case was not valid, and the High Court acquitted the accused, 19 C.W.N. 834=16 Cr. L.J. 322=28 Ind. Cas. 658. Death of complainant operates as a statutory acquittal. Reasons for adjourning a case apply only for making the complainant to appear and cannot possibly apply when he is dead and the Magistrate had no jurisdiction to proceed with the case after the death of the complainant, 51 M. 339. See 24 C.W.N. 199. But see 20 C.W.N. 862 where it was held

that this section was primarily intended to apply to a complainant who is alive and does not appear. The closing words of the first paragraph seem to suggest that the case should be adjourned in order to enable the complainant to appear. When a case was disposed of under this section, the complainant and the accused both being absent, the order under this section operates as a bar to further proceedings. An acquittal under this section acts as a bar to further proceedings equally with an acquittal on the merits under S. 403, 43 A. 58. The provisions of S. 403 *infra* that a fresh trial will not be barred unless the accused has in the first case been "tried" does not limit the effect of an order of acquittal under this section, 34 M. 253, where 4 C.W.N. 335 and 7 C.W.N. 711 and 493 followed; 40 M. 976, followed in 49 C.L.J. 119 at 121=33 C.W.N. 260, See also 31 Bom. L.R. 795. An order of acquittal under this section on a date other than the date fixed for hearing is no order at all and is a nullity, 42 C. 365; Weir II, 307; under this section the Magistrate is given a discretion to acquit the accused in the absence of the complainant. But mere absence of the complainant cannot result in the acquittal of the accused without the Magistrate passing an order in the exercise of that discretion, 23 Cr. L.J. 492=77 Ind. Cas. 892. When a Magistrate acting under this section dismisses a summons-case on account of the non appearance of the complainant under S. 203, *supra*, the effect of his order is to bar all subsequent proceedings on the same complaint or based on the same fact until his order is set aside by a competent authority. 3 C.W.N. 760 On account of the absence of the complainant the accused who was charged with mischief was acquitted but on the complainant's motion the District Magistrate revived the complaint and directed that the accused should be proceeded against for theft, it was held the acquittal on the charge of mischief was a bar under S. 403, *infra*, to his being put on his trial again on the same facts for theft and that the order of the District Magistrate was illegal, 37 C.L.J. 253=25 Cr. L.J. 149=76 Ind. Cas. 293. In a case in which the complainant being absent, the Magistrate acquitted the accused under this section, it subsequently transpired that the absence of the complainant had been procured by the fraud of the accused who had him arrested and kept in custody on a false charge, held that the High Court as a Court of Revision will not on the District Magistrate's reference under S. 493 *infra* set aside the acquittal, as an appeal lay from the order of acquittal, and no appeal having been preferred by the Government no provision is made in the Code for the Court which passed an order of acquittal under this section to vacate its order, even though such order was obtained by a fraud practised on the Court by the accused, 38 M. 1028, followed in 52 M.L.J. 173=1927 M.W.N. 275=38 M.L.T. 203=28 Cr. L.J. 270=100 Ind. Cas. 238. In the case of cognizable offences where a complainant and a complaint are not necessary, the death of the injured person makes no difference to the criminal proceedings which are a matter for the State and which are undertaken by the Government. But even in the case of non-cognizable offences such as, bribery, the Code does not intend to confine prosecution to persons directly injured. The section was intended to apply to the case of a complainant who is alive but does not appear in Court. In the case of a non-cognizable offence instituted upon complaint the maxim "*actio personalis moritur cum persona*" does not apply and the trying Magistrate has a discretion in proper cases to allow a complainant to continue by a proper and fit complainant if the latter is willing. Courts should always be on their guard against needless harassment of an accused by substituting a complainant who is not a fit person, 28 Bom. L. R. 288=27 Cr. L.J. 491=93 Ind. Cas. 891 This section is not applicable to proceedings under S. 107, *supra*, as no summons is issued and no accused in the case and the proper order to pass when complainant and his witnesses are absent is one of discharge and not an acquittal under this section, 31 C.W.N. 335=43 C.L.J. 211=28 Cr. L.J. 479=101 Ind. Cas. 607.

Upon the day appointed for the appearance of the accused.—It is to be noticed that the section does not say "upon the day on which the accused appears," but only "the day appointed for the appearance of the accused" and if it had been intended that the appearance of the accused to answer the charge was necessary, there is no reason why the Legislature should not have said so, therefore an acquittal under this section of an accused on whom no summons to appear and answer the charge is served bars a fresh trial on the same facts under S. 403, *infra*, 31 Bom. L.R. 793 at 799 following 40 M. 976 and 34 M. 253.

Unless he thinks proper to adjourn—This section gives a Magistrate a discretion to adjourn the hearing when complainant is absent and examination of witnesses on any such day during complainant's absence does not necessarily vitiate proceedings, 24 C.W.N. 199. A Court is not bound to wait till the Court is about to close for the day, 7 M. 353. See also the recent decisions of the Madras High Court, 49 M. 883, *followed*, in 51 M.L.J. 730=24 L.W. 713. See also 52 M.L.J. 173=33 M.L.T. 203=25 Cr. L.J. 270=100 Ind. Cas. 238. But the Court is bound to use some discretion when a complainant was prevented by heavy floods which cut off all communications; and in such a case the acquittal will be an improper exercise of discretion, 24 W.R. (Cr.) 54. If the complainant is dead he could not appear before the Magistrate and therefore the words "unless for some reason he thinks proper, etc." cannot apply to the case of a complainant who is dead and the Magistrate should not have, under the circumstances, proceeded with the inquiry but acquitted the accused, 51 M. 339 where 19 C.W.N. 334 is *referred* to; but the High Court did interfere in revision where the Magistrate after the prosecution was closed had posted the case for the defence at an unusual hour in the night and acquitted the accused when he found the complainant absent when the case was called, 27 Cr. L.J. 1391=93 Ind. Cas. 607 distinguishing the case in 38 M. 1028.

Further inquiry.—A District Magistrate or Sessions Judge cannot direct further inquiry or re-hear a case dealt with under this section, 7 M. 213; Weir II, 308, 7 C.W.N. 711 and 493; 4 C.W.N. 346. An acquittal of an offence arising out of a certain set of facts under a wrong section will prevent a further inquiry being directed into any offence disclosed on the same facts until that acquittal is set aside, 25 Cr. L.J. 794=81 Ind. Cas. 314; see also 25 Cr. L.J. 359=77 Ind. Cas. 295.

Revision.—The High Court will not ordinarily interfere in revision with an acquittal as the local Government could appeal under B. 417, *infra*, if the acquittal is wrong or perverse, but this rule does not properly apply to an acquittal under this section and in any case the rule will not preclude interference by the High Court when the acquittal is the result of an improper clutching at jurisdiction, 25 Cr. L.J. 793=81 Ind. Cas. 314. See in this connection the decision in 38 M. 1028 where the High Court refused to interfere in revision when moved by the District Magistrate even in a case where a trick was played upon the Court by the accused getting the complainant arrested on a charge of nuisance and thereby getting an acquittal under this section. The only remedy open when an order of acquittal has been passed under this section is to have it set aside by the High Court. A Magistrate has no jurisdiction to set aside the order of acquittal passed by him and revive the proceedings against the accused, as the order under this section operates as a bar to revival, 33 C.L.J. 196=24 Cr. L.J. 716=74 Ind. Cas. 540.

248. If a complainant, at any time before a final order is passed

in any case under this Chapter, satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw his complaint, the Magistrate may permit him to withdraw the same, and shall thereupon acquit the accused

Scope of the section.—This section deals with the withdrawal of complaint in some cases, 5 M. 316; 27 B. 369 at 372. This section has no application to warrant cases. Where therefore the offence charged is a warrant case, a Magistrate ought to proceed with the inquiry or trial in spite of the withdrawal by the complainant, if he finds the elements of an offence are made out, 3 C.W.N. 518; 13 B. 600; 37 B. 260. This section contemplates the withdrawal of the complaint, that is the complaint as a whole. When the complaint is against two accused and the withdrawal petition mentioned only one of the accused, it is a withdrawal of the whole complaint and consequently a withdrawal of the complaint in respect of both the accused [1921] Pat. 144. This view was based on the analogy of the decision in 7 C.W.N. 176, which held that the compounding of an offence with regard to

one is a compounding with regard to all the accused, but this view was dissented from in 41 M. 323 and 1 Lah. 162. The analogy will not hold good now as the amendment in sub-section (6) of S. 345 is in accordance with the view in 41 M. 323 and opposed to the ruling in 7 C.W.N. 176. This section enables a complainant at any time before a final order is passed by the Magistrate to apply for a withdrawal of a case but there is no absolute power of withdrawal under this section and before a withdrawal can be permitted, there must be sufficient grounds to the satisfaction of the Magistrate, 53 C. 631 at 636. This section is intended to apply to cases instituted upon complaint as defined in S. 4 (1) (h), *supra*, while S. 249, *infra* is intended to apply to cases instituted otherwise than on complaint. When a Civil Court which made a complaint for offences under Ss. 183 and 185, I.P.C., against a judgment debtor for disobedience of an injunction issued by it being satisfied that there was a disobedience, requests that the complaint may be withdrawn the Criminal Court to which the complaint was made will not ordinarily be justified in refusing to allow the withdrawal under this section, 27 Cr. L.J. 1247 (2)=98 Ind. Cas. 63 (2). When a Magistrate took cognizance of the case upon a police-report which was no doubt based on a complaint made to them, the person who complained to the police was not entitled under this section to withdraw charges, and the order of the Magistrate permitting the case to be withdrawn is bad in law, 23 M. 626. It is not competent for a Municipal Council to withdraw a complaint under this section when the complaint was preferred by a person in virtue of an express authorization by the Municipal Secretary to whom the powers of the Chairman were delegated under the District Municipalities Act, 27 M L.J. 617=15 Cr.L.J. 299=23 Ind.Cas. 567. When a complaint is withdrawn under this section it is a withdrawal of the whole complaint even though the withdrawal is against one of the accused. It is a question of fact whether a withdrawal is in whole or in part. The offence alleged to have been committed, however, numerous the offenders be, is one and the Code does not contemplate the partial withdrawal of a complaint or withdrawal against some of the offenders only, in spite of the fact that the complainant may now compound against some of the accused under S. 345 (c), *infra* and continue the case against the remaining accused, 5 Lah. 239. The effect of a withdrawal of a compoundable charge tried with another which was non-compoundable is that the Magistrate was entitled to acquit the accused under this section treating the petition of compromise as one of withdrawal of that charge, 42 A. 202.

At any time before a final order is passed.—These words do not apply to a time before the accused has been ordered to appear inasmuch as S. 242, *supra*, applicable to the trial of summons-cases, says that "when the accused person appears or is brought before the Magistrate the particulars of the offence of which he is accused shall be stated to him, and he shall be asked if he has any cause to show why he should not be convicted." So an order on the charge-sheet that the persons proceeded against were acquitted cannot be availed of by persons against whom no process has been issued, 36 M. 315.

Satisfies the Magistrate that there are sufficient grounds for permitting him to withdraw.—As the withdrawal of a complaint unlike the composition of an offence is a unilateral act, it is quite intelligible why the Legislature should have imposed the necessity of obtaining the permission of the Magistrate in the case of a withdrawal of the complaint. If such a restriction is not imposed a person may be harassed by a purely vexatious criminal proceeding in which a complainant having put the accused person to much inconvenience and degradation might then calmly withdraw the complaint. To prevent the abuse of the process of the Court this restriction of obtaining the permission of the Court is imposed, 1888 P.R. (Cr. J.) 19. See also 20 C.W.N. 1209. It is for the Magistrate to be satisfied that there are sufficient grounds for permitting the complainant to withdraw the complaint. Permitting the withdrawal is therefore a judicial act, the exercise of which is vested in the Magistrate by this section and the police have no authority to interfere in the matter, Ratanlal 91. The Magistrate is entitled in proper cases to refuse the application for withdrawal made by the complainant. For example in 53 C. 631 it was held that the Calcutta Corporation had no absolute power to withdraw a complaint under S. 537, Cal. Mun. Act which is only an enabling provision and that before the withdrawal can be

permitted the Magistrate must be satisfied that there are sufficient grounds for doing so and the High Court refused to interfere with the order of the Magistrate refusing permission.

Distinction between withdrawal and compounding of an offence.—An act of compounding is different from the withdrawal of a complaint made to a Magistrate. A withdrawal must be an intimation to the Magistrate holding the trial, and is permissible only in a summons-case, and the complainant is required in such a case to satisfy the Magistrate that there are sufficient grounds for permitting to withdraw. The law does not provide for the withdrawal of a warrant case. The compounding of an offence signifies that the person against whom the offence has been committed, has received some gratification not necessarily of a pecuniary character to act as an inducement for his desiring to abstain from a prosecution, and the law laid down in S. 345 of the Code provides that if the offence is compoundable, the composition shall have the effect of an acquittal, 21 C. 103 at 112-113. 'Compromise' is a word which in itself contemplates an agreement to which there are two parties, but 'withdrawal' has no such meaning. A case is compromised if with the consent of the accused it is withdrawn. A case is withdrawn under this section not with the consent of the accused but in its stead this section lays down that permission of the Magistrate is necessary, 20 C.W.N. 1209. See also 1888 P.R. (Cr. J.) 19. The power of withdrawal is confined to the complainant who has preferred a complaint. Where the Magistrate took cognizance of the case on a police-report, the informant to the police cannot be allowed to withdraw, 23 M. 826, and once a Magistrate has allowed a complaint to be withdrawn, a Magistrate has no jurisdiction to revive the case against the accused, 25 W.R. (Cr.) 64. There are three contingencies under which a person can be acquitted without a charge having been framed—(1) in a summons-case under S. 243; (2) under S. 345 on a valid compounding of the offence; (3) under S. 333 when the Advocate-General withdraws from the prosecution, 24 Cr. L.J. 120=71 Ind. Cas. 248. In a warrant-case with regard to a non-compoundable offence it is not competent to a Magistrate on a private complainant's offering to withdraw from the prosecution to enter an order of acquittal, 37 B. 369. When an acquittal results from a withdrawal of a complaint, compensation can be awarded under this section, such award of compensation is illegal only when the acquittal is a statutory acquittal under sub-section (6) of S. 345, *infra*, owing to the composition of an offence which can be validly compounded under S. 345, *infra*, Ratanlal 957; 11 Cr. L.J. 638=8 Ind. Cas. 387. See also Ratanlal 760.

249. In any case instituted otherwise than upon complaint, a

Presidency Magistrate, a Magistrate of the first class, or, with the previous sanction of the District Magistrate, any other Magistrate, may, for reasons to be recorded by him, stop the proceedings at any

Power to stop proceedings when no complainant.

stage without pronouncing any judgment, either of acquittal or conviction, and may thereupon release the accused.

Scope of the section.—This section applies only to cases instituted otherwise than on a complaint, 21 Cr. L.J. 184=54 Ind. Cas. 888; 13 Cr. L.J. 860=17 Ind. Cas. 796, and S. 247, *supra*, applies to such cases, instituted on complaint, 6 Pat. 243.

Stay of proceedings at any stage.—The order of the Magistrate stopping proceedings without pronouncing a judgment of acquittal or conviction and releasing the accused is no bar to further proceedings in accordance with law. Such an order is not an acquittal within S. 403, *infra*. A District Magistrate purporting to act under S. 436, *infra*, cannot set aside such an order as his powers under that section are confined to a complaint dismissed under S. 203 or S. 201 (3), *supra*, or where there has been an order of discharge under S. 253 or S. 259 *infra*. An order under this section does not fall under any of those sections, and cannot be dealt with by the District Magistrate in revision 13 Cr. L.J. 880=17 Ind. Cas. 796.

Frivolous Accusations in Summons and Warrant-cases.

250. (1) If, in any case instituted upon complaint or upon information given to a police-officer or to a Magistrate, *one or more persons* is or are accused before a Magistrate of any offence triable by a Magistrate and the Magistrate by whom the case is heard discharges or acquits *all or any of the accused*, and is of opinion that the accusation, against them or any of them was *false and* either frivolous or vexatious, the Magistrate may, by his order of discharge or acquittal, if the person upon whose complaint or information the accusation was made *is present*, call upon him *forthwith* to show cause why he should not pay compensation to such accused or to each or any of such accused when there are more than one, or, *if such person is not present direct the issue of a summons to him to appear and show cause as aforesaid.*

(2) The Magistrate shall record and consider any cause which such complainant or informant may show, and if he is satisfied that the accusation was *false* and either frivolous or vexatious may, for reasons to be recorded, direct that compensation to such amount *not exceeding one hundred rupees*, or, *if the Magistrate is a Magistrate of the third class, not exceeding fifty rupees*, as he may determine, be paid by such complainant or informant to the accused *or to each or any of them.*

(2A) *The Magistrate may, by the order directing payment of the compensation under sub-section (2), further order that, in default of payment, the person ordered to pay such compensation shall suffer simple imprisonment for a period not exceeding thirty days.*

(2B) *When any person is imprisoned under sub-section (2A), the provisions of sections 68 and 69 of the Indian Penal Code shall, so far as may be, apply,*

(2C) *No person who has been directed to pay compensation under this section shall, by reason of such order, be exempted from any civil or criminal liability in respect of the complaint made or information given by him :*

Provided that any amount paid to an accused person under this section shall be taken into account in awarding compensation to such person in any subsequent civil suit relating to the same matter.

(3) A complainant or informant who has been ordered under sub-section (2) by a Magistrate of the second or third class to pay compensation or has been so ordered by any other Magistrate to pay compensation exceeding fifty rupees may appeal from the order, in so far as the order relates to payment of the compensation, as if such complainant or informant had been convicted on a trial held by such Magistrate.

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(2C) *No person who has been directed to pay compensation under this section shall, by reason of such order, be exempted from any civil or criminal liability in respect of the complaint made or information given by him :*

Provided that any amount paid to an accused person under this section shall be taken into account in awarding compensation to such person in any subsequent civil suit relating to the same matter.

(3) *A complainant or informant who has been ordered under sub-section (2) by a Magistrate of the second or third class to pay compensation or has been so ordered by any other Magistrate to pay compensation exceeding fifty rupees may appeal from the order, in so far as the order relates to payment of the compensation, as if such complainant or informant had been convicted on a trial held by such*

(4) Where an order for payment of compensation to an accused person is made in a case which is subject to appeal under sub-section (3), the compensation shall not be paid to him before the period allowed for the presentation of the appeal has elapsed or, if an appeal is presented before the appeal has been decided *and where such order is made in a case which is not so subject to appeal, the compensation shall not be paid before the expiration of one month from the date of the order.*

Extent of amendment.—This section has been partly re-drafted. The amount awardable is raised to rupees one hundred unless the Magistrate is a third-class Magistrate who can award only rupees fifty. Imprisonment in default of payment is to be for a period not exceeding thirty days and the order awarding compensation may now specify the same, and the provisions of Ss. 69 and 70, I.P.C., are made applicable to such imprisonment. This section is made applicable to false, frivolous or vexatious accusations; (1) for the purpose of recovery and imprisonment in default of payment, the compensation will be treated in all respects as a fine; (2) the procedure in awarding compensation has been clearly laid down by, directing that a Magistrate in his order of discharge or acquittal may call upon the complainant to show cause why he should not pay compensation, and he shall then *consider and record any cause shown and pass such orders as he sees fit.* As the section is now worded, the order to pay compensation is part of the order of discharge or acquittal and the recording and consideration of objections is to precede such order. The procedure now adopted is more logical. An appeal is now also provided in cases where a Magistrate other than a second or third class Magistrate awards more than fifty rupees as compensation.

Scope and object of the section.—This section is a penal provision and must be construed strictly. There is, therefore, no authority for introducing into it words which would extend the liability to pay compensation to any person beyond the actual complainant or person who gives the information on which the case is initiated. The word 'information' as used in this section is limited to the information given and entered in the cognizable register under S. 154, *supra*. A person who abets the giving of information or a person who gives information on which the information is recorded under S. 154, *supra*, or one who appears afterwards in the case is not within the section. A wide construction of the section would enable Magistrates to order compensation to be paid by persons not contemplated by the section, 21 Cr. L.J. 49=55 Ind. Cas. 401; 20 Cr. L.J. 100=48 Ind. Cas. 980. The provisions laid down herein should be strictly followed, 30 Cr. L.J. 438=115 Ind. Cas. 334. The section applies to proceedings under this and following Chapters including summary trial, 11 M. 142. The object of the section is not to punish a complainant, but, by a summary order, to award *some compensation* to the person against whom a frivolous or vexatious accusation is brought, leaving him to obtain further redress against the complainant, if he seeks for it by a regular suit or criminal prosecution, 30 Cr. L.J. 123 (F.B.) at 129; 16 Cr. L.J. 92=26 Ind. Cas. 1004; 1881 A.W.N. 167. The principle of giving compensation is to recompense by way of damages the party who has been vexatiously dragged before a Criminal Court, 38 M. 1091 at 1033; under this section compensation can be awarded only against a complainant. It does not provide for the responsibility of a next friend or guardian who cannot be ordered to pay compensation, 13 Cr. L.J. 136=13 Ind. Cas. 824. The compensation which the Court is empowered to award under this section is not a fine but is in the nature of damages for malicious prosecution although it is made recoverable in a summary manner as if it were a fine, 26 M. 127. Proceedings under Chapter VIII for taking security are not accusations of an offence within this section enabling the Magistrate to award compensation, 20 A.L.J. 624; 36 A. 382; 15 A. 365; 7 A.L.J. 743; 25 B. 48. So also maintenance proceedings do not come within the provisions of this section, 16 M. 234; 6 M.L.T. 261. There is nothing illegal for a Magistrate to proceed simultaneously under S. 470, *infra*, and this section. There is no conflict between the two sections as the object of this section is to give some compensation to the accused who had been harassed by a false,

and frivolous or vexatious complaint, whereas proceedings under S. 476, *infra*, are taken on grounds of public policy to punish complainants for making a false charge, 10 Sind L.R. 162 7 Sind L.R. 10; see also 29 C. 479; 21 M. 237; 3 C. 123 (F.B.); 15 Bom. L.R. 49, 1901 P.R. (Cr.J.) 6. If a false charge is of such a nature that a prosecution is necessary on grounds of public policy, it may be well for the Magistrate to act under S. 476, *infra*, but if the charge is one which does not render it necessary on grounds of public policy that a prosecution should be started a Magistrate may award compensation under this section and he cannot be said to have exercised his jurisdiction wrongly, 27 M. 59. Although a Magistrate who makes a complaint of Court in writing under S. 476, *infra*, is not debarred from granting compensation it may not be an exercise of proper discretion, 26 A. 542; 37 B. 376; 21 M. 237 dissenting from 22 C. 586. This is a penal section and should be construed strictly, 14 Cr. L.J. 437= 20 Ind. Cas 597; but this section does not warrant an order against a person who only instigates the giving of false information but does not himself make the complaint or give information. There is no authority for introducing into it words which would extend the liability beyond the actual complainant or person who gives the information on which the case is instituted, 20 Cr. L.J. 100=43 Ind. Cas. 930. A Magistrate cannot act under this section when the offence has been lawfully compounded by the parties, 11 Cr. L.J. 638= 8 Ind. Cas 387. To award compensation the Magistrate himself is to discharge or acquit the accused, 16 Cr. L.J. 92=26 Ind. Cas 1004.

Any case instituted upon complaint or information given to a police-officer or Magistrate — '*Complaint as defined in this Code*' was the expression found in this section before the recent revision of the Code. Now the words "*as defined in this Code*" are omitted. When a certain decree-holder applied for a complaint by Court to prosecute his judgment-debtor for obstructing the Court Bailiff in executing a warrant of attachment issued by the Court, and the Court when refusing the same passed an order under S. 476 *infra*, sending the judgment-debtor to the nearest first class Magistrate for trial who in discharging the accused awarded compensation against the decree-holder, it was held that the order for compensation was bad, as the accusation was not made upon the complaint or information of the decree-holder and complaint cannot include the deposition made during the course of the trial, 13 Bom. L.R. 1166. This section has no application to a case instituted on a police report, 21 C. 579; 7 C.W.N. 206; 5 C.W.N. 370; 7 M. 563; 6 A. 96; 22 B. 934. See also 21 M.L.J. 844=10 M.L.T. 191. This section is not applicable to cases under Ch. VIII of the Code relating to security proceedings. The provisions therein contained are aimed at prevention of and are not consequent upon the commission of specified offence. See also 3 Cr. L. Rev. 410=12 A.L.J. 506, where it was held that an order awarding compensation against a person laying information with a view to start proceedings under S. 107 *supra* was not proper and was set aside. A police-officer in a non-cognizable case may initiate proceedings by laying information before a Magistrate just like any other complainant, and in such a case the information which he lays will be a complaint within this section and compensation can be awarded against such police-officer if the information was found to be vexatious, 26 B. 450 (F.B.) overruling 22 B. 934. See also 6 A. 96, where it was held that a case instituted by the police on a complaint made to them is not one instituted upon complaint under this section. But see 24 A.L.J. 221=27 Cr. L.J. 702=34 Ind. Cas. 884, where it was held that a person who gave information to the police upon which proceedings were started can be dealt with under this section and he cannot be heard to say he was merely an informant and not a real complainant. This section refers to information given to the police and not to information which led to information being given to the police. If A tells B and B tells C and C tells the police; A cannot be asked to pay compensation under this section, 1929 M.W.N. 785 distinguishing (1913) M.W.N. 803. A person who complains to a Village Magistrate of an offence knowing that the latter must in the ordinary course of his duty report the substance of the complaint to the police, gives information to the police just as effectively as if he went in person to the police station and if the police charge the case, it is instituted on information given to police-officer within the section. A comparison of the opening words of this section with S. 190, *supra*, will show that they closely correspond and that the former are intended to cover all the three methods marked in S. 190 (a), (b) and (c) in which a Magistrate may

take cognizance of a case, with the single exception "of his own knowledge or suspicion" which would be inappropriate to this section. It is difficult to understand that a person who chooses to institute a frivolous or vexatious charge in one way should be less liable to pay compensation than one instituting it in another, seeing that all are equally effective methods of inducing the Criminal Courts to take action, 39 M. 1006 *dissenting from*, 22 M.L.J. 138. The same view was taken in 4 Cr. L. Rev. 183, where it was held that information to the Village Magistrate was information to a police-officer within the meaning of this section, and a Magistrate was entitled to act under this section by awarding compensation to the accused. Where a Station-House officer prepared a charge-sheet and presented it to a Magistrate on the strength of a sanction granted to prosecute a person by the Assistant Superintendent of Police for an offence under S. 211, I.P.O., and the Magistrate discharged the accused and awarded compensation against the constable under this section, it was held that the constable was not in such circumstances the person upon whose complaint or information the accusation was made, and therefore the compensation order was illegal, 21 M.L.J. 834=10 M.L.T. 191=12 Cr. L.J. 482=12 Ind. Cas. 90. See also *Weir II*, 318 where the order for compensation against a public servant who acted merely on the information of his official superior was held bad. Information contemplated by this section is limited to information given and entered in the cognizable register under S. 154, *supra*, 21 Cr. L.J. 49=54 Ind. Cas. 401. 'Information to a police officer' will include not only a case in which the police were originally put in motion but also a case where subsequent information is given leading to the accusation of others during police investigation of the case, 14 C.W.N. 326=5 Ind. Cas. 693. A statement made by a person at a police inquiry which results in the institution of criminal proceedings against another is not a complaint within this section and the institution of the proceedings is not his complaint or information given by him but is a result of the police inquiry, 17 Cr. L.J. 336=35 Ind. Cas. 512. If a person makes a report to the police which is found by the Magistrate to be false, frivolous or vexatious the Magistrate can direct the complainant to pay compensation under this section, 23 A.L.J. 1054=27 Cr. L.J. 35=91 Ind. Cas. 67 where 1 Pat. L.J. 106 is *referred to*. This section has no application to a case instituted upon a police-report or on information given by a police-officer, 21 C. 979; 5 C.W.N. 370; 7 C.W.N. 206. In 39 M. 1006 the Court was inclined to take the view that the term "Magistrate" occurring in this section included a Village Magistrate, but the point was not actually decided, although the decision in 25 M. 667 which took a different view was *disapproved* on the strength of the latter Full Bench ruling in 32 M. 238. Under this section a guardian or next friend of a minor complainant cannot be ordered to pay compensation to accused, 13 Cr.L.J. 136=13 Ind. Cas. 824. The report of an excise officer is a complaint falling within S. 4 (1) (h), *supra*, and it is only a police report for the purposes of S. 190, *supra*, and not the section and so an order to pay compensation can be passed against the excise officer who makes the complaint acting on the information given to him by an informer. Even if the report is not a complaint, it is information given to a Magistrate and the officer is the person on whose information the accusation was made to make the section applicable 54 C. 371.

Any offence triable by a Magistrate.—An order for compensation can be passed not only in summons-cases but also in warrant cases, 28 Cr. L.J. 450=101 Ind. Cas. 482. It must be an offence first, 43 B. 463; 15 A. 365. Offence need not necessarily be under the Indian Penal Code, 4 N.W.P.H.C.R. 94; 1872 P.R. (Cr. J.) 11. The person must have been accused before a Magistrate of an offence, 25 B. 48. See S. 4 (1) (c) for definition of an offence. Proceedings under Chapter VIII for taking security instituted on the information given by a private person is not an accusation of an offence, and therefore the provisions of this section are inapplicable to such a case, 45 A. 363; 36 A. 382; 15 A. 365; 7 A.L.J. 749; 25 B. 48; 24 Cr. L.J. 228=71 Ind. Cas. 692; 45 A. 363; 1903 P.L.R. (Cr.J.) 9 at p. 32. Where a complaint is filed by a person to initiate security proceedings against another under S. 107, *supra*, but the Court chooses to regard it as one falling under S. 106, I.P.O., and ultimately dismisses it, it has no jurisdiction to act under this section by awarding compensation even though the accused expressed his willingness to furnish security, it can never be said that the complaint was false, frivolous or vexatious, 49 A. 750

following 45 A. 363, or to maintenance proceedings under S. 489 *infra*, 16 M. 234; 6 M.L.T. 261=4 Ind. Cas. 1046. Nor can it be a case of mere breach of contract under S. 2 (1st part) of Act XIII of 1859 (Breach of Contract), 4 C.W.N. 253. A complaint under S. 28 of the Bombay Public Conveyances Act is not a complaint in respect of an offence within the meaning of this section, although there is a summary remedy provided for the recovery of the legal fare of a public conveyance and so the Magistrate is not entitled to award compensation under this section, 22 Bom L.R. 193=21 Cr. L.J. 390=55 Ind. Cas. 860; 44 B. 463. The object of the Legislature in enacting this provision was to exclude offences of a grave nature from the provisions of this section and the words *triable by a Magistrate* mean triable under S. 28, *supra*, by a Magistrate and the cases provided by this section are those specified in the 8th column of the 2nd Sch. as triable by a Magistrate. Where the 8th column shows that an offence say under S. 436, I.P.C., is triable by a Court of Session, a District Magistrate not empowered under S. 30, *supra*, cannot pass an order under this section awarding compensation. 'Triable by a Magistrate' means ordinarily triable by a Magistrate as distinguished from the case ordinarily triable by the Court of Session exclusively, 1902 P.L.R. (Cr. J.) 139 at p. 602. Therefore a Magistrate holding a preliminary inquiry into a case triable exclusively by the Court of Session is not competent to act under this section when he discharges the accused, Weir II, 315; 20 Cr. L.J. 141=43 Ind. Cas. 173; 40 A. 615; 25 A.L.J. 818=23 Cr. L.J. 933=105 Ind. Cas. 507 where 40 A. 615 is followed; 19 Bom. L.R. 60=18 Cr. L.J. 463=39 Ind. Cas. 303. Where in a complaint filed, the offence disclosed was one of dacoity not triable by a Magistrate that will not oust the jurisdiction of the Magistrate, to make an order under this section if the Magistrate, after a preliminary inquiry issued process for an offence triable by him. To restrict the operation of this section to cases in which the section referred to in the complaint was an offence triable by a Magistrate would seriously diminish the usefulness of this section and enable complainants to evade its provision by intentionally referring to sections triable exclusively by a Court of Session. In filing a complaint, the complainant must be deemed to make an accusation which includes not only the offence specifically referred to, but also any offence which the facts disclosed in the complaint considered in the light of such inquiry as the Magistrate considers necessarily disclosed, 26 Cr.L.J. 265=84 Ind. Cas. 329. But when the complaint is for offences some of which are triable exclusively by the Magistrate and some by the Sessions Court and the accused after trial was discharged of all the offences, it was held that no order for compensation could be passed even when the accused was discharged under S. 253, *infra*, 48 A. 166 followed in 28 Cr. L.J. 450=101 Ind. Cas. 482. Where a Magistrate tries an accused person for an offence within his jurisdiction when the offence disclosed was one exclusively triable by a Court of Session and discharges the accused, he is competent to award compensation to the accused under this section, 43 M. 29, 23 Cr. L.J. 633=103 Ind. Cas. 910, but see 20 A.L.J. 433 and 23 Cr. L.J. 289=66 Ind. Cas. 513. The provisions of this section are applicable to summons-cases tried summarily by virtue of S. 262 *infra*, and compensation may be awarded, 11 M. 142. A Magistrate who has no jurisdiction to try a charge and who inquires into the charge and discharges the accused cannot award compensation, 9 Cr. L. J. 502=2 Ind. Cas. 159.

The Magistrate before whom case was heard.—The word "heard" was substituted for the word "tried" and as a complete trial is not necessary now for awarding compensation, order can be passed after hearing a case partly, and the only restriction is that evidence must be heard, 10 W.R. (Cr.) 6. So compensation cannot be awarded in cases where the complaint is dismissed without issuing process to the accused, because in such a case there is no 'hearing' within the meaning of this section and there is no discharge or acquittal within the meaning of this section. The Magistrate cannot award compensation to an accused before process is issued for his appearance, even though the accused appeared at the preliminary investigation under S. 202, *supra* by a pleader to watch the proceedings, 7 P.L.R. 234=4 Cr. L.J. 35. The words 'the Magistrate by whom the case is heard' mean the Magistrate by whom the case is decided and not that the evidence must have been recorded by him. The section does not say the Magistrate by whom the evidence is heard but the Magistrate by whom the case is heard. A Magistrate who decides a case is under no necessity

to hear the evidence under the provisions of S. 250, *infra*, when the hearing is made over to another Magistrate. Under the provisions of S. 245, *infra*, after recording some evidence and the latter Magistrate heard the rest of the evidence and ordered complainant to pay compensation such Magistrate was competent to do so under this section, 19 A.L.J. 631=22 Cr. L.J. 406=61 Ind. Cas. 646. This section is confined by its terms to the Courts of Magistrates trying cases in the first instance and does not confer the requisite powers on appellate Courts to award compensation when setting aside a conviction, 43 A.83 followed in 7 Lah. 152; 27 Cr. L.J. 570=14 Ind. Cas. 138. The special provisions of this section are applicable only to original trials. The words 'are the Magistrate by whom the case is heard' and they will not include a Court of appeal and therefore an appellate Court while reversing a conviction cannot award compensation under this section, 3 Bom. L.R. 631, 7 Bom. L.R. 995=3 Cr. L.J. 83; 8 M.H.C.R. Appx. 7. In view of the language of this section it is only the Magistrate who originally heard the case can pass an order for compensation. It is not intended by the Legislature that any other tribunal other than the Magistrate who heard the evidence should have the power. It would be inconvenient if, when the tribunal before which the case is heard finds a charge proved, an appellate Court when revising that finding could pass an order for compensation and such order cannot be justified by invoking the aid of S. 423, (1) (d) *infra*, 3 A.L.J. 382=3 Cr. L.J. 441. An order making a complainant to compensate an accused for having been frivolously or vexatiously charged does not come within the words " consequential or incidental order that may be just and proper " occurring in S. 423 *infra* defining the powers of the appellate Court as the making of an award of compensation would require express authority, and the special power under this section is given only to an original magisterial Court. Moreover, as the exercise of such a power by the appellate Court would involve such an extreme measure of contempt for the judgment of the inferior Court concerned, that it could but seldom be used with propriety, it can readily be understood why the Legislature should not have thought it worth while if, indeed, it did not think it actually inexpedient to extend it to such a Court, 39 C. 157 (F.B.) at 161-62 overruling 14 C.W.N. 212; 28 A. 625; 1892 A.W.N. 53. The Magistrate who heard the case alone is competent and his successor cannot award compensation under this section, and this is clear from the wording of the section. When a case is disposed of after hearing some of the prosecution witnesses and the Magistrate did not care to examine the other witnesses being of opinion that their evidence will not materially help the case the Magistrate was not justified in awarding compensation although he was entitled under the law to discharge the accused at any stage. But it is only after the examination of all the witnesses for the complainant whom he wanted to examine, the Magistrate can come to the conclusion that the complaint is false, frivolous or vexatious, 51 M. 337; 44 M. 51 at 53; 25 Cr. L.J. 1280=82 Ind. Cas. 288.

Discharges or acquits the accused.—The wording of this section is very clear. It is only the trying Magistrate who, if he discharges the accused can order compensation to be paid. The appellate Court has no jurisdiction to proceed under this section, 46 A. 80 following 28 A. 625 and 39 C. 157 (F.B.), followed in 7 Lah. 152. This section is not applicable to a case in which a complaint is dismissed under S. 203, *supra*, without any process being issued for the attendance of the person against whom such complaint is made. In such a case there is no discharge or acquittal within the meaning of this section entitling the Court to award compensation to the accused, 29 A. 137. See in this connection 47 A. 722 and 51 M. L.J. 605 (F.B.)=24 L.W. 613. Before compensation is awarded, the case must be heard by a Magistrate and he shall have discharged or acquitted the accused, and the principle of giving compensation is to recompense by way of damages to the party who has been vexatiously dragged before a Criminal Court, 26 M. 127, followed in 38 M. 1091. Proceedings under this section are inapplicable to a case where the accused person has himself by agreement with the prosecutor arrived at a settlement and has been a party to it. When a *Ran-nama* was filed in Court stating that the offence charged which was compoundable had been compounded, the Court ought to accept the same under S. 245, *infra*, and was not entitled to hold an inquiry whether the charge was frivolous or vexatious, to decide whether compensation should be awarded to the accused under the section 10 Bom. L.R. 1056=11 Cr. L.J. 633

—8 Ind. Cas. 337. The composition under S. 345 has the effect of an acquittal but there is no discharge or acquittal within the meaning of this section to entitle the Magistrate to award compensation to the accused. When the accused is acquitted under S. 315 (c) *infra* by a valid composition effected by the parties, the Magistrate is not entitled to act under this section. The reason is that such an acquittal is the result of an operation of law upon the act of composition effected by the parties but an acquittal under S. 215 or 217, *supra*, is the result of a purely Magisterial act. There is a withdrawal of the complaint with the permission of the Court and in such cases the Magistrate may award compensation in proper cases, 1883 P.R. (Cr.J.) 19; 10 Bom. L.R. 1056; see also 11 Cr. L.J. 638=8 Ind. Cas. 337 and Ratanlal 700. It was held in 24 C. 53 that the acquittal or discharge must be complete before awarding compensation; where an accused was charged with offences under Ss. 352 and 379, I.P.C., and one of the offences alone was proved, no compensation could be awarded as the complaint was at any rate partly true. Compensation may be awarded after hearing defence evidence because it is possible that the Magistrate might not be able to detect the frivolous or vexatious nature of the complaint until the accused had an opportunity to explain the real state of affairs, Weir II, 316; 10 B. 199; 5 M. 381.

All or any of the accused.—The words "all or any" have been newly added now. It was not very clear whether compensation could be awarded when some accused were convicted and some were acquitted. To make this clear, the words "all or any" were added. Conviction of some of the accused will not preclude a Magistrate awarding compensation to others who are acquitted. A complaint may be well founded as regards some of the accused, and frivolous or vexatious as regards the others so as to render the complainant liable to pay compensation to those others, 5 M. 381.

Is satisfied that accusation was false and frivolous or vexatious.—The Magistrate must be satisfied that the accusation was false and frivolous or vexatious and it is only then, that he is entitled to award compensation, 1881 A.W.N. 167. The alteration now made, covers a case where the complaint is shown to be false and either frivolous or vexatious. This section justifies compensation being awarded when a false complaint is filed out of enmity, 25 A.L.J. 161. The word 'frivolous' comes from Latin *frigus*, cold, and means coldly or lightly esteemed, not worth notice. Trifling acts causing slight harm, coming under S. 95, I.P.C. (*De minimis*) may be held to be frivolous. Vexatious means causing vexation or annoyance, teasing, distressing, harassing, full of trouble. In legal language every prosecution is vexatious as we find in the maxim '*nemo debet bis vexari pro eadem causa*'. As qualifying an accusation the term *frivolous* indicates that the accusation is of a trivial nature, but it may or may not be false, 2 Cr. L.J. 209 (n) and the term *vexatious* implies that the accusation is one which ought not to have been made in a Criminal Court and which it is intended to harass the accused. But neither of the two words excludes the element of falsehood in the charge. An accusation cannot be said to be vexatious within the meaning of this section unless the main intention of the complaint be to cause annoyance to the person accused and not merely to further the ends of justice, 18 Cr. L.J. 1003=32 Ind. Cas. 733. Again, a charge that is false must be vexatious though it may not be frivolous as well. A false charge is patently both a vexatious and frivolous one. Frivolous may be described as meaning trifling, silly or without due foundation, 21 Cr. L.J. 41 at 42=54 Ind. Cas. 249; 10 Bom. L.R. 128. The term frivolous or vexatious covers a deliberately false report, 21 Cr. L.J. 226=53 Ind. Cas. 98. A vexatious charge may be partly true and the idea conveyed by the word vexatious is that the object of the person making the accusation shall primarily be to harass the person accused *ibid.* at 228. The word "false" has now been added and is in accordance with the decision in 30 C. 123 (F.B.) which overruled 28 C. 251; see 26 A. 512; 34 A. 354; 38 M. 1091 and 16 Cr. L.J. 92=26 Ind. Cas. 1004. So there is no reason why a case in which the accusation is false should be considered as being outside the scope of the section. The object of the section is not to punish the complainant but by a summary order to award some compensation to the person against whom a frivolous or vexatious accusation is brought leaving it to him to obtain further redress if he seeks for it in a Civil or Criminal Court. When a false complaint was made at the

instance of another party by the complainant it is vexatious within the meaning of this section, *Weir II*, 313; 21 M. 237. But when the complainant finding his wife absent and the accused also missing, filed a complaint against him of enticing away his wife and the order of discharge showed that the complaint had good grounds for coming to the conclusion that they had gone together, though a good *alibi* was proved by the accused, the complaint was held to be not vexatious, 3 Cr. L. Rev. 389 at 390. When a complaint is not wilfully false and there does not appear to be any perversion or exaggeration of the evidence the case is not a fit one for compensation, 30 Cr. L.J. 839=115 Ind. Cas. 900.

Magistrate may in his discretion.—The question whether the discretion given by this section has been rightly exercised must always depend upon the facts of the particular case. If the false charge is of such a nature that a prosecution is necessary on grounds of public policy it may well be that a Magistrate would exercise his discretion wrongly, if instead of sanctioning a prosecution, he awarded compensation. If the false charge is not one which does not render it necessary on grounds of public policy that a prosecution should be sanctioned, a Magistrate who makes an order for compensation cannot be said to exercise his discretion wrongly. These are considerations to be borne in mind in making an order under this section, 27 M 59 at 60 61. Where a Magistrate awarded compensation under this section in a case in which the complaint was found to be false and malicious and made with deliberation on account of past misunderstandings and was instituted, knowing that there was no just and lawful ground, the High Court set aside the order for compensation holding that the Magistrate did not exercise a proper discretion in granting compensation and pointed out that the case was a fit one for proceeding against the complainant under S. 211, I.P.C., 29 C. 479.

By his order of discharge or acquittal call upon complainant forthwith to show cause.—No order under this section can be passed without discharging or acquitting the accused, 30 Cr. L.J. 854=117 Ind. Cas. 833. When a person is accused of several offences and is discharged in respect of some of them and acquitted of others, it is still open to the Magistrate to make an order under this section in respect of all the accusations when he passes the final order of acquittal. It is obviously better for the Magistrate to take action in such a case not at an intermediate stage of the trial but at the end, 27 Cr. L.J. 448=93 Ind. Cas. 240. This section requires that before a Magistrate makes it a ground for discharging an accused that the complaint was frivolous or vexatious, he shall hear the complainant on that aspect of the case and unless he does so, his order of compensation is without jurisdiction. The order awarding compensation must be contained in the order of discharge or acquittal and not, passed in a separate proceeding after the accused had been discharged and acquitted, 33 C. 302 following 25 A. 315; 34 A. 355; 15 Cr. L.J. 290=23 Ind. Cas. 493; 36 A. 132 and failure to do so cannot be cured by S. 537, *infra*, 26 Cr. L.J. 449=85 Ind. Cas. 129; 20 Cr. L.J. 774=53 Ind. Cas. 614. But the decision in 33 C. 302, was distinguished in a latter case. There a Magistrate by his order of discharge declared the case to be frivolous and directed the complainant under this section to pay compensation to the accused subject to any cause being shown by him and no cause having been shown by the complainant the Magistrate, the day after, made his previous order absolute and the High Court held that the order was not only reasonable and proper but it strictly complied with the requirements of the section. The Court further remarked that it was sufficient that the Magistrate fixed the compensation in his order of discharge but if the complainant was absent at the time of discharge the Magistrate certainly would not be justified in keeping the accused in custody with the charge hanging over their head while the complainant is fetched to show cause. The direction shall be conditional or in the nature of a rule and that the rule shall not be made absolute until complainant had shown cause, 18 C.W.N. 702. A complainant cannot insist on an adjournment to show cause why he should not be ordered to pay compensation under this section, 28 Bom. L.R. 98. A complainant who was called upon to show cause, stated "my pleader will give a written reply. I am not in a position to give my reply now" and the Magistrate passed an order directing him to pay compensation, it was held that he had not a right to an adjournment to enable him to consult his pleader and give a

written reply if he chose the procedure prescribed under this section being similar to the one prescribed in the case of an accused person in a summons-case to show cause under S. 242, *supra*, 27 Cr. L.J. 430=93 Ind. Cas. 158. It is only the trying Magistrate who can order payment of compensation when discharging or acquitting the accused. The appellate Court has no jurisdiction to proceed under this section and award compensation, 7 Lah. 152 where 23 A. 625; 39 C. 157 (F.B.); 46 A. 60; 7 Bom. L.R. 998 are followed. Where the Magistrate ordered compensation to be paid by an absentee complainant believing that the complainant deliberately absented himself on the day the judgment was pronounced, it was held that the order was illegal as the section provided for what is to be done in case the complainant was not present when judgment was delivered, i.e., to summon him and give him an opportunity to show cause before passing the order. The order was therefore set aside as illegal, 24 A.L.J. 170=27 Cr. L.J. 128=91 Ind. Cas. 705.

Before the amendment in 1923, there was a conflict of opinion as to whether a Magistrate after discharge could award compensation by separate proceedings. 25 A. 315; 34 A. 354; 38 C. 302; 20 Cr. L.J. 226 and 774 held that such order was illegal but 1916 M.W.N. 159; 8 Bom. L.R. 847; 18 Cr. L.J. 1014; 42 Ind. Cas. 758; 36 A. 132; 21 Cr. L.J. 371=55 Ind. Cas. 851 took the opposite view and held that the order was legal. By the new amendment the conflict is set at rest and the word "forthwith" has been newly added. By this section as amended and enacted in the precise words which are now to be found in it, it was intended that its provisions should be observed and carried out by the subordinate Court irrespective of any prejudice to the complainant occasioning a failure of justice. It is desirable and it should be made clear that the provisions of the Code should be observed by the Magistrates in the subordinate Courts, 29 C.W.N. 127=26 Cr. L.J. 449=85 Ind. Cas. 129. The law as it now stands is that only the order calling upon the complainant to show cause why he should not pay compensation is to be contained in the order of discharge and the order for payment of compensation is necessarily a subsequent order, 7 Lah. 121 followed in 29 Cr. L.J. 680=110 Ind. Cas. 232. The order is to be passed always in the presence of the complainant in Court. If the complainant is absent when the Magistrate discharged the accused, before he awards compensation, he must adjourn the case to secure the attendance of the complainant and give him an opportunity to show cause and then pass his final order. See 3 Cr. L.J. 123. Where a Magistrate signed and dated his order of discharge, then recorded an order calling upon the complainant to show cause why he should not pay compensation, and recorded and considered the objections and at once proceeded to pass an order to pay compensation, it was held that the entire proceedings followed one another on one and the same date and there was substantial compliance with the provisions of the section or at most an irregularity cured by S. 537, *infra*, 8 Bom. L.R. 847=4 Cr. L.J. 423 followed in 28 Cr. L.J. 592=102 Ind. Cas. 560; 10 Cr. L.J. 220. The same view was taken in 36 A. 132. There, after calling upon the complainant to show cause, the Magistrate four days later after hearing complainant passed an order awarding compensation, it was held that the proceedings though not strictly in accordance with law were merely irregular and not without jurisdiction. Where a Magistrate directed the acquittal of the accused and asked the complainant if he had any cause to show, and immediately thereafter passed the order, it is only a continuation of the same order, and if instead of signing the order at two places, he had signed the order at the very end no objection can be taken to the procedure adopted, 27 Cr. L.J. 35=91 Ind. Cas. 67 where 25 A. 315 and 34 A. 354 are distinguished. Where a Magistrate after acquitting the accused passed an order directing complainant to pay compensation to each of the accused and then called upon complainant to show cause why he should not pay the same, complainant being absent, his brother verbally showed cause which was held by the Magistrate to be insufficient; held, that the complainant was in fact given no opportunity to show cause, 18 C.W.N. 1277=15 Cr. L.J. 707=26 Ind. Cas. 153; 25 Cr. L.J. 1312=82 Ind. Cas. 480.

Direct the person upon whose complaint accusation is made.—An executive body cannot authorize one of its servants to prefer a frivolous and vexatious complaint and so screen its servant who prefers the complaint from the legal penalty; such servant can be

ordered to pay compensation under this section, Ratanlal 309. Judicial officers acting judicially cannot be made liable under this section, 1 B. 175; 20 G. 481; 26 A. 183; 11 Cr. L.J. 634=8 Ind. Cas. 832. Public officers are liable to be dealt with under this section, Weir II, 317; but where a public servant only gave evidence in the proceedings instituted on the information of his official superior, an order for compensation against him was held bad Weir II, 318A. A Police-officer who lodges information may be dealt with under this section, 26 B. 150 (F.B.) overruling, 22 B. 534; 13 Cr. L.J. 752=17 Ind. Cas. 64. Where a servant is only a mouthpiece of his master and merely gave expression to his master's accusation, he cannot be held liable under this section, 14 C.W.N. 326=11 Cr. L.J. 201=5 Ind. Cas. 693. Where a charge sheet under B. 211, I.P.C., was presented to a Magistrate by a constable having been prepared by an S.H.O. under the orders of an Assistant Superintendent of Police it was held that the constable was not a person upon whose complaint or information the accusation was made so that the Magistrate may make an order under this section, 21 M.L.J. 844=10 M.L.T. 191=12 Cr. L.J. 482=12 Ind. Cas. 50; See also 1 B. 175; 20 G. 481; 26 A. 183; Weir II, 316; 11 Cr. L.J. 634=8 Ind. Cas. 832. A guardian and next friend of a minor complainant cannot be asked to show cause and against him an order to pay compensation cannot be made, 13 Cr. L.J. 136=13 Ind. Cas. 824.

If such person is not present direct summons to him to appear and show cause.—Under the amended section if the complainant is present in Court he is bound to show cause immediately. He cannot insist upon a grant of an adjournment for this purpose, see 23 Bom. L.R. 58. If however, an adjournment is granted or if the complainant is not present and a summons is issued to him, the Court can pass an order at the adjourned hearing after recording and considering the cause, if any, shown by the complainant or informant, 31 Bom. L.R. 591 at 593.

Shall record and consider any cause complainant may show.—These words are imperative and the omission to record and consider the objections cannot be treated as a mere irregularity, 23 Cr. L.J. 251; 10 Cr. L.J. 230; 10 C.W.N. 544; 21 Cr. L.J. 751. An order for compensation made in the absence of the complainant is not a compliance with law, as this sub-section says that the Magistrate shall record and consider any cause which such complainant may show and the order was set aside by the High Court, 9 A.L.J. 170=13 Cr. L.J. 258=14 Ind. Cas. 652. It cannot be said that an order for compensation made in spite of the request of the complainant to examine all his remaining witnesses to prove that his case was a true one is not illegal but is not one that should be made except in exceptional cases. He should be allowed to call witnesses, for until the Magistrate has heard them he cannot say that their evidences will not help him to decide the propriety of such order and the extent of the culpability of complainant to assess the amount, 44 M. 51 at 53; 23 Cr. L.J. 1290=52 Ind. Cas. 238. It is only after examining all the witnesses for the complainant whom he wanted to examine the Magistrate could come to the conclusion that the complaint is false, frivolous or vexatious. No doubt he was entitled at any stage to discharge the accused but that would not be a ground for awarding compensation to the accused, 51 M. 337 following 44 M. 51 at 53. The direction to pay compensation should be part and parcel of the order of discharge or acquittal and this clearly shows that no separate inquiry is contemplated, (1878) A.W.N. 118. It is not the intention of the Legislature that a complainant should be entitled to an adjournment to enable him to show cause, much less the opportunity of producing further evidence, 36 A. 132; 34 A. 354; 15 Cr. L.J. 364=22 Ind. Cas. 592. The addition of the word 'forthwith' is very significant and supports the view taken in the above decisions. An opportunity to show cause must be given before an order is passed, 24 Bom. L.R. 205; 5 Cr. L. Rev. 400. An order should not be made without calling upon the complainant to show cause, 38 C. 302; 3 C.W.N. 514; 11 M. 342; Weir II, 310; Ratanlal 634 & 725; 3 Bom. L.R. 586; 9 A.L.J. 170=13 Cr. L.J. 258=14 Ind. Cas. 652.

Rule 200, Mad. Cr. Rules of Pr. says that the Magistrate should call upon the complainant if he is present to show cause why he should not be ordered to pay compensation and if the complainant is not present notice should be issued to him to appear on the day

fixed for delivery of judgment to show cause; if the complainant cannot be served with notice in a reasonable time or appears to be keeping out of the way or having been served with notice fails to appear on the appointed day, the Magistrate may proceed *ex parte* and make an order under this section if he deems fit to do so.

For reasons to be recorded directing compensation.—The Magistrate should state his reasons why he holds the complaint to be frivolous or vexatious. A bare statement that the prosecution evidence is in his opinion highly unsatisfactory and upon the evidence and the written statements and documents there is no doubt that the complaint is vexatious was held not to be sufficient, 10 C.W.N. 844. On a proper reading of this section it is clear that recording of reasons for ordering compensation to be paid, is almost a condition precedent to the proper exercise of the power. The recording of reasons is in addition to the finding of the Magistrate that the accusation was either frivolous or vexatious. No doubt there are no words in the section calculated to indicate what the reasons recorded should be but obviously the reasons must go to show, why it is that the Magistrate considers the accusation against the accused to be frivolous or vexatious and why in his opinion it was a fit case in which an order for compensation should be made. The reasons for the Magistrate finding the accusation to be frivolous or vexatious must be set out.....The policy of the Legislature in requiring that in such a case the reasons should be recorded in writing is obviously to afford an opportunity to the appellate or revising tribunal to consider the sufficiency of the reasons so recorded, 21 L.W. 646 at 647—26 Cr. L.J. 1501—80 Ind. Cas. 157. The mere fact that a Magistrate is trying a case summarily does not justify his omission to record the complainant's objection to an order directing compensation and such an omission is not a mere irregularity which can be cured by S. 537, *infra*. The section shows that the Court must first be of opinion that the complaint is false, frivolous or vexatious and then he is to call upon the complainant for his explanation. It is necessary after hearing the explanation that he should still be of the same opinion. His final opinion should be that the case is false, frivolous or vexatious and not that the explanation of the complainant is unsatisfactory merely saying that the complaint is false frivolous or vexatious and then that the explanation is not satisfactory does not give the Court of revision sufficient grounds for finding whether there were good grounds for awarding compensation or not, 30 Cr. L.J. 438—115 Ind. Cas. 334 following 15 Cr. L.J. 666—25 Ind. Cas. 894.

Sub-section (2).—Under this sub section all that is prohibited is that the compensation to the accused or each of them where there are more than one accused should not exceed rupees one hundred in amount. This sub section does not mean, if there are a number of accused persons, the total amount awarded to all of them must not exceed the maximum, 24 A.L.J. 221—27 Cr. L.J. 702—94 Ind. Cas. 894.

Sub-section (2A).—Where under the provisions of sub-section (2) the Court orders a complainant to pay compensation separately to each of several accused and in default to suffer imprisonment, imprisonment may be awarded for default of each separate payment as ordered, even though this sub-section is not very explicit, 3 Ran 93. For the purpose of recovery and imprisonment in default of payment, the compensation is to be treated in all respect as a fine. It is now enacted that the Magistrate by his order directing payment may further order that, in default of payment, the complainant shall suffer simple imprisonment for a period not exceeding thirty days. So the decisions in Weir II, 320; 18 C.W.N. 702; 5 C.W.N. 213 and 214, 23 C. 231 and 164; 22 C 536 and 139; 18 A. 96, 19 A 73 and similar decisions, which held that the order should not specify imprisonment in default and a prior attempt to recover the amount was absolutely necessary before imprisonment is awarded, are no longer law. The provisions of S. 397, *infra*, cannot apply when the detention of the person against whom an order of imprisonment for default of payment of compensation under this sub-section is made under the order of a Civil Court as such detention is not a sentence of imprisonment, penal servitude or transportation and as a Magistrate has no power to order that the sentence of imprisonment in default, shall take effect after a term of detention by order of a Civil Court, 3 Ran. 93.

ordered to pay compensation under this section, Ratanlal 309. Judicial officers acting judicially cannot be made liable under this section, 1 B. 175; 20 C. 481; 26 A. 183; 11 Cr. L.J. 634=8 Ind. Cas. 832. Public officers are liable to be dealt with under this section, Weir II, 317; but where a public servant only gave evidence in the proceedings instituted on the information of his official superior, an order for compensation against him was held bad Weir II, 318A. A Police-officer who lodges information may be dealt with under this section, 26 B. 150 (F.B.) overruling, 22 B. 534; 13 Cr. L.J. 752=17 Ind. Cas. 64. Where a servant is only a mouthpiece of his master and merely gave expression to his master's accusation, he cannot be held liable under this section, 14 C.W.N. 326=11 Cr. L.J. 201=5 Ind. Cas. 693. Where a charge sheet under S. 211, I.P.C., was presented to a Magistrate by a constable having been prepared by an S.H.O. under the orders of an Assistant Superintendent of Police it was held that the constable was not a person upon whose complaint or information the accusation was made so that the Magistrate may make an order under this section, 21 M.L.J. 844=10 M.L.T. 191=12 Cr. L.J. 482=12 Ind. Cas. 50; See also 1 B. 175; 20 C. 481; 26 A. 183; Weir II, 316; 11 Cr. L.J. 674=8 Ind. Cas. 832. A guardian and next friend of a minor complainant cannot be asked to show cause and against him an order to pay compensation cannot be made, 13 Cr. L.J. 136=13 Ind. Cas. 824.

If such person is not present direct summons to him to appear and show cause.—Under the amended section if the complainant is present in Court he is bound to show cause immediately. He cannot insist upon a grant of an adjournment for the purpose, see 28 Bom. L.R. 18. If however, an adjournment is granted or if the complainant is not present and a summons is issued to him, the Court can pass an order at the adjourned hearing after recording and considering the cause, if any, shown by the complainant or informant, 31 Bom. L.R. 591 at 593.

Shall record and consider any cause complainant may show.—These words are imperative and the omission to record and consider the objections cannot be treated as a mere irregularity, 23 Cr. L.J. 261; 10 Cr. L.J. 230; 10 C.W.N. 545; 21 Cr. L.J. 751. An order for compensation made in the absence of the complainant is not a compliance with law, as this sub-section says that the Magistrate shall record and consider any cause which such complainant may show and the order was set aside by the High Court, 9 A.L.J. 170=13 Cr. L.J. 268=14 Ind. Cas. 652. It cannot be said that an order for compensation made in spite of the request of the complainant to examine all his remaining witnesses to prove that his case was a true one is not illegal but is not one that should be made except in exceptional cases. He should be allowed to call witnesses, for until the Magistrate has heard them he cannot say that their evidences will not help him to decide the propriety of such order and the extent of the culpability of complainant to assess the amount, 44 M. 51 at 53; 25 Cr. L.J. 1293=82 Ind. Cas. 289. It is only after examining all the witnesses for the complainant whom he wanted to examine the Magistrate could come to the conclusion that the complaint is false, frivolous or vexatious. No doubt he was entitled at any stage to discharge the accused but that would not be a ground for awarding compensation to the accused, 51 M. 337 following 44 M. 51 at 53. The direction to pay compensation should be part and parcel of the order of discharge or acquittal and this clearly shows that no separate inquiry is contemplated, (1898) A.W.N. 158. It is not the intention of the Legislature that a complainant should be entitled to an adjournment to enable him to show cause, much less the opportunity of producing further evidence, 36 A. 132; 34 A. 354; 15 Cr. L.J. 504=22 Ind. Cas. 592. The addition of the word 'forthwith' is very significant and supports the view taken in the above decisions. An opportunity to show cause must be given before an order is passed, 25 Bom. L.R. 805; 5 Cr. L. Rev. 400. An order should not be made without calling upon the complainant to show cause, 38 C. 302; 5 C.W.N. 514; 11 M. 342, Weir II, 310; Ratanlal 634 & 725; 3 Bom. L.R. 585; 9 A.L.J. 170=13 Cr. L.J. 228=14 Ind. Cas. 652.

Rule 200, Mad. Cr. Rules of Pr says that the Magistrate should call upon the complainant if he is present to show cause why he should not be ordered to pay compensation and if the complainant is not present notice should be issued to him to appear on the day

fixed for delivery of judgment to show cause ; if the complainant cannot be served with notice in a reasonable time or appears to be keeping out of the way or having been served with notice fails to appear on the appointed day, the Magistrate may proceed *ex parte* and make an order under this section if he deems fit to do so.

For reasons to be recorded directing compensation.—The Magistrate should state his reasons why he holds the complaint to be frivolous or vexatious. A bare statement that the prosecution evidence is in his opinion highly unsatisfactory and upon the evidence and the written statements and documents there is no doubt that the complaint is vexatious was held not to be sufficient, 10 C.W.N. 544. On a proper reading of this section it is clear that recording of reasons for ordering compensation to be paid, is almost a condition precedent to the proper exercise of the power. The recording of reasons is in addition to the finding of the Magistrate that the accusation was either frivolous or vexatious. No doubt there are no words in the section calculated to indicate what the reasons recorded should be but obviously the reasons must go to show, why it is that the Magistrate considers the accusation against the accused to be frivolous or vexatious and why in his opinion it was a fit case in which an order for compensation should be made. The reasons for the Magistrate finding the accusation to be frivolous or vexatious must be set out.....The policy of the Legislature in requiring that in such a case the reasons should be recorded in writing is obviously to afford an opportunity to the appellate or revising tribunal to consider the sufficiency of the reasons so recorded, 21 L.W. 646 at 647=26 Cr. L.J. 1501=90 Ind. Cas. 157. The mere fact that a Magistrate is trying a case summarily does not justify his omission to record the complainant's objection to an order directing compensation and such an omission is not a mere irregularity which can be cured by S. 537, *infra*. The section shows that the Court must first be of opinion that the complaint is false, frivolous or vexatious and then he is to call upon the complainant for his explanation. It is necessary after hearing the explanation that he should still be of the same opinion. His final opinion should be that the case is false, frivolous or vexatious and not that the explanation of the complainant is unsatisfactory merely, saying that the complaint is false frivolous or vexatious and then that the explanation is not satisfactory does not give the Court of revision sufficient grounds for finding whether there were good grounds for awarding compensation or not, 30 Cr. L.J. 438=115 Ind. Cas. 334 following 15 Cr. L.J. 666=25 Ind. Cas. 994.

Sub-section (2).—Under this sub-section all that is prohibited is that the compensation to the accused or each of them where there are more than one accused should not exceed rupees one hundred in amount. This sub section does not mean, if there are a number of accused persons, the total amount awarded to all of them must not exceed the maximum, 24 A.L.J. 221=27 Cr. L.J. 702=94 Ind. Cas. 894.

Sub-section (2A).—Where under the provisions of sub-section (2) the Court orders a complainant to pay compensation separately to each of several accused and in default to suffer imprisonment, imprisonment may be awarded for default of each separate payment as ordered, even though this sub-section is not very explicit, 3 Ran. 93. For the purpose of recovery and imprisonment in default of payment, the compensation is to be treated in all respect as a fine. It is now enacted that the Magistrate by his order directing payment may further order that, in default of payment, the complainant shall suffer simple imprisonment for a period not exceeding thirty days. So the decisions in *Weir II*, 320 ; 18 C.W.N. 702 ; 5 C.W.N. 213 and 214 ; 23 C. 251 and 164 ; 22 C. 536 and 139 ; 18 A. 96 ; 19 A. 73 and similar decisions, which held that the order should not specify imprisonment in default and a prior attempt to recover the amount was absolutely necessary before imprisonment is awarded, are no longer law. The provisions of S. 397, *infra*, cannot apply when the detention of the person against whom an order of imprisonment for default of payment of compensation under this sub-section is made under the order of a Civil Court as such detention is not a sentence of imprisonment, penal servitude or transportation and so a Magistrate has no power to order that the sentence of imprisonment in default, shall take effect after a term of detention by order of a Civil Court, 3 Ran. 93.

Sub-section (2B) is new. Ss. 68 and 69, I.P.C., provide for termination of imprisonment on payment of fine or proportionate portion of fine.

Sub-section (2C) is also new and makes it clear that the award of compensation under this section will not exonerate the complainant from any civil or criminal liability with regard to such complaint and the proviso which was sub-section (5) before makes it clear that such amount already awarded may be taken into consideration in any subsequent civil proceedings.

Sub-section (3) provides for an appeal against an order for payment of compensation passed by a Magistrate of the second or third class and also an appeal is now provided from a similar order of any other Magistrate to pay more than rupees fifty as compensation. This sub-section means that whenever a complainant is ordered under sub-section (2) to pay compensation exceeding rupees fifty the right of appeal is given, whether the compensation is awarded only to one accused or is to be distributed among a number of accused in sums not exceeding rupees fifty. In a case where the total compensation awarded is over rupees fifty to all the accused, the complainant is entitled to appeal, 49 B. 440 at 442, 26 Cr. L.J. 1504=89 Ind. Cas. 180; 29 Cr. L.J. 430=108 Ind. Cas. 617. The words of this sub-section are general and do not repeat the provisions of sub-Sections (1) and (2) stating the limit of compensation to each individual accused. When the total amount ordered to be paid as compensation in one particular case exceeds rupees fifty there is a right of appeal even though the amount awarded to each individual accused may not exceed rupees fifty, 24 A.L.J. 167=27 Cr. L.J. 146=91 Ind. Cas. 882; 9 Lah 462 following 49 B. 440 and 24 A.L.J. 167. See also 30 Cr. L.J. 905=118 Ind. Cas. 215. The remedy to have the order revised by the High Court after the appellate Court has declined to interfere is still open under Ss. 435 and 439, *infra*. A Sessions Judge has no power to set aside an order for compensation made by a first class Magistrate unless the amount exceeds rupees fifty although he has power to set aside the order of discharge made by a first class Magistrate. A Bench of the Madras High Court has held that when a Sessions Judge or District Magistrate is moved under S. 436, *infra*, to set aside an order of discharge by a first class Magistrate and to direct a further inquiry, if there is a further order awarding compensation also, the Sessions Judge or District Magistrate should report the matter to the High Court which alone would be competent to deal effectively with both the orders of discharge and compensation, 10 Cr. L.J. 569=4 Ind. Cas. 399. This will also prevent conflict of decisions by the superior and inferior Courts; but see 18 L.W. 651 following 43 A. 497 and 36 C. 643 which took a different view. There it was held that it is a right course to adopt to insist on a party exhausting all his remedies in an inferior Court before he comes up to the High Court, and the fact that the order of compensation is revisable by the High Court only, does not alter the procedure. This section does not declare what the powers of an appellate Court are in disposing of appeals under this sub-section and it is necessary to invoke the aid of S. 423, *infra*, for this purpose. S. 430, *infra*, illustrates the difference in this respect between this section and S. 195 *supra* which 'has been held to be a self-contained section . . . It seems to be an anomaly which might be cured when the Code is amended that no provision should be made for notice to the person most interested in the order being upheld in the case of an appeal being preferred against an order of compensation passed by a second class or third class Magistrate, but if the matter is taken to the High Court for revision of his order S. 539 (2), *infra*, strictly construed, will make it imperative that notice should go to the accused. In appeals under this section notice should ordinarily be given to the accused and an order made without such notice even though not illegal will be set aside by the High Court under S. 439 as improper, 38 M. 1031 following 29 M. 187 and 33 M. 89 and distinguishing 27 M.L.J. 629=16 M.L.T. 426=1 L.W. 908=15 Cr. L.J. 648=23 Ind. Cas. 848; 2 L.W. 1244=17 Cr. L.J. 1=32 Ind. Cas. 129; 23 Cr. L.J. 209=76 Ind. Cas. 631. No provision is made by the new amendment to give notice in appeals to the accused in whose favour an award was made to support the order. See 27 Cr. L.J. 243=92 Ind. Cas. 424 where it was held that though want of notice is not illegal it is desirable generally that before an order is made the accused should have notice of any intended interference with an order of compensation made in his favour. See also 83 C. 869. When the order is sought to be impugned

in appeal or revision, it is obligatory to serve notice on the Crown, 23 Cr. L.J. 417=101 Ind. Cas. 192; both appeals and revisions are strictly speaking between persons aggrieved and the Crown and the respondent in an appeal from the order awarding compensation is the Crown quite a part from the question whether an *ex* accused should or should not be given an opportunity of appearing and being heard, 8 Lah. 563.

Sub-section (4).—In cases where no appeal is provided for, it is enacted that the compensation is not to be paid to the accused before the expiration of one month from the date of order within which a complainant may apply to the High Court in revision and get an order for stay. When the compensation awarded to the accused is paid over to him and the order is subsequently set aside in appeal or revision the amount so paid may be recovered under S. 547, *infra*, 1904 P.L.R. (Cr. J.) 2 p. 5 following 1885 P.R. (Cr. J.) 12 and 10 A. 112.

CHAPTER XXI.

OF THE TRIAL OF WARRANT-CASES BY MAGISTRATES.

Procedure in Warrant-cases.

251. The following procedure shall be observed by Magistrates in the trial of warrant-cases.

Warrant-cases.—For definition of a "warrant-case" see S. 4 (1) (*w*) *supra*. For mode of recording evidence in warrant-cases see Ss. 356 and 362, *infra*. The distinction between a summons-case and a warrant-case is that in a warrant-case sufficient evidence to support the charge must be recorded before a charge can be framed and the accused called upon to plead, 27 C.W.N. 923 at 524. The powers of a Magistrate who has taken a warrant case on his file for trial are as follows:—(1) he may try it himself if he has jurisdiction; he may, if he thinks he cannot inflict a proper sentence or act under S. 349 or S. 349, send it to a higher Magistrate, (2) he may, if he thinks that it is a proper case for Sessions, commit the accused under S. 547, (3) If he has no power to commit, send the case to another Magistrate to commit under S. 346, 42 M. 83 at 89. The procedure prescribed by this Chapter is to be observed when there are two charges arising out of the same facts, one triable as a summons case and the other as a warrant-case, 11 C. 91 followed in 39 M. 503. When once the trial has been begun according to the provisions of this Chapter as a warrant-case, it is not open to the Magistrate after recording the evidence for the prosecution and holding that an offence triable as summons-case only is made out and try and convict the accused of that offence without framing a charge for the offence which according to the Magistrate has been made out by the prosecution evidence. In such a case the procedure prescribed by this Chapter ought to be followed by the Magistrate, 23 Cr. L.J. 227 (1)=99 Ind. Cas. 1027 (1) relying on 19 A.L.J. 6. Similarly where a case is tried as a warrant-case under this chapter and the accused reserves his right to cross-examine the prosecution witnesses, he is still entitled to have the prosecution witnesses recalled for cross-examination after the framing of the charge even if the charge is framed for an offence triable as a summons-case. If this is not done it is obvious that the accused will be prejudiced considerably and the procedure adopted will be considered improper, 29 Cr. L.J. 235 (1)=107 Ind. Cas. 285 (1). When a warrant-case is tried as a summons-case and the conviction was passed on an admission made by the accused under S. 243, *supra*, which applied only to summons-cases it was held that this was something more than an irregularity and the conviction was set aside and a retrial ordered, as the procedure adopted by the Magistrate may have prejudiced the accused, 29 M. 372; 41 M. 727. See 27 C.W.N. 923. It is settled law that proceedings before a Magistrate in a warrant case under this chapter is only an "inquiry" until a charge is framed and on a charge being framed it becomes a "trial," 38 M. 535; 32 M. 213 and 220. Even in the case of mandatory provisions their application must vary according to the circumstances of case, 25 A.L.J. 845=29 Cr. L.J. 735=134 Ind. Cas. 725.

252. (1) When the accused appears or is brought before a Magistrate, such Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution.

Evidence for prosecution.

Provided that the Magistrate shall not be bound to hear any person or complainant in any case in which the complaint has been made by a Court.

(2) The Magistrate shall ascertain, from the complainant or otherwise, the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and shall summon to give evidence before himself such of them as he thinks necessary.

Amendment.—The proviso to sub-section (1) is new and dispenses with the hearing of complainant when a complaint is made by a Court in writing under Ss. 195 and 476 *infra*.

Scope of the section—The procedure to be followed in the trial of warrant-cases is laid down in this section which provides that the Magistrate shall proceed to hear the complainant, if any, and take all such evidence as may be produced in support of the prosecution, and, after ascertaining the names of any persons likely to be acquainted with the facts of the case, he shall summon such of them to give evidence as he thinks necessary. The section clearly contemplates that once action has been taken against the accused the case will formally proceed. It is nowhere contemplated that a desire on the part of the complainant to refrain from further pursuing the case shall justify the arrest of further proceedings. The very words of S. 248, *supra*, which occur in the chapter dealing with summons-cases make it clear that no such action is contemplated in the trial of warrant cases, while S. 259, *infra*, only gives discretion to a Magistrate in a warrant-case instituted on complaint to discharge the accused in the absence of the complainant and if the offence may be lawfully compounded or is not a cognizable offence. The principle underlying the provisions dealing with the trial of non-compoundable or cognizable warrant-cases is that whether instituted on complaint or otherwise, the final responsibility for the conduct of such cases rests with the State and that where there is reasonable ground for believing that an offence has been committed, once the machinery of law has been set in motion, the right of arresting its progress rests with the State alone, 5 Ran. 136. This section lays down that not only shall the Magistrate take down all the evidence which may be produced in support of the prosecution but shall himself ascertain the names of other persons able to give evidence for the prosecution and summon such of the latter as he thinks necessary. When a new list of witnesses is filed by complainant some time after the complaint was filed and after the trial had begun, what then is the proper attitude for the Court to take up regarding such a list? The section does not appear to be very clear on the point but it means that the complainant should himself produce what evidence he can in support of the prosecution and the Magistrate shall then proceed to hear it. The Court is apparently not bound to issue process for such witnesses or grant time for their production but if produced he must record their evidence. Unlike the corresponding provisions in 208 (2), *supra*, and 244 (2), *supra*, there is a remarkable omission here S. 257, *infra*, gives the accused power to issue compulsory process to his witnesses while this section gives the Magistrate power to summon persons whom he has himself ascertained to be acquainted with the facts of the case. When the complainant has done all he can without the assistance of the Court it is then for the Magistrate to ascertain from the complainant or otherwise the names of other persons likely to give evidence and he is to summon such of them as he thinks necessary. He cannot arbitrarily refuse to summon such witnesses. It is his duty to assist and not to hamper the prosecution and for that purpose he must issue

summons to persons named by the complainant when he thinks that they are likely to give useful evidence. The Magistrate is not bound to, or expected to exercise this duty of ascertaining more than once and the proper time is when evidence produced, by the prosecution, has been taken, 49 M. 978.

When the accused appears or is brought before a magistrate.—S. 204, *supra*, deals with issue of process for causing the accused to be brought or to make him appear at a certain time before a Magistrate. S. 205, *supra*, deals with the power of the Magistrate when he issues a summons to an accused to appear before him, to dispense with his personal attendance and to permit him to appear by pleader. When an accused is brought before the Court it is duty of the Court to try the accused for the offence charged. There is no provision of law which requires or entitles the Magistrate to go into the question as to the legality of the arrest or as to how the accused came into the hands of the police. See 35 B. 225; 31 C. 557; 26 C. 124; 1889 P.R. (Cr. J.) 6; 29 Cr. L.J. 1089=112 Ind. Cas. 673.

Proceed hear the complainant.—Hearing of a complainant within the meaning of this section does not involve his examination on oath and the trial in a warrant-case is not irregular merely because it did not begin with an examination of the complainant by the Court, 42 M.L.J. 103=(1922) M.W.N. 71=15 L.W. 311. This section directs that the Magistrate shall proceed to hear the complainant and take all such evidence produced by him. So he cannot refuse to examine any witness merely because his evidence will be the same as that already recorded, 4 M. 329; 2 A. 447; 1882 A.W.N. 179 but he should enforce the attendance of the witnesses. S. 253 (a) empowers the Magistrate to discharge the accused without examining all the witnesses of the complainant if for reasons recorded, he considers the charge to be groundless.

Take all such evidence as may be produced.—A Magistrate under this section is bound to take the evidence of the witnesses produced before him in support of the prosecution. But he is not bound by law to hear one witness beyond those mentioned in the original list. The law clearly lays down that after the witnesses produced in support of the case have been heard, the Magistrate is then to ascertain the names of persons likely to be acquainted with the facts of the case and shall summon to give evidence before himself only such of them as he, the Magistrate, thinks necessary. He is not bound by law to accept a list thrown at his head from time to time by the police or by any one else and it would be well if the Magistrate bore this more clearly in mind. The length to which cases are spun out threatens to be a danger to the administration of justice, 12 A.L.J. 262 at 263-264=15 Cr. L.J. 368=23 Ind. Cas. 731; 49 M. 978. S. 510, *infra*, is to be read along with this section. By the former section it was not intended that a Magistrate should exercise his powers at the bidding of any person, but that the powers are given to prevent any danger of miscarriage of justice just because some particular witness has not been called and are to be exercised with great discretion. Under this section the prosecution is given full opportunity of substantiating their whole case. But it is expected and the expectation is right and proper one, that the prosecution should come to Court with their case fully prepared and thought out. After the witnesses produced in support of the prosecution are heard, it is the duty of the Magistrate to see that prosecutors are not allowed to set the Court on to a roving inquiry summoning persons in the hope that something may be elicited which would help their case, and cases which ought to be heard within a fortnight are spun out to a period of six weeks and more to the inconvenience of all concerned. Now a witness is not an inanimate thing and is not to be moved about as if he were a stick or a stone. He is a living person who has his work to do and whose convenience has to be considered. For a Magistrate to send for every person whom the complainant names in a supplementary list is a thoughtless act and in some cases may cause very serious inconvenience to persons who ought not to be subjected to such inconvenience, 12 A.L.J. 15 at 16, 17; 14 Cr. L.J. 682=21 Ind. Cas. 1003. But once the Magistrate has issued summons to the witnesses named, he must enforce their attendance. This section applies to the course which may be taken before the issue of summons and not after, 4 M. 329; 35 C. 1023; 6 C.W.N. 543. For form of summons, see Sch. V, Form No. XXX.

252. (1) When the accused appears or is brought before a Magistrate, such Magistrate shall proceed to hear the complainant (if any) and take all such evidence as may be produced in support of the prosecution.

Evidence for prosecution.

Provided that the Magistrate shall not be bound to hear any person or complainant in any case in which the complaint has been made by a Court.

(2) The Magistrate shall ascertain, from the complainant or otherwise, the names of any persons likely to be acquainted with the facts of the case and to be able to give evidence for the prosecution, and shall summon to give evidence before himself such of them as he thinks necessary.

Amendment.—The proviso to sub-section (1) is new and dispenses with the hearing of complainant when a complaint is made by a Court in writing under Ss. 195 and 476 *infra*.

Scope of the section—The procedure to be followed in the trial of warrant-cases is laid down in this section which provides that the Magistrate shall proceed to hear the complainant, if any, and take all such evidence as may be produced in support of the prosecution, and, after ascertaining the names of any persons likely to be acquainted with the facts of the case, he shall summon such of them to give evidence as he thinks necessary. The section clearly contemplates that once action has been taken against the accused the case will formally proceed. It is nowhere contemplated that a desire on the part of the complainant to refrain from further pursuing the case shall justify the arrest of further proceedings. The very words of S. 248, *supra*, which occur in the chapter dealing with summons-cases make it clear that no such action is contemplated in the trial of warrant cases, while S. 239, *infra*, only gives discretion to a Magistrate in a warrant-case instituted on complaint to discharge the accused in the absence of the complainant and if the offence may be lawfully compounded or is not a cognizable offence. The principle underlying the provisions dealing with the trial of non compoundable or cognizable warrant-cases is that whether instituted on complaint or otherwise, the final responsibility for the conduct of such cases rests with the State and that where there is reasonable ground for believing that an offence has been committed, once the machinery of law has been set in motion, the right of arresting its progress rests with the State alone, 5 Ran. 136. This section lays down that not only shall the Magistrate take down all the evidence which may be produced in support of the prosecution but shall himself ascertain the names of other persons able to give evidence for the prosecution and summon such of the latter as he thinks necessary. When a new list of witnesses is filed by complainant some time after the complaint was filed and after the trial had begun, what then is the proper attitude for the Court to take up regarding such a list? The section does not appear to be very clear on the point but it means that the complainant should himself produce what evidence he can in support of the prosecution and the Magistrate shall then proceed to hear it. The Court is apparently not bound to issue process for such witnesses or grant time for their production but if produced he must record their evidence. Unlike the corresponding provisions in 208 (2), *supra*, and 244 (2), *supra*, there is a remarkable omission here S. 237, *infra*, gives the accused power to issue compulsory process to his witnesses while this section gives the Magistrate power to summon persons whom he has himself ascertained to be acquainted with the facts of the case. When the complainant has done all he can without the assistance of the Court it is then for the Magistrate to ascertain from the complainant or otherwise the names of other persons likely to give evidence and he is to summon such of them as he thinks necessary. He cannot arbitrarily refuse to summon such witnesses. It is his duty to assist and not to hamper the prosecution and for that purpose he must issue

This section deals with discharge of accused in a warrant case. See S. 20, *supra*.

Sub-section (1).—An order of discharge cannot *ordinarily* be passed until the evidence of all the witnesses for the prosecution has been taken, 4 M. 329; 20 W.R. (Cr.) 67; 22 W.R. (Cr.) 25, but sub section (2) permits the discharge of the accused at any previous stage of the case, if the Magistrate, for reasons to be recorded by him, considers the charge to be groundless, (1911) 1 M.W.N. 149=9 M.L.T. 302=12 Cr. L.J. 103=9 Ind. Cas. 606. A Magistrate should not refuse to examine witnesses for the sole reason that their evidence will be to the same effect as that already recorded by him, 3 C. 389; 2 A. 447.

Scope of the section—The words of this section are as plain as any words can be. Sub-section (1) states that if on taking all the evidence referred to in S. 252 *supra* and if necessary examining the accused, no case is made out against the accused, the Magistrate shall discharge him. Sub-section (2) says that nothing in the section shall be deemed to prevent a Magistrate from discharging the accused at any previous stage of the case, that is, before all the evidence referred to in S. 252, *supra*, has been taken, if for reasons to be recorded the Magistrate considers the charge to be groundless. Authority for supporting such a plain statutory provision is needless. The amount of evidence which would enable a Magistrate to say that a charge was groundless is so entirely dependent on circumstances and no general rule or direction can be laid down that he is required to arrive at his conclusion judicially and not capriciously. If acting judicially he has come to the conclusion on grounds recorded that the charge must fail either because the allegations are false or because they disclose a dispute of a civil nature which is distorted into a Criminal case or for any other reason, then there is nothing to prevent him from discharging the accused before examining all the witnesses for the complainant, 37 M.L.J. 430 at 492=33 L.W. 273 at 275=1929 M.W.N. 575 at 576. It is not a proper exercise of the discretion vested in a Magistrate under this section to discharge the accused merely on a statement by a prosecution witness of a prior admission by the complainant that the case was a false case. In such a case the Magistrate will do well to hear the whole evidence and after that to come to a conclusion, 30 Cr. L.J. 854=117 Ind. Cas. 883.

Such examination of accused as he thinks necessary.—This section does not place any restriction on the power of the Magistrate to examine the accused. But it should be conducted according to the provisions of S. 315, *infra*, and recorded in the manner laid down in S. 364, *infra*. A Magistrate should not examine the accused if the evidence adduced by the prosecution discloses no proper subject of a criminal charge against him, 1 B.L.R. Appx. 16. The object of an examination of the accused is to enable the Judge to ascertain from the accused from time to time, particularly if he is undefended, what explanation he may desire to offer regarding any facts stated by the witnesses or after close of the case how he can meet what the Judge may consider damning evidence against him, 9 C. 96 at 102 and not to fill up gaps in the prosecution evidence, 23 C. 43; 27 M. 233; 33 M. 770. An accused cannot be asked to make admissions to enable the crown to procure a legal decision. It is not the function of a Court of Justice to supplement the deficiencies of the prosecution and the subject cannot be made to suffer because of the neglect or omission of the Crown in the mode in which it conducts a criminal proceeding, 5 Lah. 423. S. 312 *infra* says the examination of the accused by the Court is for the purpose of enabling the accused to explain any circumstance appearing in evidence against him. The Magistrate may examine the accused if he thinks it necessary, 48 M. 419 (F.B.) at 452, 451. The Magistrate can examine the accused after the evidence for the prosecution is taken to enable him to decide whether a charge shall be framed or not. There may be cases where the Magistrate sees an easy answer to the prosecution evidence and he desires that answer to be given by the accused before discharging him 49 A. 551. It is not absolutely compulsory for the Magistrate in a warrant case to examine the accused before framing a charge provided he does so after all the prosecution witnesses have been examined and before the accused is called on to enter on his defence and such non-examination before charge where the accused has been duly examined at the close of the prosecution case, would amount to a mere irregularity, 27 Cr. L.J. 830=93 Ind. Cas. 606.

When no case is made out Magistrate shall discharge.—The phrase 'no case is made out' and the phrase 'he considers the charge to be groundless' are not used in this section in the same sense. Where a complaint *prima facie* discloses an offence a Magistrate cannot hold a charge to be groundless unless he knows what is the sort of evidence that is going to be adduced to prove it. Without examining witnesses and without knowing what they are going to say, a Magistrate cannot judicially come to the conclusion that the charge is groundless and discharge the accused, 51 M. 185. A Magistrate who finds that he had no jurisdiction to try the case cannot discharge the accused under this section which authorizes only a discharge on the ground that no offence has been proved by the evidence for the prosecution, but the proper procedure for him is to send the accused before a Magistrate having jurisdiction under S. 346, *infra*. Weir II, 323. The Legislature does not render the writing of reasons by the Magistrate necessary when an accused person is discharged after he has heard all the prosecution evidence. It is, however, desirable that the Magistrate should record his reasons as his order is not final and to satisfy a Court of Revision that a proper judicial discretion was exercised. The provisions of S. 367 *infra* apply only to a judgment which is a final decision of the case so far as the Court trying the case is concerned, 9 Bom. L.R. 250; 23 G. 726. An order of discharge under sub-section (1) is not a judgment which indicates the final order in a trial terminating in either conviction or acquittal of the accused. It is clear that the Legislature never intended that a Magistrate discharging an accused should furnish him with a certificate of immunity from further molestation and the section does not require the Magistrate to give reasons for his order in ordinary circumstances, 31 M. 543. A Magistrate has power to re-entertain a complaint or of his own accord to revive a proceeding after a discharge of the accused without such order being set aside by a superior Court. The principle enunciated in 29 M. 126 (F.B.) was extended to cases coming under this section by 31 M. 543. No distinction in principle could be drawn between a discharge under this section or under S. 203, *supra*, or S. 259, *infra*. A defence of *autre fois acquit* has no application to a case of discharge. It has been held in Ratanlal 350 that a discharge not operating as an acquittal leaves the matter at large for all purposes of judicial inquiry and there is jurisdiction vested in all Magistrates including the Magistrate who discharged the accused to inquire again into the case and due judicial discretion must be exercised. 31 Bom. L.R. 146=30 Cr. L.J. 534=116 Ind. Cas. 251 following 29 Bom. L.R. 312, 23 G. 726; 29 M. 123; 36 A. 129. A discharge not operating as an acquittal leaves the matter at large for all purposes of magisterial inquiry, 31 M. 543 at 546. It is competent to a Magistrate who had tried and discharged an accused person on a particular charge to again inquire into the same charge on a second complaint, 36 A. 53. See also the decisions in 28 G. 652; 29 G. 725 (F.B.); 35 G. 828; 29 M. 126; 28 M. 310; 31 M. 543; 40 C. 71; 29 A. 7, which take the same view, but unless there is manifest error, or manifest miscarriage of justice no process is to issue, 29 M. 126 (F.B.). See also 9 Bom. L.R. 250; 12 Cr. L.J. 381=11 Ind. Cas. 132. But the appropriate remedy for a complainant whose complaint is wrongly dismissed is to move the superior Court to set aside the dismissal, 11 Cr. L.J. 582=8 Ind. Cas. 202; 11 Cr. L.J. 203=52 Ind. Cas. 696. A very heavy burden lies on those who seek to disturb in revision the order of discharge, 10 Cr. L.J. 160=2 Ind. Cas. 825; 10 Cr. L.J. 314=3 Ind. Cas. 580. The mere absence of a complainant is not a valid ground for discharging the accused in a warrant case regarding a non-compoundable offence, 10 C. 67; 20 C.W.N. 698, nor can a Magistrate discharge an accused on the ground that the accused was illegally arrested by the police without a warrant issued on complaint of a non-cognizable offence, 21 A. 263.

Sub-section (2)—This sub-section was introduced in the 1898 Code, under which it is competent to a Magistrate to discharge the accused *after examining some only of the prosecution witnesses*, 9 M.L.T. 302=(1911) 1 M.W.N. 149=12 Cr. L.J. 105=9 Ind. Cas. 805. No doubt the language in the three sub-sections of this section is different but it is impossible to lay down any general principle or attempt to define what precisely is meant by the word "groundless." Probably, as good a definition as any, is that the evidence must be such that no conviction could be rested on it. It obviously does not mean that the evidence discloses no offence whatever, 57 M.L.J. 493=33 L.W. 273=1929 M.W.N. 575. If he does

so, he is bound under this sub-section to record his reasons for the same. The reasons are to the effect that the Magistrate considers the charge to be groundless and no case is made out against the accused. When in a warrant-case the Magistrate discharged the accused under this section on account of the absence of the complainant it was held, setting aside the discharge, that this section only provided for discharge when the Magistrate found that no case had been made out or he considered the charge to be groundless, and when the complainant was absent, the discharge must be under S. 259, *infra*, provided the offence is compoundable under S. 345, *infra*, 23 C.W.N. 693. Under this sub-section, the Magistrate may discharge an accused person even when no witnesses are examined in accordance with the provisions of S. 252 *supra*, 27 Cr. L.J. 531 = 93 Ind. Cas. 1037; but solid and substantial reasons are required to justify such a course, 15 C. 608 at 621; 11 A.L.J. 431; 25 Cr. L.J. 696 = 81 Ind. Cas. 184.

Further inquiry.—A District Magistrate or a Sessions Judge can direct a further inquiry under S. 436, *infra*, 32 M. 229; 18 Cr. L.J. 703 = 49 Ind. Cas. 706. So also the High Court, but further inquiry is to be made sparingly and in exceptional cases and notice to accused should as a rule be given before an order to his prejudice is made, 17 L.W. 247. But it is open to a Magistrate who has discharged the accused under this section to entertain a fresh complaint on the same charge, 2 Cr. L. Rev. 443 where 1895 A.W.N. 86 is followed; 36 A. 53; 29 C. 726; 38 C. 828; 29 M. 126; 31 M. 643. See also notes at pp. 385 and 505.

254. If, when such evidence and examination have been taken and made, or at any previous stage of the case, the Magistrate is of opinion that there is ground for presuming that the accused has committed an offence triable under this chapter, which such Magistrate is competent to try, and which, in his opinion, could be adequately punished by him he shall frame in writing a charge against the accused.

Charge to be framed when offence appears proved.

Scope of the section.—This section merely lays down what a Magistrate must do when proceeding with the trial of warrant-cases. It would be an undue extension of its scope to hold that it was meant to fetter the discretion of the Magistrate in all circumstances. S. 347, *infra*, is a general section which applies to all inquiries and trials and gives the Magistrate power to deal with the case under Chapter XVII at any stage before signing judgment and if this power is exercised, then, the provisions of this section are no longer applicable, 3 Ran. 42 where 42 M. 83 is followed.

The words "*or at any stage of the case*" were added in the Code of 1898. Before this amendment, the Magistrate was bound to take all the evidence for the prosecution before framing charge. The amendment was made for the purpose of protecting witnesses from the inconvenience of being required to attend a second time by enabling the Magistrate at any stage of the case to frame a charge in writing and if a cross examination then takes place, it would be in the terms of S. 256, *infra*, and then, unless there has been some amendment of the charge, a second cross-examination might be refused, 27 C. 371 at 372. No Magistrate or Court can refuse to allow an accused person to cross-examine prosecution witnesses before charge is framed and the Magistrate's procedure in refusing to allow such cross-examination was most irregular and in contravention of law. The proper course in revision, where such a procedure is adopted is for the High Court to cancel the charge and direct that the cross-examination of the witnesses be permitted, 23 Cr. L. J. 556 = 81 Ind. Cas. 41, 21 C. 642. The discretion was given to the Magistrate to draw up a charge at any previous stage of the case in order to enable the cross-examination of the witnesses for the prosecution to take place on their first attendance. Before the amendment the procedure in inquiries held in cases triable exclusively by the Court of Session under Chapter XVIII of the Code and in trials under this Chapter as to warrant-cases up to the time of drawing up a charge was the same, and

there was no difficulty when the accusation was for offences, some of which were triable exclusively by the Court of Session, while others were triable by the Magistrate, but when some of the offences were triable exclusively by the Court of Session, the Magistrate cannot proceed under this section. S. 208, *supra*, requires that an opportunity should be given to the accused to cross-examine the witnesses for the prosecution before the stage of proceedings is reached at which it might be found necessary to draw up a charge, and the Magistrate has power under S. 213 (2) *supra*, to cancel a charge if on taking further evidence after the charge he finds that no case is made out for commitment, 3 C.W.N. 110 at 111, 112. S. 239, *infra*, also makes provisions for the examination of the remaining witnesses for the prosecution after a charge was framed at an early stage without examining them all.

Offence triable under this chapter.—The procedure prescribed by this section is applicable only to the trial of warrant-cases, but where one of the offences with which the accused is charged is triable exclusively by the Court of Session, then proceedings will be in the nature of an inquiry under Chapter XVIII and S. 208, *supra*, and this section is not applicable, 3 C.W.N. 110. Where the accused was tried at one trial of defamation, a warrant-case and using criminal force, a summons-case, and was convicted of the latter offence and it was objected that the conviction was bad as the provisions of this section only allowed the Court in the course of a warrant-case to charge an offence triable under this Chapter, it was held by the High Court that the procedure of the Magistrate was legal, inasmuch as the allegations made by the complainant in her evidence constituted a fresh complaint and the accused understood this new charge and cross-examined the witnesses with reference to this new charge 3 Bom. L.R. 673. Where in the course of a trial under this Chapter the warrant-case fails the Magistrate can then and there, under the provisions of S. 238, *supra*, try the accused for a minor offence, a summons-case, adopting the procedure to be followed in trying summons-cases, 7 M. 454. Where in the course of a trial under this Chapter, the Magistrate finds that the charge was unsustainable and he immediately proceeded to try and complete the hearing altering the section into an offence which is a summons-case without framing a charge and without affording the accused an opportunity of further cross-examining the prosecution witnesses, it was held that the trial and conviction was altogether bad, 28 Cr. L.J. 227 = 99 Ind. Cas. 1027 following 19 A.L.J. 6 = 22 Cr. L.J. 146 = 59 Ind. Cas. 880.

Offence which the Magistrate was competent to try and adequately punish.—A charge is not to be framed when the Magistrate (1) cannot himself punish adequately; (2) is of opinion that he should submit the case to a superior Magistrate under S. 349 *infra*; (3) thinks the case ought to be committed; but a Magistrate is not bound to commit merely because the evidence disclosed another offence triable exclusively by a Court of Session, 4 Lah. 69; 37 C.L.J. 34. Failure by a Magistrate to exercise his own power where the offence is within his jurisdiction, is a failure to comply with the provisions of this section and an unnecessary committal can be quashed, 26 Cr. L.J. 148 = 83 Ind. Cas. 708. A Magistrate who is competent to try a case should not commit it to the Sessions unless he considers that he cannot pass an adequate sentence. The mere fact that the Magistrate was a witness to the identification parade is no ground for committing the accused, 21 A.L.J. 420 = 23 Cr. L.J. 683 = 81 Ind. Cas. 153. The complaint given to the Magistrate gave him jurisdiction to try the offence complained of, and, if it was established, to proceed with the trial and to convict, 27 A. 69 at 70. It is not irregular to frame a charge even in cases where the Magistrate knows that he may have to send up the case to a superior Magistrate for adequate punishment, 2 Cr. L.J. 454. In framing a charge the Magistrate is to consider the sole question, what is the offence disclosed by the evidence on record? When the Magistrate is of opinion that the offence is one which he is competent to try but could not be adequately punished by him, he can commit the accused to the Court of Session, 24 C. 429; 41 A. 454; 42 M. 83, followed in 3 Ran. 42 or he may not under S. 349, *infra*, see 2 Cr. L.J. 454. A Magistrate's discretion to commit to the Court of Session is not limited by this section which directs the Magistrate only to frame a charge, 42 M. 83. Under this section a Magistrate has to exercise a discretion in each particular case and his proceedings in the exercise of this discretion are clearly subject to examination and review by a superior Court either on appeal or by way of revision, 16 B. 880. The terms of this section are mandatory. It is imperative on a

Magistrate to draw up a formal charge against the accused in the manner indicated in this section and also to strictly comply with the provisions of B. 242, *infra*, 43 C.L.J. 100; 80 B. 230. The Magistrate is given a discretion to commit to the Court of Session only such of the cases as are within his competence to try but which cases he is of opinion cannot be adequately punished by him and so they should be tried by the Court of Session, 15 Cr. L.J. 664=25 Ind. Cas. 997.

He shall frame in writing a charge.—It is important to bear in mind the distinction obviously recognized in the code between the preliminary proceedings in warrant-cases that precede the drawing of a charge, which may be terminated by an order of discharge, that does not amount to an acquittal nor bar a second prosecution at the instance of the complainant and those that ensue after charge framed and pleaded, which can only be concluded by an acquittal or conviction which the accused can afterwards avail himself under B. 403 *infra*. So long as the case continues in the stage of inquiry, the duty of the Magistrate is confined to ascertaining whether there is anything that the person accused ought to be called upon to answer. When once the charge has been framed and a plea has been taken, the inquiry is turned into a trial and the evidence in support of the charge already recorded becomes evidence on that trial, subject to the right of the accused as declared by B. 256 and 257, *infra*, 9 A. 52 (F.B.) at 58. "Trial begins when the accused is charged and called upon to answer and then the question before the Court is whether the accused is to be acquitted or convicted and not whether the complaint is to be dismissed or the accused discharged. The observations in 15 C. 608 at 620 are questions which arise at the stage of inquiry," 32 M. 220 (F.B.) at 234, where during the trial of a warrant case, the complainant when examined, further charged the accused of an offence triable as a summons-case and the accused cross-examined the complainant and her witnesses upon the new charge a conviction upon the new charge is legal and is not prohibited by this section, 3 Bom. L.R. 675. Omission to frame a charge in writing will not invalidate the trial and acquittal of the accused, 3 A. 129. When a Magistrate frames a charge he indicates thereby that *prima facie* case exists against the accused, 7 C.W.N. 521. When a Court has framed a charge against an accused for an offence which is compoundable without the permission of the Court, and the charge has been read and explained to the accused who has pleaded to the same, the Court should when an application is made to it intimating that a composition by the person authorized to compound has been effected at once accept the composition and acquit the accused and has no power to alter the charge already drawn up, 18 Cr.L.J. 81=26 Ind. Cas. 993.

255. (1) The charge shall then be read and explained to the accused, and he shall be asked whether he is guilty or has any defence to make.

Plea,

(2) If the accused pleads guilty, the Magistrate shall record the plea, and may in his discretion convict him thereon.

Scope of the section.—An accused person does not plead to a section of a criminal statute. He pleads guilty or not guilty to the facts alleged to disclose an offence under that section. Accordingly the Court has to consider whether the facts set out in the charge establish an offence within a particular section, 7 Lah. 339 at 362.

Charge shall be read and explained to accused.—The provisions of this section are imperative and it is an illegality to ignore them. Mere reading of the charge to the accused is not sufficient. Where a Judge after reading the charge did not explain the charge to the accused as he is required to do by law, the conviction was set aside, 7 C. 98; 9 M. 61. When arraigning an accused, and before receiving his plea, the Court should be careful to ensure the explanation of the charge in a manner sufficiently explicit to enable the accused to understand thoroughly the nature of the charge which he is called upon to plead 5 C. 838,

are in attendance they are to be examined, and after that the accused shall be allowed to re-call and cross-examine the witnesses for the prosecution. If he refuses to exercise this right after he has entered on his defence he cannot demand as of right to re-call the witnesses for the prosecution if the case is adjourned because he has not produced his witnesses. He has had the opportunity intended by the section," 2 A. 233 at 238. The right conferred by this section is absolute and unqualified, 43 M. 411. The privilege conferred by this section on the accused is a substantial one and when denied it was for the prosecution to show that there was no prejudice, 39 M. 303. The provisions of this section are applicable to the summary trial of a warrant case, 1920 Pat. 283=21 Cr. L.J. 530-57 Ind. Cas. 434. The section gives the accused a right of recalling witnesses after a charge is framed. In summary trials where no charge is framed the accused has no such right, 28 Bom. L.R. 95=27 Cr. L.J. 431=93 Ind. Cas. 159, but see 50 M. 740. When an accused seeks to exercise his right of cross-examining the prosecution witnesses under this section he cannot be required to deposit the expenses, likely to be incurred by the witnesses, the right under this section being absolute, 25 Cr. L.J. 912=81 Ind. Cas. 449. When after framing of the charge, the accused requires the recall of the prosecution witnesses and the complainant failed to produce the witnesses the Magistrate is not entitled to order the complainant to deposit process fee for summoning the witnesses and to pay the accused a certain sum as costs, 29 Cr. L.J. 20=106 Ind. Cas. 436. See also 30 Cr. L.J. 664=116 Ind. Cas. 710. See 32 C.W.N. xv-xvi—critical note as to the effect of the new amendment of this section.

Sub-section (1).—This sub-section was re-drafted in 1893. From this sub-section it is clear that in a warrant-case "the trial" does not begin till a charge has been framed and the accused claims to be tried. Till a charge is framed it is only an inquiry. Trial begins when the accused is charged and called on to answer and then the question is whether the accused is to be convicted or acquitted, and not whether the complaint is to be dismissed or accused discharged, 32 M. 220 at 234 and 218 followed in 38 M 595; 2 L.W. 1244=17 Cr. L.J. 1=32 Ind. Cas. 129. An accused person is not bound to answer any question put to him at all, and can, if he likes, decline to plead and if he declines to plead, the case goes on just the same. S. 179, I P.C., has nothing whatever to do with the conduct of the accused persons in Court and no conviction for refusing to plead to a charge against an accused under S. 179, I P.C., can stand, 47 M 396.

Shall be required to state at the commencement of the next hearing whether he wishes to cross-examine.—According to the new amendment, after charge has been framed, unless the accused pleads guilty, the Magistrate is bound to ask the accused at the commencement of the next hearing of the case or if he, for reasons to be recorded in writing so thinks fit, forthwith whether he wishes to cross-examine any, and if so, which of the prosecution witnesses whose evidence has been taken. When the accused makes up his mind and desires to cross-examine the prosecution witnesses the Magistrate is bound to procure the attendance of those witnesses, 28 Cr. L.J. 861=104 Ind. Cas. 637; 53 B. 578. Under this section the accused is to be called upon to state whether he wishes to cross-examine any of the prosecution witnesses, only at the commencement of the next hearing. But if the Magistrate requires the accused to state so forthwith, the law requires the Magistrate to state his reasons for doing so. Where the accused is represented by a vakil from the very beginning he may be asked forthwith to state whether he wishes to cross-examine for the simple reason that the accused will not be prejudiced and it is convenient to arrange a date for the attendance of such of the prosecution witnesses whom the accused wishes to further cross examine before the witnesses leave the Court. But if the accused is not represented reasons must be recorded for not postponing the question to the next hearing by which time he can consult a vakil. The provisions of the section are undoubtedly mandatory. Before the amendment it was held that omission on the part of the Magistrate to ask the accused if he wished to cross examine the prosecution witnesses vitiated the trial. The Legislature has now amplified the mandatory section and an omission on the part of the Magistrate to comply with the mandatory provisions cannot be cured by S. 537, *infra*. The safest guide is the well-known ruling of the Judicial Committee in 23 M. 61 (P.C.), that a disobedience to an express provision of law as to a mode of trial is not a mere irregularity

but an illegality, 30 M. 740, *dissenting* from 6 Lah. 534 and 23 Bom L.R. 95=27 Cr. L.J. 431=93 Ind. Cas. 159, *followed* in 30 Cr. L.J. 850=118 Ind. Cas. 200 and *distinguishing* 49 A. 315. See also 55 M.L.J. (Sh n) 6. If failure of justice has resulted from the non-compliance with the provisions of this section, it would furnish a valid ground for remanding the case for a re-trial, 29 Cr. L.J. 354=108 Ind. Cas. 412, but a different view was taken in 49 A. 315, holding that decision of the Privy Council in, 23 M. 61 (P.C.), applies only to a disobedience to an express provision of law as to the mode of trial and mere disobedience to an express provision of law cannot come within that ruling; the provisions in this section are not provisions relating to the mode of trial and it would be wrong to hold that failure to follow the provisions strictly amounts to more than an irregularity in procedure especially when no failure of justice has been occasioned thereby, 23 Cr. L.J. 851=104 Ind. Cas. 637. See in this connection 3 Ran. 53 (P.C.) & 8 Lah. 230 (P.C.) explaining, 23 M. 61 (P.C.). See also 29 Cr. L.J. 354=108 Ind. Cas. 412. The intention of the Legislature is that sufficient time should be given to an accused person to consider whether he wishes to cross-examine any of the prosecution witnesses after the framing of the charge and it is only in special cases the Magistrate can require him to state forthwith if he so wishes. This does not come into operation until the charge is framed and where a pleader for the defence, before charge, had cross-examined the witnesses and stated that he no longer required their attendance it will not deprive the accused of his right to cross-examine prosecution witnesses after charge and any irregularity committed by the Magistrate in not asking the accused to state if he wished to further cross-examine the witnesses can be condoned if the defence pleader expresses a desire that the witnesses should be re-called for further cross-examination. The Magistrate has no power when passing an order under this section to impose a condition on the accused that he should deposit in Court the expenses of re-calling the prosecution witnesses before they are actually recalled, 5 Pat 110; 13 Cr. L.J. 554=15 Ind. Cas. 970. The Legislature intended to give accused persons, against whom charges are framed an interval of time to think out the line of their defence before they are called upon to inform the Court how they intended to proceed. Where a Magistrate infringed the imperative provisions of this section he commits an illegality which vitiates the whole proceedings. The Legislature has conferred upon an accused person the privilege that ordinarily after being charged with an offence, he shall have a period of not less than twenty-four hours to consider the method in which he will meet the charge, and it is difficult to say that he has not been prejudiced if the Magistrate without assigning any reason departs from the normal procedure probably overlooking or being unaware of the recent changes in the law and has not allowed the accused that privilege, 26 Cr. L.J. 1158=89 Ind. Cas. 518. Provided no failure of justice has been occasioned the Magistrate's omitting to record reasons in writing forthwith questioning the accused under this section is only an irregularity as the provisions of this section as to the recording of reasons are not mandatory and the trial held cannot be said to be illegal by this omission but cured under 8, 537, *infra*, 6 Lah. 534. But see 50 M. 740 which *dissents* from this view. Where the Magistrate fails to comply with the imperative provisions of this section it is for the prosecution to show that the accused was not prejudiced and when the illegality has been committed the proper course for the appellate Court is to order a re-trial, 31 Bom. L.R. 593 *following* 39 M. 503 and 16 Cr. L.J. 788. See also 30 Cr. L.J. 880=118 Ind. Cas. 200. Where the prosecution witnesses came from a distant Native State and it would have taken a long time to have again secured their attendance, it was held that the Magistrate was justified in asking the accused forthwith whether they wished to cross-examine any of the prosecution witnesses, 27 Cr. L.J. 720=94 Ind. Cas. 912. The obligation imposed by this section on a Magistrate to ask the accused whether he wishes to further cross-examine the prosecution witnesses is quite distinct from the obligation imposed by 8, 549, *infra*, to question the accused generally for the purposes mentioned therein, 50 B. 42. The accused is not required to state *immediately*. Time till the next hearing is to be given to him generally, but if the Magistrate thinks fit he may for reasons to be recorded by him in writing forthwith ask the accused to state *immediately* after a refusal or omission to plead or claim to be tried whether he wishes to cross-examine the witnesses. The object of the amendment is to require the accused to exercise his right at once only in exceptional cases. The provisions contained herein are imperative and it is an illegality to ignore them. The

law allows no option in the matter and the accused must be asked at the appropriate time if he wishes to re-call witnesses for cross examination, 16 Cr L J. 146=27 Ind. Cas. 210; 50 M. 740. The terms of this section are an exception to the general rule. It is permissible to a Magistrate to put the question *forthwith* on the framing of the charge and taking the accused's plea thereto but if he follows that procedure he has to record his reasons in writing which must appear to be cogent and adequate. The reason that it was the usual practice of the Magistrate to put the question forthwith and that the accused's pleader ought to have foreseen that the cross-examination of the prosecution witnesses would have to be proceeded on the day the charge is framed is no sufficiently cogent or adequate reason for adopting the procedure, 31 Bom. L.R. 593 at 595. This section gives the Magistrate no discretion and the accused is entitled to have the witnesses re-called for the purpose of cross-examination. Indeed, after a charge has been drawn up, it is his duty to require the accused to state whether he wishes to cross examine and, if so, which of the witnesses for the prosecution whose evidence has been taken. The fact that there has already been some cross-examination before the charge has been drawn up does not affect the privilege. It is only after the accused has entered upon his defence that the Magistrate is given a discretion to refuse, 27 C 370 at 371-372; 14 Cr L J 358=20 Ind. Cas 212. To the same effect are the rulings in 7 C.L.J. 240; 4 C.W.N. 361 and 6 C.W.N. 421, but it was held in a case in 4 Cr L. Rev. 393, that the omission on the part of the Magistrate to ask the accused whether he wishes to cross-examine the prosecution witnesses again after the charge was framed is an irregularity, and a conviction ought not to be interfered in revision by the High Court, as the records in that case showed that the accused was not prejudiced in any way. Failure on the part of the Magistrate to record his reasons in writing for calling upon the accused to answer forthwith whether he wished to cross examine, prosecution witnesses as required by this section does not render the trial illegal. The provision is only directory and not mandatory and it is a mere irregularity which can be cured under S 537, *infra*, unless there has been a failure of justice, 6 Lah. 534; see also 28 Bom. L.R. 98=27 Cr L J. 431=93 Ind. Cas. 159. But see 50 M. 740. When an accused person is deprived of his right conferred on him by this section, i.e., the right to have the prosecution witnesses cross-examined after charges there is a violation of an express provision of law which is not mere irregularity but an illegality vitiating the whole trial and there is no authority for the position that the accused can be deprived of this right after charge 30 Cr L J 880=118 Ind. Cas. 200 following 50 M 740 and 25 M 61 (P.C.) The privilege conferred by this section is a substantial one and, when denied, it is for the prosecution to show that there was no prejudice, 39 M. 503 at 504; see also 46 M 449 (F.B.). When there are several accused and some of them have cross-examined, that fact will not in any way affect the right under this section of each accused to cross-examine, 11 C.W.N. cxi.

Witnesses named by him shall be re-called—The word "re-call" is very significant and does not mean *re summon*. If the pleader for the defence who had heard the evidence-in-chief is not prepared to cross-examine the witnesses then and there after the charge has been framed, he hardly deserves the name and rank of a pleader. Cross-examination is intended for testing the accuracy and credibility of witnesses, not for building up a case for the defence and the witnesses should then and there after cross and re-examination have been discharged and they would have been discharged with a minimum inconvenience. Then should follow the evidence of the remaining witnesses for the prosecution who should then and there be cross-examined and re-examined and discharged. After this the accused should be called upon to enter upon his defence and produce his evidence. The moment the stage has been reached when there is ground for presuming that an accused has committed an offence triable under Chapter XXI, is the critical moment at which the examination of the accused should be taken and the charge drawn up, 8 A.L.J. 707 at 701, 709=42 Cr. L.J. 471=11 Ind Cas 1007. But when the case is a complicated one, a pleader ought not to be asked to cross-examine immediately, and time ought to be given to prepare for such cross-examination, 1895 A.W.N. 40. Where the accused is undefended it is not giving him a reasonable opportunity to ask him immediately after charge was framed to cross-examine the witnesses, more especially when he had no means of knowing that a charge would be

framed on that date and that the prosecution witnesses would be present then for cross-examination, and a refusal of the Magistrate to give a reasonable adjournment, and to summon the prosecution witnesses for cross-examination was regarded by the High Court not merely as an irregularity but an illegality vitiating the conviction, and the conviction was set aside, [1911] 2 M.W.N. 192=12 Cr. L.J. 545=12 Ind. Cas. 524. Similarly where the accused who were ignorant persons wanted time to cross-examine after a charge has been framed against them to obtain legal advice and assistance and the Magistrate refused the request of the accused, it was held that no reasonable opportunity was given to the accused to cross-examine the witnesses and asking them who were undefended to cross-examine immediately after the charge was framed was not giving them a reasonable opportunity, 18 Cr. L.J. 786=31 Ind. Cas. 542. Where the accused applied for an adjournment to have the prosecution witnesses cross examined by Counsel who could not appear on the date fixed and the Magistrate refused the adjournment and when they were summoned as defence witnesses the Court refused Counsel to cross-examine them, the High Court while setting aside the conviction holding that the Magistrate was wrong in refusing cross examination of the witnesses, made the following general observation. "We may observe at the very outset that in our opinion the work of this Court would be appreciably lightened, if the Subordinate Magistrates in dealing with the law relating to the rights of accused persons, would construe it in a less technical spirit than they are sometimes accustomed to do. In the inferior Courts the right principle is occasionally reversed and a person is presumed to be guilty the moment he is accused, and every attempt on his part to prove his innocence is regarded as vexatious. When the law vests in a Court a certain discretion, that discretion in our opinion should be exercised so as not to give rise to any reasonable complaint of prejudice or bias, 23 C. 594 at 595. Where a Magistrate refused to re-summer a medical witness for cross-examination unless the accused paid beforehand the fees for his attendance, and convicted the accused, the High Court set aside the conviction and sentence and directed the Magistrate to issue process for the attendance of the witnesses, 4 C.W.N. 351. Where before charge was framed the accused was allowed to cross-examine the prosecution witnesses on the distinct understanding that the witnesses will not be asked to be re-called after charge and the accused after charge wanted to re-call for further cross examination of the witnesses and the Magistrate refused to re-call them, it was held that the Magistrate acted contrary to the provisions of this section, but as the accused offered to pay the expenses incidental to the re-call of the witnesses they were directed to pay the same, 6 C.W.N. 423. Where an inquiry commenced as a warrant-case and the accused curtailed their cross-examination of the prosecution witnesses under the impression that they will have a further opportunity to cross-examine after the framing of a charge but no offence triable as a warrant-case having been disclosed, the Magistrate closed the case and convicted the accused, it was held that the refusal of the Magistrate to recall the prosecution witnesses for cross-examination was inequitable and that it was his duty to allow the accused an opportunity of completing the cross-examination before proceeding with the charge, 16 Cr. L.J. 230=28 Ind. Cas. 108. Similarly where a summons and a warrant case are tried together the procedure to be followed being that prescribed for a warrant-case, the accused would be entitled under this section to recall for cross-examination the prosecution witnesses even if the charge triable as a warrant-case had been dropped. The accused should not have anticipated such an event and the refusal of the Magistrate to recall the witnesses for cross-examination was held illegal, 39 M. 503; 41 M. 727, see also 53 B. 578. When the records showed that the requirements of this section as to requiring the accused to state whether he wished to cross-examine any witness had been complied with, then there is no provision requiring a Magistrate to offer an opportunity to the accused to have his witnesses summoned. It is his right to apply and when he did not exercise it he has nothing to complain, [1912] M.W.N. 1121=13 Cr. L.J. 828=17 Ind. Cas. 572. A person proceeded against under S. 110, *supra*, has no right to further cross-examination of the prosecution witnesses under this section, 8 Lah. 265 following 1916 P.R. (Cr. J.) 1 and 33 C. 243; 17 Cr. L.J. 84=32 Ind. Cas. 676; but in 50 A. 71 an opposite view was taken. The Madras High Court recently referred the question to a Full Bench, see 56 M.L.J. (Sh. n.) 40 See p. 164 under S. 117, *infra*. The Judges in the Full Bench decision in 43 M. 511 were of opinion that S. 117, *infra*, attracted to itself all the provisions of the warrant-case

so this section also applied. The Full Bench has held (*Cr. R. C. No. 941 of 1923*) 57 M.L.J. (Sh. n.) 39=30 L.W. (Sh. n.) 47 that the accused has no absolute right to have the prosecution witnesses recalled for further cross-examination and the expression 'no charge need be framed' occurring in S. 117 (2), *supra*, would mean that it would not be possible or there would be no occasion for framing a charge in security proceedings; the notice to show cause issued to the accused would take the place of a charge in a warrant. *o*ise as such a notice is to state the substance of the information. It was further held that the hardship, if any, to the person proceeded against can be obviated by invoking the provisions of S. 257, *infra*, which is a sufficient protection against any such hardship. The decisions in 8 Lah. 263; 35 C. 243 were *followed* and 50 A. 71 was *not followed* and the view expressed in 43 M. 811 was held to be *mere obiter* as the question did not arise there specifically for decision. See 30 Cr. L.J. 251=118 Ind. Cas. 647, *following* 48 M. 1 as to the admissibility of evidence not subjected to cross-examination by accused either before charge or after charge due to serious illness of the witness.

Evidence of remaining witnesses for prosecution shall be taken—The expression "*remaining witnesses*" occurring in this sub-section is not necessarily limited to the witnesses named by the complainant and summoned by the Magistrate before the framing of the charge. The expression is wide enough to include any witness who, according to the prosecution, is able to support its case, though he has not been named, provided, of course, that he is not sprung upon the defence all of a sudden, and sufficient opportunity is given to the latter to prepare for the cross-examination of the witnesses, 11 Bom. L.R. 1153=10 Cr. L.J. 530=4 Ind. Cas. 268. The witnesses whom the complainant may wish to examine after the cross-examination and the re-examination of the prosecution witnesses already examined are "*remaining witnesses*" within this sub-section and if they are not in attendance he has a right to insist, on an adjournment for the hearing of their examination, 26 Cr. L.J. 958=87 Ind. Cas. 110.

Accused to be called upon to enter upon his defence.—If a charge is framed the accused is given an opportunity of cross-examining the prosecution witnesses. There the remaining witnesses, if any, for the prosecution are to be examined and the accused is called upon to enter on his defence and produce his evidence. This is the procedure prescribed by the section. S. 342, *infra*, adds something further to this section. It requires questioning the accused generally on the case just before the accused is called upon to enter on his defence, 49 A. 551. An accused cannot be called upon to enter upon his defence until the prosecution closes its case. After the accused has entered upon his defence, no further evidence can be adduced against the accused except under S. 540, *infra*, for which there must be valid reasons which must be recorded by the Magistrate, 10 A.L.J. 333 at 334.

Sub-section (2)—This is the only provision in the Code for putting in a written statement by an accused which the Magistrate should file with the record. When the accused says he will file a written statement as an answer to questions put to him it means he prefers to put in a written statement and does not wish to answer by word of mouth, 45 M. 449 at 470. The sub-section provides that if the accused puts in any written statement the Magistrate shall file it with the record. When a document is written by an accused person whether it be a letter or any other document, it is open to the accused person to file it along with his statement. It may be that there is no witness to speak to the actual writing of the document but the Court is bound to consider the document along with his statement. It may be that the statement is not true but in order to see whether the documents are relevant or irrelevant, the Court must look into them, see what they purport to be and then consider the statement of the accused that he wrote them and then decide the case. It is not open to a criminal Court to shut its eyes to the statement of the accused when that statement refers to certain documents to which the accused is a party. Under the law the Court is bound to consider the statement of the accused and may require further proof and if further proof is not forthcoming it may decline to act on it. But no Criminal Court is justified in brushing aside the documents to which the accused is a party when the accused himself files those documents in Court along with his statement. As the accused cannot give evidence on oath he can only file a statement or to refer to some documents to which he was a party, 53

section ought not to be used for defeating the ends of justice, 39 C. 781. The principle of this section applies also to summons-cases, 29 Cr. L.J. 308 at 310-107 Ind. Cas. 846; 43 M. 411. The Magistrate has no discretion to refuse to issue process to compel the attendance of any witnesses unless he considers that the application should be refused on the ground that it was made for the purpose of vexation or delay or defeating the ends of justice and such ground shall be recorded by him in writing. The Magistrate, therefore, must issue the summons for each witness named in the list, unless he takes the responsibility of recording his ground for believing that any particular name is entered for the purpose of vexation or delay or defeating the ends of justice, 5 Pat. L.J. 95; 51 C. 1043. The case of each witness must be dealt with separately and the limitation of the number of witnesses on a particular point was purely arbitrary and cannot be upheld, 25 B. 418 at 421 followed in 27 Cr. L.J. 543=93 Ind. Cas. 1039. Every case in which a petition is rejected under this section must be judged on its merits, 21 M.L.J. 233 at 239=10 M.L.T. 84= (1911) (1) M.W.N. 327=12 Cr. L.J. 150=9 Ind. Cas. 897. The Magistrate cannot decline to examine the witnesses for the accused on the ground that in his opinion they are unnecessary, 15 Bom. L.R. 360=13 Cr. L.J. 523=15 Ind. Cas. 795. After a charge has been altered the accused is entitled to have new witnesses examined on the altered charge unless the Magistrate is of opinion that the application to summon new witnesses is made for the purpose of vexation or defeating the ends of justice, 57 M.L.J. 478=1929 M.W.N. 530. The Madras High Court in a recent Full Bench decision, 57 M.L.J. (Sh. n.) 38=30 L.W. (Sh. n.) 47, Cr. R. C. No. 941 of 1928 has held that to proceedings under S. 110 *supra*, the provisions of this section apply and not those of S. 256 *supra*.

After the accused has entered on his defence—After a charge was framed the accused pleaded not guilty and stated he had witnesses to examine; in such a case the accused had entered on his defence and an application for further cross-examination of witnesses discharged from attendance must be deemed to have been made under this section, 43 M. 411. It is not clear whether the application for summons should be made immediately after the accused had entered upon his defence or whether it could be made within a reasonable time and how long the right of the accused will remain open. Where there was a delay of one day in making an application under this section the Magistrate, it was held, was not justified in refusing to summon the witnesses, 4 C.W.N. 241. It is open to a Magistrate after a case has been closed, and at any time before judgment is pronounced to give an opportunity to the accused to cross-examine the witnesses for the prosecution and to examine the witnesses for the defence, even if the accused had to avail himself of such opportunity at an earlier stage of the proceedings. And it always depends upon the circumstances of each case whether a belated application should be granted or not. Where the attitude of the accused is deliberately designed to harass the Court, the Magistrate will not be acting improperly by refusing his application, 21 M.L.J. 233 at 237-99=10 M.L.T. 84 at 91, 92.

Process for compelling attendance of any witness for examination or cross-examination.—This section allows an accused to summon witnesses for the purpose of cross-examination and the application for process need not state whether the accused wants the witnesses for examination or for cross-examination. It is for the Magistrate to inquire into the accused's purpose if he thinks the application is for causing vexation or delay, 24 L.W. 751=23 Cr. L.J. 32=39 Ind. Cas. 64. When certain witnesses were cited by the accused the Magistrate should not decline to issue summons on the representation of the complainant that they were cited for causing vexation or delay. It is his duty to look into the list of witnesses himself and satisfy whether the citation was for vexation or for delaying the trial and then he is entitled to say whether he will summon them or not, 29 Cr. L.J. 725=110 Ind. Cas. 581. As the law stands, an accused person, by paying expenses can enforce the appearance of any witness including the trying Magistrate under this section, unless the Magistrate considers the application should be refused on the ground that it is made for the purpose of vexation or delay or defeating the ends of justice and it would be for the Magistrate to decide whether the application shall be granted or refused. The Magistrate may however require that reasonable expenses for summoning witnesses be

13 Cr. L.J. 523=15 Ind. Cas. 795 nor is it open to him to refuse to examine a witness for the accused when the witness was actually present in Court, 4 Bom. L.R. 461.

Such ground shall be recorded.—Failure to record reasons is an illegality and cannot be cured by S. 637, *infra*, 31 M. 131; 26 B. 418. The section is imperative as to the recording of reasons for refusing the application of the accused for further cross-examination, and if the Magistrate fails to record in writing his reasons, the trial is bad, 51 C. 1044. It was held in 3 A. 392 that a failure to record reasons is to omit to satisfy the plain direction of the law. Where the Magistrate failed to give any reason for refusing to summon the witnesses cited by the accused under this section the Full Bench decision see 57 M.L.J. (Sh.n) 38=30 L.W. (Sh.n) 47, *Cr. Rev. Case*, 941 of 28 suggested that it may be a ground for interference. The proviso was newly added in the Code of 1893. When the accused had cross examined or had an opportunity to cross-examine but did not exercise it, the Magistrate is to be satisfied that to allow a further cross-examination is necessary for the purposes of justice. The evidence of a witness not cross-examined before charge and who was not available for further cross-examination after charge due to serious illness is admissible but its weight depends upon the circumstances of each case, 30 Cr. L.J. 851=113 Ind. Cas. 647 following 43 M. 1.

Proviso—A Magistrate is bound under this section to issue process on the accused's application after he has entered on his defence for compelling the attendance of his witnesses unless for stated circumstances which he must find, and record in writing his reasons for the refusal. The proviso on the other hand definitely prohibits the Magistrate from issuing such process, if the accused has cross-examined or had an opportunity to do so after charge, unless the Magistrate is satisfied that such attendance is necessary for the purposes of justice, i.e., unless he is convinced of the existence of the strongest possible grounds for disregarding the prohibition. The exception to the prohibition must not be read as swallowing up the prohibition or the whole proviso as enjoining that the Magistrate shall issue process if he is not satisfied that the attendance of witness is unnecessary for the ends of justice, or if he is not satisfied that (as in the case of witnesses not covered by the proviso) the application is made for the purpose of vexation or delay or for defeating the ends of justice. On the contrary the prohibition may not be disregarded unless the Magistrate is of opinion that the ends of justice not only warrant but demand such disregard. It is also clear that it is not incumbent to record in writing reasons for not being satisfied. The natural consequence would be a record of reasons for disregarding (not for not disregarding) a statutory prohibition. There may be exceptional cases where the Court can see at once that the attendance of witnesses referred to in the proviso should be compelled. But it is ordinarily for the applicant to satisfy the Magistrate that it is necessary for the purposes of justice that his application for compelling the attendance of such witnesses should be granted, 27 Cr. L.J. 333=92 Ind. Cas. 863.

Sub-section (2).—This section gives the accused a right to summon witnesses for cross-examination even after they have been further cross examined after the charge has been framed. It is true that this sub-section lays down that the Magistrate may, before summoning any witness require that the reasonable expenses of the witness be deposited in Court. But the ordinary procedure in warrant-cases is that the costs of causing the attendance of the accused's necessary witnesses is usually borne by Government. The Magistrate has no doubt authority to depart from this usual practice but there should be strong and cogent reasons for making the departure. When a long list of witnesses is filed to defeat or delay the ends of justice under sub-section (1) he may decline to compel the attendance of all the witnesses but the same result ought not to be achieved by refusing to summon the witnesses unless the costs are deposited. While the Court is fully justified in declining to accede to the request which would amount to an abuse of the process of the Court, it should at the same time be careful not to do any act which might hamper the accused in his defence 30 Cr. L.J. 814=117 Ind. Cas. 667. Under this sub-section it is open to the Magistrate before summoning any witness to require the accused to deposit in Court reasonable expenses for witnesses' attendance. The provision has no doubt been made so that if the accused is not prepared to deposit the reasonable expenses of the witnesses the Magistrate need not summon them and put the Government to expense

but where the witnesses have in fact been summoned at Government expense and present in Court, the Magistrate should not refuse to allow them to be cross examined unless the accused paid their expenses, 33 Cr. L.J. 333-115 Ind. Cas. 78 S. 511, *infra* 13 Cr. L.J. 534=15 Ind. Cas. 970.

258. (1) If in any case under this chapter in which a charge has been framed the Magistrate finds the accused not guilty, he shall record an order of acquittal.

Acquittal.

(2) Where in any case under this Chapter the Magistrate does not proceed in accordance with the provisions of section 319 or section 562, he shall, if he finds the accused guilty, pass sentence upon him according to law.

Conviction.

Scope of the section.—When the trial of a case was one falling under Chapter XXI of the Code, the only means by which an order of acquittal could legally be arrived at are the means described in this section and the preceding sections, that is to say, an order of acquittal could be pronounced only where, after the framing of a charge, the Magistrate is of opinion that the evidence is insufficient to justify a conviction. In a warrant-case in respect of a non-compoundable offence the Magistrate without framing a charge and instead of exercising his own mind upon the evidence in the case, allowed the decision to be taken out of his hands by a private arrangement between the persons interested and acquitted the accused, it was held that upon the provisions of the Code the order was unwarranted and a rehearing of the case was ordered, 37 B. 369 at 372, 22 W.R. (Cr.) 25. No order acquitting the accused under this section can be made without the Court recording a finding that the accused is not guilty. Where the charge had been framed against the accused and they pleaded not guilty to the charge and entered on their defence they cannot be acquitted on account of the complainant's absence on an adjourned hearing and such acquittal is illegal, 28 Cr. L.J. 264=84 Ind. Cas. 323. Where after framing a charge a Magistrate is transferred and succeeded by another Magistrate who recommenced the inquiry under S. 350 *infra*, if the succeeding Magistrate is satisfied that the charge framed by his predecessor is not well-founded, he must acquit the accused under this section and cannot discharge under S. 253 (2), *supra*, 22 C.W.N. 117. See also 33 M. 583. An order of acquittal made under this section cannot be set aside by the District Magistrate or Sessions Judge and further inquiry ordered under S. 436, *infra*, 38 M. 583. The only remedy open is to move the Local Government to prefer an appeal against the acquittal under S. 417, *infra*, to the High Court. An acquittal of some of the accused under this section bars the trial even of those accused who could have been charged and tried along with the acquitted accused but were not tried. So long as the acquittal on the same facts remained in force, the acquittal could be pleaded as a bar even by those accused who were not so tried, 7 C.W.N. 473 and 711; 4 C.W.N. 345.

Any case in which a charge has been framed—If a charge has been framed under S. 254, *supra*, the accused must either be acquitted or convicted. S. 535, *infra*, lays down the procedure to be followed when a failure of justice has been occasioned by an omission to frame a charge. The Court of appeal or revision shall in such a case order a charge to be framed and the trial recommenced from the point immediately after the framing of the charge. Even where the order is styled 'an order of discharge' it is in effect an acquittal, 38 M. 535. S. 537, *infra*, applies only to error, omission or irregularity in the charge framed and not to absence of a charge.

Shall record an acquittal—Discharge is different from an acquittal. After framing a charge there cannot be a discharge and even where the order is styled one of discharge it is really one of acquittal, 22 W.R. (Cr.) 25; 38 M. 583 following 1903 P.R. (Cr. J.) 35. A Magistrate in a warrant-case after a charge against the accused is not found to convict him merely because the accused did not produce any rebutting evidence but is bound to acquit him if at the time of giving judgment he has a reasonable doubt as to the accused's guilt, Ratanlal 854. It is not necessary that the acquittal should be by the Magistrate who framed the charge 3 C. 495 and where an order of acquittal is in force, it is not competent

for the superior authorities to order a further inquiry into the case, 3 C.L.R. 131; 9 B.H.C.R. 170; 38 M. 585.

Shall pass sentence according to law, etc.—The words "unless he proceeds in accordance with the provisions of S. 349 or S. 562" have been newly added. Every case of conviction need not necessarily now be followed by a sentence. The Magistrate, if empowered, may pass an order under S. 562, *infra*, releasing the accused upon probation of good conduct or release on admonition instead of sentencing him at once to undergo punishment or he may send up the case under S. 349 *infra* to a superior Magistrate for a more severe punishment. A Magistrate when convicting the accused cannot release the accused without passing a sentence on the ground that the hardship he has already undergone was sufficient punishment. Some sentence however nominal should be passed unless he acts under S. 562 or releases on admonition now, see 4 M.H.C.R. Appx. 66; 1884 A.W.N. 219.

259. When the proceedings have been instituted upon complaint, and upon any day fixed for the hearing of the case the complainant is absent, and the offence may be lawfully compounded, or is not a cognizable offence, the Magistrate may, in his discretion, notwithstanding anything hereinbefore contained, at any time before the charge has been framed, discharge the accused.

Amendment—The words "or is not a cognizable offence" have been newly added now for conferring a discretion on the Magistrate to discharge the accused if the complainant is absent and the offence is not cognizable.

Scope of the section.—This section applies only to warrant-cases and that to warrant-cases where the offence is lawfully compoundable under S. 345, *infra*. This section gives a Magistrate discretion to discharge the accused, when in a case instituted upon complaint, the complainant chooses to be absent on the day fixed for hearing and when the offence is one which may be lawfully compounded or when it is a non-cognizable offence. When the complainant is dead but he has been examined and cross-examined his evidence can be used under S. 84, Ind. Ev. Act and therefore the Magistrate is not bound to discharge the accused but can proceed with the trial and by so doing he exercises a proper discretion, 6 Ran 667. An order under this section has not the effect of an acquittal under S. 403, *infra*, 28 M 310; 26 Cr. L.J. 1040=87 Ind. Cas. 923, under this section, which deals with warrant-cases the Magistrate can pass an order of discharge where the offence is compoundable. This section cannot apply to the case of withdrawal by a complainant, 10 C 551 and 67. In a warrant-case a Magistrate is bound to proceed with trial of a non-compoundable offence after the framing of the charge and to conclude it regardless of the fact whether the complainant does or does not attend. After the framing of a charge in such a case, the position of the complainant is reduced to that of a witness and he cannot be ordered to pay the costs of the adjournment occasioned by his failure to attend at the date of the particular hearing 25 Cr. L.J. 87=76 Ind. Cas. 23. The principle underlying the provisions dealing with the trial of non-compoundable and cognizable cases is whether instituted on complaint or otherwise the final responsibility of the conduct of such cases rests with the State and where there are reasonable grounds for believing that an offence has been committed. Once the machinery of law has been set in motion, the right of arresting its progress rests with the State alone, 5 Ran. 136. This section gives no power to dismiss a warrant case for default after a charge has been framed, 20 Cr. L.J. 763=53 Ind. Cas. 491 and the Magistrate ought to enforce the attendance of the complainant in such a case, Ratanlal 524 and 847; 4 C.W.N. 26. A discharge under this section can be made on the ground of the absence of the complainant. The offence may be lawfully compoundable and is not cognizable. The Magistrate has a wide discretion under this section and before discharging the accused he is bound to see whether a *prima facie* case has been made out by the evidence on record, 1881 A.W.N. 116; 12 Cr. L.J. 184=9 Ind. Cas. 1007. He is not bound to wait till the Court is about to close for the day in order to give an opportunity

for the absentee complainant to appear before discharging the accused, 7 M. 336 and 213 followed in 43 M. 893. When, in a warrant-case, the Magistrate discharged the accused under S. 253, *supra*, on account of the absence of the complainant, it was held that the only provision which enabled a Magistrate to discharge the accused for absence of complainant was this section, 20 C.W.N. 638. A Magistrate discharging the accused under this section is incompetent to rehear the case without an order for further inquiry. A discharge not operating as an acquittal leaves the matter at large for all purposes of judicial inquiry and there is jurisdiction to entertain a fresh complaint but the Magistrate must exercise a judicial discretion, 31 Bom. L.R. 145. It is competent to a Magistrate to entertain a fresh complaint to restore to file the first complaint on sufficient grounds being shown for complainants' absence, 21 Cr. L.J. 391=100 Ind. Cas. 381, but see 32 Cr. L.J. 411=115 Ind. Cas. 309 discussed under S. 203 *supra* at p. 355. The order of discharge has not the effect of an acquittal, 31 M. 543; 23 M. 128 (F.B.); 23 C. 632; 23 C. 726; 18 M.L.J. 561; 23 M. 310, 41 M. 727; 22 B. 711; 31 Bom. L.R. 145; 27 Bom. L.R. 332; Ratanlal 350; 36 A. 123.

Complainant is absent.—The absence of the complainant raises a presumption that he does not wish to proceed with the prosecution, 12 Cr. L.J. 181=9 Ind. Cas. 1007. On the non-appearance of a complainant in a summons-case S. 247, *supra*, authorises an acquittal unless the Magistrate for some reason thinks fit to adjourn the case but in a warrant-case which is not compoundable he cannot discharge the accused, 10 C. 67. If a stage has been reached in the trial indicated in S. 254, *supra*, he is bound to frame a charge if he believes the evidence, Ratanlal 524. If a Magistrate discharges the accused because of the non-appearance of the complainant under this section and subsequently he excuses the non-appearances he must proceed *de novo*. None of the evidence recorded at first can be carried over to the second case. If no evidence is recorded at first and the Magistrate is asked to proceed *de novo* he must take a fresh sworn statement and failure to do so is only an irregularity, 1929 M.W.N. 195=30 Cr. L.J. 433 (1)=115 Ind. Cas. 64. When a case involving a serious offence has been charge-sheeted by the police and on the day fixed for hearing, the officer charged with the prosecution takes no steps to proceed with the case, no one present to conduct the prosecution and no witnesses were present in Court, the Magistrate dismissed the case under this section, it was held that although the Magistrate was well within his rights of protesting against the manner in which the Court was treated, he was not entitled to dismiss the case as the case was not instituted on complaint and the complainant was absent and no action was taken by the Court under S. 253, *supra* on the ground that no case was made out on the evidence, 28 Cr. L.J. 816=104 Ind. Cas. 256.

The offence may be lawfully compounded.—S. 315, *infra*, and Sch. II, column G show what offences may be compounded and the table attached to sub-section (2) of S. 345, *infra*, gives the offences which may be compounded with the permission of the Court. Warrant-cases which cannot be lawfully compounded cannot be dismissed or end in a discharge owing to the absence of the complainant. The Magistrate should enforce the attendance of the complainant and his witnesses under S. 92, *supra*, and admit the accused to bail if the complainant is absent, 1891 A.W.N. 116, see Ratanlal 524.

Further inquiry.—There was a conflict of opinion as to whether a further inquiry could be ordered when no fresh evidence was forthcoming but it was made clear that a further inquiry could be ordered even when no fresh evidence is available, 15 M. 334 (F.B.); 10 B. 131; 15 C. 603 (F.B.); 9 A. 52 (F.B.). A District Magistrate and the Sessions Judge can direct under S. 436, *infra*, a further inquiry into the case of discharge under this section. An accused person should be given an opportunity to show cause before an order of discharge

that the complainant was absent and it transpired subsequently that his absence was due to heavy floods the order of discharge was set aside. The power under S. 436 *infra* is very wide and not limited as the powers of a Court of appeal, 12 Cr. L.J. 184=9 Ind. Cas. 1007. The High Court has also under Ss. 436 and 439, *infra*, power to direct further inquiry.

CHAPTER XXII.

OF SUMMARY TRIALS.

Scope of the Chapter.—Summary procedure under this chapter in cases of serious offences though legal is inappropriate especially when a conviction entails serious consequences, 6 M. 396 ; Ratanlal 778 and 784. Powers under this Chapter should be exercised very cautiously. The responsibility thrown on Magistrates entrusted with summary powers is very great and the responsibility of those who have to entrust them with such powers is equally great. Magistrates who are sufficiently alive to the responsibility extended to them will take care that the procedure and the record are not made more summary than the law has laid down, 21 A. 189 at 192 ; 2 C.L.J. 565 at 567=10 C.W.N. 79=3 Cr. L.J. 178. In summary trials the procedure to be adopted is the same as that prescribed for summons and warrant-cases respectively but the full record of evidence and judgment required ordinarily are dispensed with and the right of appeal is also curtailed. The trial is not summary in respect of proceedings themselves which should be as complete and as carefully conducted as if they were recorded at length. Summary trial is summary only in respect of records of its proceedings. No tribunal can properly clutch at jurisdiction by intentionally ignoring facts of aggravation which make the offence really cognizable only by a higher tribunal and where the accused himself has objected to the jurisdiction of the lower Court, the High Court will interfere in revision and set aside the conviction, 25 Cr. L.J. 1193 following *Weir II*, 21. It has been repeatedly held that it is not for a Court, to minimise an offence by shutting its eyes to a graver offence which on the facts found by it has been committed and to refrain from charging the accused with that offence and by such abstention to justify itself in trying the case summarily, 27 A.L.J. 340. Splitting up of offences for purposes of summary trial is not permitted by law but highly objectionable, 4 C. 18 ; C.L.R. 434 ; 11 C. 236 ; 23 W.R. (Cr.) 19 ; 22 W.R. (Cr.) 28 ; 25 W.R. (Cr.) 19 ; 1 Bom. L.R. 688 ; 16 C. 715, where the facts disclosed in a complaint amount to an offence of an aggravated nature the case cannot be tried summarily 27 C.W.N. 148=25 Cr. L.J. 528=77 Ind. Cas. 992. There is no law forbidding a public servant being tried summarily and it would be unwise to make any general pronouncement as to classes of public servants who should never be tried summarily and such summary trials cannot constitute an irregularity, 26 Cr. L.J. 1452=89 Ind. Cas. 972. In 35 A. 173 it was held that Magistrates should ordinarily restrict summary trials to simple cases and a re-trial was ordered in a case under the Indian Companies Act involving inspection of accounts. The mere fact that the case involves a question of title, say to certain trees cut will not be a sufficient ground for holding the case to be complicated for a summary trial, 26 Cr. L.J. 1452=89 Ind. Cas. 972. Cattle lifting is a serious offence and should not be tried summarily, 13 Cr. L.J. 780=17 Ind. Cas. 412 ; 23 Bom. L.R. 984=23 Cr. L.J. 21=64 Ind. Cas. 501. So also a case involving question of title depending on documentary evidence supporting the same, 13 Cr. L.J. 771=17 Ind. Cas. 403. Cases to be tried summarily should be of simple character not calling for severe punishment, 35 A. 173. The sections which the complainant chooses to enumerate in his complaint themselves cannot be the criterion to determine the jurisdiction of the tribunal or the offence for which process should issue. The Magistrate is expected to scrutinise the complaint petition, examine the complainant and form an independent opinion for himself before fixing the offence disclosed and issuing process and he should record reasons for his conclusion. As a rule Courts should not reduce the accusation merely to clutch at jurisdiction to try summarily or otherwise when occurrence is on the border line or partakes for any reason of a serious character it is always desirable if not necessary, to exercise the discretion in favour of a regular trial, 28 Cr. L.J. 164=99 Ind. Cas. 596 See also 23 L.W. 86=28 Cr. L.J. 164 (2)=99 Ind. Cas. 592. This Chapter is not applicable to Presidency Magistrates, Ratanlal 539, but Ss. 862 and 370, *infra*, provide something like a summary trial so far as they are concerned. First-class Magistrates must be specially empowered to try summarily. In Madras every Sub-divisional first-class Magistrate who had exercised first-class powers for two years has been invested with the powers under this Chapter.—*Fort St. George Gazette*, 1874, p 1136 ; G.O. No. 159 Jud., dated 24-1-1896. Second and third-class Magistrates cannot exercise powers under this

Chapter and they cannot even be empowered to try under this Chapter. But under S. 261 Bench of Magistrates invested with the powers of a Magistrate of the second or third class can try certain specified offences mentioned in that section summarily. The District Magistrate of Bangalore has no power to try a European British subject summarily and a trial held is void under S. 530, *infra*. The Code does not apply primarily to Bangalore which is no part of British India and is only in force there by virtue of declarations of the Governor General in Council in the exercise of powers conferred by the Indian Foreign Jurisdiction Order in Council, 1907. The notification confers on Justices of the Peace certain specified powers among which the powers of trying offenders summarily under this section is not included, 39 M. 942. The Chapter of the Code does not appear to intend that proceedings in summary trials shall commence ordinarily, otherwise than in other criminal trials, either by summons or warrant, indeed S. 262 implies the contrary. S. 263 requires a record of the proceedings to be made by the presiding officer, and it is intended that the record shall be made at the time of trial. Magistrates who exercise powers to try summarily must realize that they should strictly comply with the conditions which the Code imposes on them because otherwise the intention of the Legislature as to the exercise of summary powers is set at naught, 30 Bom. L.R. 954 at 956.

Power to try summarily.

260. (1) Notwithstanding anything contained in this Code,—

(a) the District Magistrate,

(b) any Magistrate of the first class specially empowered in this behalf by the Local Government, and

(c) any Bench of Magistrates invested with the powers of a Magistrate of a first class and especially empowered in this behalf by the Local Government,

may, if he or they think fit, try in a summary way all or any of the following offences:—

(a) offences not punishable with death, transportation or imprisonment for a term exceeding six months;

(b) offences relating to weights and measures under sections 264, 265 and 266 of the Indian Penal Code;

(c) hurt, under section 323 of the same Code;

(d) theft, under sections 379, 380 or 381 of the same Code, where the value of the property stolen does not exceed fifty rupees;

(e) dishonest misappropriation of property under section 403 of the same Code, where the value of the property misappropriated does not exceed fifty rupees;

(f) receiving or retaining stolen property under section 411 of the same Code, where the value of such property does not exceed fifty rupees;

(g) assisting in the concealment or disposal of stolen property, under section 414 of the same Code, where the value of such property does not exceed fifty rupees;

(h) mischief, under section 427 of the same Code ;

(i) house trespass; under section 448 and offences under sections 451, 453, 454, 456 and 457 of the same Code ;

(j) insult with intent to provoke a breach of the peace under section 504, and criminal intimidation, under section 506, of the same Code ;

(k) abetment of any of the foregoing offences ;

(l) an attempt to commit any of the foregoing offences, when such attempt is an offence ;

(m) offences under section 20 of the Cattle-trespass Act, 1871 :

Provided that no case in which a Magistrate exercises the special powers conferred by section 34 shall be tried in a summary way.

(2) When in the course of a summary trial it appears to the Magistrate or Bench that the case is one which is of a character which renders it undesirable that it should be tried summarily, the Magistrate or Bench shall re-call any witnesses who may have been examined and proceed to re-hear the case in manner provided by this Code.

A Magistrate specially empowered.—The Government confers powers of summary trial only on experienced Magistrates and any irregularity in procedure cannot be explained on the ground that the Magistrate is hard pressed with work, 28 Cr. L.J. 756=103 Ind. Cas. 836.

May try in a summary way.—This section gives a discretion to a Magistrate to try summarily certain offences, if he thinks fit. The fact that there are a number of accused does not appear to be a conclusive reason against trying a case summarily, 28 Cr.L.J. 140=99 Ind. Cas. 343. A long and complicated case should not be tried summarily, 29 Bom L.R. 710=28 Cr.L.J. 537=102 Ind. Cas. 345 where 26 Cr. L.J. 1026=87 Ind. Cas. 914 is followed. The summary trial under this section is intended only to apply to short and simple cases where little evidence is needed, 25 W R (Cr.) 65, where from the nature of the dispute and particularly from the plea taken by the accused it is obvious that the case involved complicated questions of right and title to property and that it was not possible in a summary procedure to come to a definite and correct conclusion upon these points, the Magistrate exercises a wrong discretion in adopting the summary procedure, (1922) Pat. 10=21 Cr. L.J. 374=55 Ind. Cas. 855. The jurisdiction to try summarily does not depend on the complaint alone but on the complaint and examination of the complainant taken together, 36 C 67 ; 29 C 409 ; 27 C. 983 ; 2 C. L.R. 374 ; 25 W R. (Cr.) 19 ; 23 W.R. (Cr.) 23. Where a Deputy Magistrate being also the Chairman of the Municipality while seated in his pony convicted an accused on his own admission of having raised the level of a road, of the offence of causing obstruction to a highway without dismounting from his pony, without issuing process and without making a record of proceedings under this section, the conviction was set aside. The record prepared after the close of the trial from memory or possibly from rough notes is not the procedure contemplated by the Code even in summary trials, 15 M. 83 at 87. The question whether a complaint affords sufficient grounds for a summary trial or requires a trial in the ordinary way must be left in a great measure to the discretion of the Magistrate to be exercised with due care according to judicial methods with reference to the circumstances of each case, 10 A. 53 at 56, but when an accused person is charged with two offences, one of which is triable summarily and the other is not so triable, it is not open to the Magistrate to ignore

the later charge and to proceed to try the case summarily, 11 C. 238. No tribunal can properly elude its jurisdiction by intentionally ignoring facts of aggravation which make the offence really cognizable only by a higher tribunal and where the accused himself has objected to the jurisdiction of the Lower Courts the High Court will interfere in Revision and set aside the conviction, 15 Cr. L.J. 1193=82 Ind. Cas. 57, following *Weir II*, 21; 28 Cr. L.J. 164=6 Ind. Cas. 596; 31 C.W.N. 553. Where the facts disclosed in the complaint amounted to an offence of an aggravated nature the case cannot be tried summarily, 27 C.W.N. 148=25 Cr. L.J. 516=77 Ind. Cas. 922, but where the so-called circumstances of aggravation are mere exaggerations the Court may ignore them and try the case summarily 1 Bom. L.R. 633; 23 B. 90. Similarly a Magistrate cannot split up a charge so as to give himself a summary jurisdiction unless he disbelieves some of the essential elements of the offence charged, 16 C. 715; 3 C.W.N. 252; 4 C. 13; 27 C. 933; 6 N.W.P.H.C.R. 234; 23 W.R. (Cr.) 19; 22 W.R. (Cr.) 26; 25 W.R. (Cr.) 19; 1 Bom. L.R. 663; 25 Cr. L.J. 164=69 Ind. Cas. 516. A Magistrate after hearing evidence finds that the offence disclosed is one triable summarily, he may adopt summary procedure, 22 M. 459; but once the Magistrate had followed recording evidence in the regular manner he could not afterwards change his procedure to that followed in this Chapter, 25 C.W.N. 831; 37 C.L.J. 105=24 Cr. L.J. 157=71 Ind. Cas. 509. The responsibility thrown on the Magistrate entrusted with summary powers is very great and the responsibility of those who have to entrust them with such powers is equally great. Magistrates who are sufficiently alive to the responsibility entrusted to them will take care that the procedure and the record are not made more summary than the law has laid down, 21 A. 189 at 192. In summary trials there must be clear findings on questions of facts because it is only by means of those findings the High Court will be in a position to exercise its revisional jurisdiction effectually, 24 Cr. L.J. 916=75 Ind. Cas. 292.

May if he or they think fit.—The words "If he or they think fit" have been added in the Code of 1893. A very wide discretion is given to the Magistrate or Bench of Magistrates to try under this Chapter or to proceed in the ordinary way. A District Magistrate has a free discretion as to whether he should proceed under this Chapter or not, 3 Cr. L. Rev. 378.

All or any of the offences.—Joinder of charges is permitted. The offences of mischief and theft may be tried together, 23 W.R. (Cr.) 5.

Sub-section (1) (c), (m) and sub-section (2) were introduced in the Code of 1893. Under S. 4 (1) (c) the word "offence" was made to include any act for which a complaint may be made under S. 20 of the Cattle-trespass Act. The re-hearing under sub-section (2) must be *de novo* as the proceedings held till then were without jurisdiction and therefore void under S. 539 (g), *infra*, 23 W.R. (Cr.) 3.

Clause (a).—An offence under S. 22 of the Criminal Tribes Act VI of 1924 is punishable with the maximum amount of six months' rigorous imprisonment and therefore that offence can be tried summarily under this section, 50 A. 718.

Clause (f).—Before a Magistrate can assume jurisdiction to try offences of theft or receiving stolen property in a summary way, he has to satisfy himself that the property in respect of which the offence has been committed is less than rupees fifty in value and must record this fact in the form prescribed in this section. Where there is no such reference in the records of the case, the conviction cannot stand, 22 W.R. (Cr.) 65; 20 W.R. (Cr.) 17; 1891 A.W.N. 183; 1892 A.W.N. 30; 25 Cr. L.J. 545=81 Ind. Cas. 33.

The following offences are not to be tried summarily.—(1) Theft when combined with a charge of previous conviction, *Weir II*, 324; (2) breach of contract of service under Act XIII of 1859; 4 M. 234; 20 M. 235; 27 C. 131; 16 B. 368; (3) petition under S. 483, *infra*, for maintenance of wives and children, 20 C. 331; (4) preferring a false charge under S. 211, I.P.C., 23 C. 251; (5) where the offence charged is one under S. 60 of the Excise Act 1910 as modified by Act II of 1923 punishable with imprisonment for one year, 26 Cr. L.J. 800=86 Ind. Cas. 432. A Magistrate cannot to the prejudice of an accused change his procedure in the middle of a regular trial to one under this section, 25 C.W.N. 831=37 C.L.J. 105=24

Cr. L.J. 157=71 Ind. Cas. 509. A trial by a Magistrate not empowered to try summarily (e.g., an offence under S. 147, I.P.C.), is a nullity under S. 530 (g) even though the offence for which the accused is convicted is triable summarily say S. 323 I.P.C. S. 537, *infra*, cannot cure the defect as the procedure adopted is more than an irregularity, 52 B. 254.

261. The Local Government may confer on any Bench of Magistrates invested with the powers of a Magistrate of the second or third class power to try summarily all or any of the following offences:—

(a) offence against the Indian Penal Code, sections 277, 278, 279, 285, 286, 289, 290, 292, 293, 294, 323, 334, 336, 341, 352, 426, 447 and 504;

(b) offences against Municipal Acts, and the conservancy clauses of Police Acts which are punishable only with fine or with imprisonment for a term not exceeding one month *with or without fine*;

(c) abetment of any of the foregoing offences;

(d) an attempt to commit any of the foregoing offences, when such attempt is an offence.

Amendment.—S. 504, I.P.C., has been newly added to cl. (a) and to cl. (b) the words "with or without fine" have been added. In Madras every Bench with first class or second class powers is empowered to try summarily.—*Fort St. George Gazette*, 1891, Part I, p. 279, *Mad. Cr. Rules of Pr. Rule 2*. This section unlike S. 260, *supra*, applies only to certain sections of the I.P.C., and against Municipal and Police Acts but does not apply to Special and Local laws. Under S. 407, *infra*, an appeal lies from the conviction by a Bench of Magistrates exercising second or third class powers, 9 M. 36. A Bench of Magistrates cannot try any offence except those mentioned in this and S. 260, *supra*, 9 C. 96. They are not entitled to take proceedings under the security chapter.

Offences against municipal acts—In prosecutions under Municipal Acts the Magistrate is bound to conduct the proceedings according to the rules applicable to summary trials. The expression summary proceedings occurring in Municipal Acts must be proceedings for which provision is made in Chapter XXII of the Code. There is no other provision in the Code which appears applicable to the case, 17 B. 731 at 732-733.

Offences against conservancy clauses of police acts.—S. 48 of the General Police Act XXIV of 1859 which relates to obstructions and nuisance in roads within the limits of towns is a general conservancy clause and that offences committed thereunder are within the cognizance of a Bench of Magistrates, 13 M. 142 at 143. S. 355, *infra*, does not apply to offences under this clause, 29 Bom. L.R. 710=23 Cr. L.J. 537=102 Ind. Cas. 345.

262 (1) In trials under this Chapter, the procedure prescribed for summons-cases shall be followed in summons-cases, and the procedure prescribed for warrant-cases shall be followed in warrant-cases, except as hereinafter mentioned.

Procedure for summons and warrant-cases applicable.

(2) No sentence of imprisonment for a term exceeding three months shall be passed in the case of any conviction under this Chapter.

Limit of imprisonment.

Sub-section (1).—The procedure prescribed for summons and warrant cases shall be followed in summary trials according as the offences tried are summons or warrant-cases. It was held by the Bombay High Court in 28 Bom. L.R. 95=27 Cr. L.J. 431=93 Ind. Cas. 159 that the mere fact that a Magistrate in a summary trial did not ask the accused before he is called upon to enter on his defence whether he wishes to recall any of the prosecution witnesses for further cross-examination is not an illegality but only an irregularity cured by S. 237 *infra*, but the Madras High Court in 51 M.L.J. 637=35 M.L.T. 141=24 L.W. 649 at 652=78 Cr. L.J. 12=99 Ind. Cas. 44 *dissented* from the above view and held that the mandatory provisions of S. 250 *supra*, apply equally to warrant-cases tried summarily under Chapter XXII of the Code and it cannot be said that when the accused who is unrepresented is called upon to state forthwith whether he wishes to cross examine and the Magistrate recorded no reasons for such a course as required by S. 250, *supra*, that no failure of justice had been occasioned in such a case. In a warrant case tried summarily the memorandum of the substance of evidence of witnesses must in conformity with S. 350 (3), *infra*, be signed by the Magistrate, 23 Cr. L.J. 114=45 Ind. Cas. 210. Under this section it is necessary that in a summary trial the procedure prescribed in warrant cases shall be followed in warrant cases with certain exceptions; one of the distinguishing points between a summons case and a warrant case is that in a warrant case sufficient evidence to support the charge must be recorded before a charge can be framed and the accused called upon to plead. Where a Magistrate convicted the accused in a warrant case without recording evidence on the plea of the accused and passed an appealable sentence, the conviction was held bad, 27 C.W.N. 923. The procedure prescribed by this Chapter does not appear to intend that proceedings in summary trials shall commence ordinarily otherwise than in criminal trials either by summons or warrant; indeed, this section implies the contrary, 15 M. 83 at 87. In summary trials whether appealable or not a formal charge in writing need not be framed, 7 Lah. 303, following 27 C.W.N. 923=23 Cr. L.J. 1270=82 Ind. Cas. 278, Ratanlal 768. See also 53 C. 738.

Sub-section (2).—This Sub section lays down the limit of punishment in summary trials. The term shall not exceed three months. See 9 Cr. L.J. 23=23 Ind. Cas. 939. But where an accused is convicted for more than one offence in the same trial, there is nothing in law to prevent the Magistrate passing a sentence of three months for each of the offences the sentences unless otherwise directed running consecutively under S. 35, *supra*. The limit of three months is applicable only to substantive sentence passed, and will not apply to imprisonment awarded in default of payment of fine which is only a process for enforcement of fine, 6 A. 61. There is nothing to limit the amount of fine in a summary trial, 35 A. 173. There is also nothing in this sub section making it illegal to impose solitary confinement as part of the sentence under S. 73, I.P.O., 6 A. 83. Where an accused was convicted in a summary trial, the High Court in revision can enhance the sentence under sub-section (3) of S. 439 *infra*, up to two years the limit to which a Presidency Magistrate or a Magistrate of the first class can sentence the accused.

263. In cases where no appeal lies, the Magistrate or Bench of

Magistrates need not record the evidence of the witnesses or frame a formal charge; but he or they shall enter in such form as the Local Government may direct, the following particulars:—

Record in cases where there is no appeal.

- (a) the serial number;
- (b) the date of the commission of the offence;
- (c) the date of the report or complaint;
- (d) the name of the complainant (if any);

- (e) the name, parentage and residence of the accused ;
- (f) the offence complained of and the offence (if any) proved, and in cases coming under clause (d), clause (e), clause (f), or clause (g), of sub-section (1), of section 260, the value of the property in respect of which the offence has been committed ;
- (g) the plea of the accused and his examination (if any) ;
- (h) the finding, and, in the case of a conviction, a brief statement of the reasons therefor
- (i) the sentence or other final order ; and
- (j) the date on which the proceedings terminated.

Scope of the section.—This section does not excuse the Magistrate from hearing the evidence of all the witnesses but only excuses him from recording the evidence of witnesses which is a different thing from hearing the evidence, 39 C. 931. The provisions of this section should be strictly complied with in cases of summary trials in which so little is recorded and therefore there is very little protection from without to the person accused, against the risk of error, haste or inaccuracy. The scanty provisions of the section must be fully and strictly complied with and the record must be sufficiently exact and full to enable a Revision Court to say whether the law has been complied with or not on the points to be recorded. Three particular things are to be recorded, (1) the offence complained of, (2) offence, if any, proved, (3) in case of conviction a brief statement of the reasons. These must be recorded in such a way as to enable the Court of Revision to say "aye" or "no" from within the four corners of the record itself, whether the offence charged is an offence in point of law, whether the offence proved is an offence in point of law and whether the reasons for the conviction are good and sufficient, 2 C.L.J. 563 at 567=10 C.W.N. 79=3 Cr. L.J. 178; 21 A. 189; 10 A.L.J. 251; 12 Cr. L.J. 233=10 Ind. Cas. 921; 16 Cr. L.J. 713=30 Ind. Cas. 1001; 21 Cr. L.J. 636=57 Ind. Cas. 672; 23 Cr. L.J. 431=51 Ind. Cas. 207. This section is not abrogated by S. 441, *infra*, 46 M. 233; 20 L.W. 330 and provides for the preparation of record in cases where there is no appeal from a conviction under this chapter. With regard to appeals from summary convictions, see Ss. 407, 408, 412, 413, 414 and 415 *infra*. The next section provides for preparation of record in appealable cases. The section cannot apply to a case tried summarily in which the Magistrate passes an appealable sentence, 27 C.W.N. 923 at 924=25 Cr. L.J. 1270=82 Ind. Cas. 273. This section must be read along with S. 355, *infra*, and this section only lays down by way of exception that in cases where no appeal lies the Magistrate need not record any evidence. The primary rule is that the Magistrate shall make a memorandum of the substance of the evidence, but he can do away with it only when he makes up his mind at the initial stage that in any event the sentence to be passed will be non-appealable, 43 C. 280 not followed in 49 A. 261 holding that it is left to the Magistrate to note whatever he pleases and such notes are his private property and he may do whatever he pleases with them. See also 29 Bom. L.R. 710=28 Cr. L.J. 537=102 Ind. Cas. 345 where 43 C. 280 is not followed, see 49 A. 562. The Magistrate's notes should form part of the record and where they have not been kept the conviction is liable to be set aside as the High Court will not be in a position to form an opinion as to the propriety of the conviction without the notes of evidence, 26 Cr. L.J. 1451=81 Ind. Cas. 974. A Magistrate if he destroys his notes of a summary trial, the conviction cannot be invalidated on that ground 49 A. 562 following 49 A. 261 and not following 43 C. 230. See 49 A. 131 which took a different view and that decision cannot be regarded as good law after 49 A. 261 and 562 but in a summary trial the Magistrate is not relieved of the duty of making a précis of the evidence adduced before him and if he fails to do so the conviction is bad in law, 23 Cr. L.J. 534=109 Ind. Cas. 600. In summary trials it is very important that there should be clear findings on questions of facts because it is only then, the High Court will be in a position to exercise its revisional jurisdiction effectively, 24 Cr. L.J. 916=78 Ind. Cas. 292, Magistrates

who exercise powers to try cases summarily must realize that they should strictly comply with the conditions which the Code imposes on them because, otherwise the intention of the Legislature as to the exercise of summary powers is set at naught 33 Bom. L.R. 934 at 936.

Need not record the evidence.—This section does not excuse the Magistrate from hearing the evidence of all the witnesses. It excuses him only from recording the evidence of any of the witnesses. It is an elementary point, that recording evidence is not the same as hearing evidence. In all criminal cases if the accused denies the charge, the complainant and such witnesses as he may produce must be examined and the case must be decided upon the effect of their evidence, 39 C. 931 at 932. Where there is no obligation on the part of the Magistrate to record the evidence what the witnesses stated may be proved by the oral evidence of persons who heard the witnesses depose, Ratanlal 338.

Need not frame a formal charge.—This section expressly says that no charge need be framed in non appealable cases and from the omission of such a provision in S. 264, *infra*, dealing with appealable cases it cannot be contended that a formal charge should be framed in appealable cases. In a summary trial whether appealable or non-appealable no formal charge in writing need be framed. Charge cannot be held to be part of the record or what is usually called the record of evidence and sub section (2) of S. 264 cannot therefore apply to a charge, 7 Lah. 303, see also 53 C. 733 at 745. In a case triable summarily, where non appealable sentence is given, the Magistrate need not frame a formal charge but he should specify in his record the offence complained of, and the offence (if any) proved. In these circumstances it is mainly the offence complained of, in regard to which process had been issued, that determines whether a particular accused has been tried for an offence. In a case where the trial is held summarily and falls under this section, and when an accused is put in peril of a conviction, say, for rioting under S. 147, I.P.C., (not triable summarily) it cannot be said that the accused were not actually tried for that offence, 52 B. 254. Although no formal charge need be drawn up, the accused must be called-upon to answer to the particulars of the offence charged, whether the proceedings be summary or otherwise, and the Magistrate must specify the offence complained of to give the accused sufficient notice of what is charged against him. The same rules of law as to misjoinder of charges in warrant-cases must apply to the particulars required to be set out by this section in a summary record, 16 C.W.N. 696 at 697=13 Cr. L.J. 224=14 Ind. Cas. 320. The record should state the offence clearly and distinctly, 1852 A.W.N. 59.

Shall enter in such a form the particulars.—The Magistrate should himself prepare the record in non-appealable cases subject to the exception contained in sub-section (2) of S. 265, *infra*, where a Bench may be authorized to employ a clerk. A Magistrate is not authorized in either case to employ a clerk to prepare the record or to affix his signature to the record by a stamp, 6 M. 396; 8 A. 293; 10 C.W.N. 79=2 C.L.J. 563=3 Cr. L.J. 178; 12 Cr. L.J. 280=10 Ind. Cas. 921, 16 Cr. L.J. 713=30 Ind. Cas. 1001. The facts found by the Magistrate must show what offence has been committed, 3 C.W.N. 281. But where no reasons are given the defect cannot be subsequently cured by the explanation called the written statement submitted to the High Court by the Magistrate, 9 C.W.N. 1xxvi.

Clause (f).—The value of the property alleged to be stolen should be stated and the value should be found to be less than the amount mentioned in S. 260 (d) to (g); otherwise the conviction will be bad, 20 W.R. (Cr.) 17, 22 W.R. (Cr.) 65; 1891 A.W.N. 183; 1892 A.W.N. 30; 25 Cr. L.J. 545=81 Ind. Cas. 33; 17 A.L.J. 1146=21 Cr. L.J. 28=54 Ind. Cas. 172.

Clause (g).—It seems unthinkable that the Legislature should have intended by this section to give Magistrates a discretion in cases ending in a conviction to dispense with the examinations of the accused. The principle '*audi alteram partem*' is the first and most important principle governing the mode of administering justice and essential of a fair trial. The meaning of the words 'if any' in this and S. 370, *infra*, are clear if one considers Ss. 243, 245, 253 and 289 of the Code. It is not in every trial the examination of the accused is required, *e.g.*, in a summons-case if the accused admits his having committed the offence the Magistrate may convict him under S. 243, *supra*, and again if the prosecution evidence

does not support the charge under S. 245 the Magistrate may acquit and under S. 253, *supra*, the Magistrate may discharge in a warrant-case. This is only reasonable and in harmony with S. 342, *infra*, for in such a case there is nothing in the evidence requiring the accused to explain. Similarly under S. 289, *infra*, the Court may without examination direct the Jury to return a verdict of not guilty. The words 'if any' do not limit the obligation under S. 342, *infra*, or render it inapplicable to summary trials. They really have reference to those cases in which owing to the admission and plea of the accused or owing to the weakness of the prosecution evidence the accused can be convicted or acquitted without his examination. That the mandatory provisions of this section apply to summons-cases has been recognized by all the High Courts, 26 Cr. L.J. 1534=90 Ind. Cas. 434. See 45 B. 672; 46 B. 441; 5 Pat. L.J. 174; 6 Pat. L.J. 174; 23 Cr. L.J. 154=65 Ind. Cas. 618 but see 46 M. 758. Where a Magistrate failed to record a plea of the accused the conviction was held bad, 9 C.W.N. 1xxvi. This clause does not give a Magistrate discretion whether he will examine the accused or not. This is governed by S. 342, *infra*, which gives the accused the right to refuse to say anything if he chooses. Failure to record the plea of the accused and his examination vitiates the trial, 26 A.L.J. 109=29 Cr. L.J. 265=107 Ind. Cas. 592. But there must be an examination in all warrant-cases and the words "if any" occurring in this clause do not apply when the case tried by the Magistrate is a warrant-case, 41 C. 743 at 745; see also 46 M. 449 (F.B.).

Clause (h).—Under this clause a brief statement of reasons for conviction must be given showing that there is evidence to prove the existence of the ingredients necessary to complete the offence, 10 A.L.J. 251=13 Cr. L.J. 708=16 Ind. Cas. 516; 21 A. 189 at 191; 16 Cr. L.J. 713=30 Ind. Cas. 1001; 23 Cr. L.J. 161=65 Ind. Cas. 625; 14 Cr. L.J. 594=21 Ind. Cas. 456; 23 Cr. L.J. 94=65 Ind. Cas. 446; 28 Cr. L.J. 495=101 Ind. Cas. 671; 26 A.L.J. 109=29 Cr. L.J. 265=107 Ind. Cas. 592 where 10 A.L.J. 251; 1883 A.W.N. 213; 1886 A.W.N. 181; 1899 A.W.N. 81 are referred to. See also 10 Cr. L.J. 216; 21 A. 189 and 18 B. 97. The Magistrate under this section need not write a judgment as in the case contemplated by S. 204, *infra*. He is bound to state briefly his reasons for conviction. The Legislature has provided a minimum protection for the person affected by the order and it is absolutely necessary that officers who act under the Chapter should most strictly observe the scanty formalities which the law provides. If they do not do so, it would be absolutely impossible for the High Court as a Court of Revision or any other authority to exercise the smallest control over proceedings which may form the subject of complaint, 22 W.R. (Cr.) 28; 10 C.W.N. 79=2 C.L.J. 565=3 Cr. L.J. 178; 21 A. 189; 46 M. 253. The law does not require the Magistrate who deals with the case summarily to record the evidence but he must record his reasons for the conviction and so state them that a superior Court acting in revision may see that the reasons are different from those before the Magistrate to find the accused guilty. See 1883 A.W.N. 114 and 1886 A.W.N. 181. The duty of the Magistrate and of the person accused but what he should do and what he must take care he does, is to leave upon record some brief but intelligible reasons for the conclusions at which he has arrived so that the High Courts' superintendence of his proceedings may not be defeated, 1883 A.W.N. 114; 1885 A.W.N. 213; 1886 A.W.N. 181; 1899 A.W.N. 81, but where there is clear evidence to justify a conviction the omission to comply strictly with the provisions of this sub-section may be treated as an irregularity cured under S. 537, *infra*, and there is no contravention of some express provision of law as to the mode of trial, 26 Cr. L.J. 466=83 Ind. Cas. 146. The record must be sufficiently elaborate to satisfy a Court of Revision that the finding is correct, legal or proper under this Chapter, 2 Cr. L.J. 375; 6 C. 579; 18 B. 97; 46 M. 253; 20 L.W. 330; 3 C.W.N. 281; 8 C. 193. When the case ends in an acquittal, it is not necessary to record reasons which is imperative in a case of conviction only, 3 Cr. L.J. 433. When the President of a Bench of Magistrates is in a minority as to a conviction or acquittal the judgment should be written by some member of the Majority of Bench Magistrates otherwise there will be a conviction or an acquitting judgment and the High Court in revision will be left without any reasons for conviction when the law as laid down herein says that reasons should be set out by the Bench, 1923 M.W.N. 31=27 L.W. 239.

264. (1) In every case tried summarily by a Magistrate or Bench in which an appeal lies, such Magistrate or Bench shall, before passing sentence, record a judgment embodying the substance of the evidence and also the particulars mentioned in section 263.

Record in appealable cases.

(2) Such judgment shall be the only record in cases coming within this section.

Scope of the section.—The section deals with the preparation of the record in appealable cases in summary trials held under this Chapter. The procedure for the trial is prescribed in S. 262 (1) *supra*, see S 3 C. 738. Failure to observe the conditions prescribed in this section is one that will prejudice the accused because it prevents the proper disposal of the appeal that he is entitled to prefer and the appellate Court should know the substance of the evidence that had been given, so as to be in a position to decide the appeal on the merits and it is not proper to decide the appeal by merely finding that the Bench did address themselves with due diligence to the question of fact that arose for consideration, 30 Bom L.R. 954 at 956=23 Cr L.J. 1033=112 Ind. Cas. 221.

In which an appeal lies—An appeal lies from a conviction by a Bench of Magistrates exercising second or third class powers, 9 M. 38, and the Bench should record a judgment under this section. This section may not apply to the case of an acquittal although an appeal is provided for by S 417, *infra*, at the instance of the Local Government.

Before passing sentence.—The record should be made at the time of trial and not after concluding it, from memory or from rough notes, 15 M. 83.

Judgment embodying substance of evidence, etc—Under this section a Magistrate is not bound to record the substance of every deposition. He has to state generally the substance of the witness's evidence and the substance of the evidence is a matter distinct from the facts which may be considered as proved by the evidence. The substance of the evidence should be recorded in such a manner that a superior Court acting in appeal or revision may be in a position to judge that there were sufficient materials to support the conviction and a judgment which contains the substance of the evidence sufficient to decide the case is not illegal merely because evidence is not summarized fully, 30 Cr. L.J. 537=116 Ind. Cas. 57. Sufficient evidence must be recorded to justify the judgment. No doubt the object of the procedure laid down in this Chapter is to shorten the course of the trial, but this will not absolve the Magistrate from recording sufficient evidence to support his order, 27 C. 450 at 451. The judgment under this section must contain in addition to the particulars required to be mentioned in non appealable cases under S 263, *supra*, the substance of the evidence on which a conviction is based and such judgment shall be the only record in appealable cases tried summarily. See 27 C.W.N. 928. This section requires that the substance of the evidence shall be plainly stated in the judgment and not that the Court should be driven to inferences in order to find out the substance of the evidence 30 Bom. L.R. 954=29 Cr. L.J. 1005=112 Ind. Cas. 221. When the record does not comply with the requirements of the section, the conviction cannot be upheld 9 Cr L.J. 23 and such failure is not a mere irregularity cured by S. 537 *infra* but renders the whole proceedings bad 3 Bom. L.R. 934=29 Cr. L.J. 1005=112 Ind. Cas. 211.

Sub-section (2).—Under this section the judgment is the only record available to the appellate Court. Rough and incomplete notes of evidence made by the Magistrate is no evidence, 26 Cr. L.J. 1026=87 Ind. Cas. 914. The judgment alone embodying as it does the substance of the evidence is the only record of the case. There is no other record, 7 Lah. 303 following 27 C.W.N. 928. See S 3 C. 738, which also takes the same view that the judgment is the only record in the case. The express terms of this sub-section clearly show it cannot be laid down that if a Magistrate takes rough notes for his own purposes such notes form part of the record. There is some justification in saying that such note

destroyed in cases falling under S. 355, *infra* but not otherwise, 29 Bom. L.R. 710=28 Cr. L.J. 537=102 Ind. Cas. 345 where 43 C. 280. is not followed and 26 Cr. L.J. 1026=87 Ind. Cas. 914 is followed. Such Judgments shall be the only record in the case and additional matter such as notes made by the trying Magistrate cannot be called for or consulted by the appellate Court, 52 M.L.J. 32=1927 M.W.N. 40=33 M.L.T. 35=25 L.W. 43. The appellate Court cannot go beyond the records and look into the complaint and sworn statement, 55 M.L.J. 117=28 L.W. 394=29 Cr. L.J. 625=109 Ind. Cas. 897 following 52 M.L.J. 32; 53 C. 738 and 7 Lah. 303.

265. (1) Records made under section 263 and judgments recorded under section 264 shall be written by the
 Language of record and judgment. presiding officer, either in English or in the language of the Court, or, if the Court to which such presiding officer is immediately subordinate so directs, in such officer's mother-tongue.

(2) The Local Government may authorise any Bench of Magistrates empowered to try offences summarily to
 Bench may be authorised to employ clerk. prepare the aforesaid record or judgment by means of an officer appointed in this behalf by the Court to which such Bench is immediately subordinate, and the record or judgment so prepared shall be signed by each member of such Bench present taking part in the proceedings.

(3) If no such authorisation be given, the record prepared by a member of the Bench and signed as aforesaid shall be the proper record.

(4) If the Bench differ in opinion, any dissentient member may write a separate judgment.

Scope of the section :—Sub sections (3) and (4) were added in the Code of 1898. See S. 355, *infra*, which contains similar provisions as to mode of taking and recording evidence in inquiries and trials. It is doubtful whether S. 355, *infra*, was intended to apply to cases coming under this Chapter. It is no doubt important that the substance of evidence, on which the conviction is based should be set forth in the judgment to enable the appellate Court to perform its functions in appeal. The prisoner's right of appeal must not be defeated in consequence of an imperfect statement of the substance of the evidence. On the other hand it does not appear necessary to cancel a conviction and sentence not otherwise apparently exceptionable by reason of such a defect. The Session Judge may have found authority in precedents for the course adopted by him in this case. But if he found it impossible to dispose of the prisoner's appeal because the substance of the evidence for the prosecution has not been sufficiently embodied in the judgment of the Magistrate, it would have been better to have required that officer to repair the defect in this judgment by recording a judgment in which the substance of the evidence should be fully embodied and if necessary re-examining the witnesses for that purpose, or, to have ordered a retrial with that view. The Session Judge's order was therefore cancelled and he was directed to dispose of the appeal afresh, 1 A. 680 at 682.

Sub-section (2) —Where the judgment of a Bench of Magistrates is prepared by the President of the Bench under this sub-section it is sufficient if he alone signs it and it is not necessary that the other Members of the Bench should sign the record or judgment, S. 367 *infra*, requires the presiding officer of the Court to write judgment which shall be dated and signed

by him in open Court at the time of pronouncing the same but if the Presiding officer wrote the judgment and signed and delivered the same after the other members of the Bench had left the Court, the judgment was not a proper judgment and the conviction based on such judgment is illegal. S. 366 *infra* requires that the judgment of a Criminal Court should be pronounced by the Court and if required by the accused it shall be explained to him but when the members composing the Bench leave the Bench there is no Court at all and the mere fact that the Presiding officer sits in the Court room and writes his judgment will not make that a Court, when a judgment is delivered the members of the Bench who took part in the trial and who concurred or differed from the judgment should be present. Such a procedure is not an irregularity which can be cured. 52 M. 237 see also 23 L.W. (Sh. n) 55; Cr. R. Case (M.H.O.) 373 of 1929 & 922 of 1927. In Madras every Bench of Magistrates is empowered to prepare the record or judgment of the Bench by means of an Officer appointed by the sub-divisional Magistrate, *Mad. Cr. Rules of Pr. Rule 20*.

Sub-section (3).—This sub-section does not apply to the case of the preparation of the record or judgment by the Presiding officer of the Court. If the record is prepared by a member of the Bench and not by the Presiding officer, it shall have to be signed by each member of the Bench taking part in the proceedings, but it will be otherwise if the Presiding officer himself prepares the record or judgment, 52 M. 237.

Sub-section (4).—The dissenting judgment, even where the Bench consists of only two members only, should form part of the record otherwise the appellate Court would not be in a position to know whether the judgment of the lower Court is a concurrent judgment of the two Magistrates composing the Bench or a judgment of the President dissented from by the other member of the Bench. This view is consistent with the intention of the Legislature as expressed in this sub section, 29 Bom. L R. 1470 at 1473.

CHAPTER XXIII.

OF TRIALS BEFORE HIGH COURTS AND COURTS OF SESSION.

A—Preliminary.

266. In this Chapter, except in sections 276 and 307, and in Chapter XVIII, the expression "High Court" means a High Court of Judicature established under the Indian High Courts Act, 1861, or the Government of India Act, 1915, and includes the Chief Courts of Oudh and Sind and the Court of the Judicial Commissioner of the Central Provinces, and such other Courts as the Governor-General in Council may, by notification in the Gazette of India, declare to be High Courts for the purposes of this Chapter and of Chapter XVIII.

The words "and includes the Courts of the Judicial Commissioner of the Central Provinces" and the other italicised words have been added by Act XII of 1923. Now the Judicial Commissioner's Courts of Oudh and Sind are raised to Chief Courts. For definition of "High Court" see S. 4 (1) (j), *supra*. This section merely prescribes the procedure to be adopted by the various Courts herein mentioned, after they have been given the jurisdiction of a High Court by some local Legislature. Where any of the Courts mentioned in this section has by a local Legislature been given the jurisdiction of a High Court then and then only this section comes into operation in respect of that Court, 29 Cr. L.J. 945=111 Ind. Cas. 865. See also 26 Cr. L.J. 562=85 Ind. Cas. 706.

always first determine whether that offence has been committed, by an individual and next whether S. 149, I.P.C., makes the participator responsible. So it is with S. 34, I.P.C., 5 Pat. 238.

Various Local Governments have issued notifications under this sub-section specifying what offences are triable by Jury.

Madras: Ss. 379, 380, 392, 392 to 395, 397 to 402, 411, 412, 414, 451 to 459 and 461, I.P.C., and abetments of these offences. G.O. of 20th March, 1883. Fort St. Geo. Gazette, Pt. I, p. 150; Notification No. 145, Fort St. Geo. Gazette, Pt. I, p. 1859, dated 10-11-1896, Mad. Crl. Rules of Pr. Rule No. 40.

Bombay: All offences for which under Chapters VIII, XI, XII, XXI, XXIII or under any of the Chapters taken with S. 75, I.P.C., the punishment awardable is death, transportation for life or imprisonment for ten years or upwards.

Bengal: All offences under Chapters VIII, XI, XVI, XVII, XVIII and XX, I.P.C. Cal. Gaz. of 27th March, 1893, *ibid* March 1895.

United Provinces and Oudh: Ss. 363 to 369, 372, 373, 376, 379, 380, 381, 392, 393 to 395, 397 to 399, 401, 403, 404, 411 to 414, 426 to 432, 434 to 436, 440, 448, 450 to 462, 493 to 498 and offences under Chapters V and XXIII, I.P.C.

Burma: See Burma Gazette 1900, Pt. I, p. 321.

Assam: See Assam Gazette 1903, Pt. II, p. 170.

Any particular class of offences.—The classification need not be the same classification recognized by the Legislature such as offences against the State, against the person, or bailable or cognizable offences, etc. The classification may be according to the persons who commit them, i.e., the offences, the offenders or allowing to the persons or property against whom or which the offences are committed, or in regard to the particular occasion in connection with which they are committed. Thus the fact of offences having been committed by old offenders or members of criminal tribes or having been committed against women or against public property would afford reasonable grounds for a classification. Offences connected with an outbreak of riots and disturbances directed against a section of the population, i.e., riots and disturbances known as the "anti Shanar" riots was properly dealt with by notification as a particular class of offences, 23 M. 632 at 633.

Sub-section (2).—Trial by Jury is a comparatively recent innovation in India and even now few offences are so tried and the classes of cases to be so tried may be varied from time to time by Government, 26 M. 1 at 16. Powers given to the Local Government to revoke its general order as regards certain particular class of offences; offences connected with an outbreak of riots and disturbances can be dealt with by a notification under this section as a particular class of offences. When the Madras Government soon after the Sivakasi Shanar riots in Tinnevely District issued a notification under this section revoking the previous Jury notification as to trial of offences by Jury and directing that the rioters who were committed for trial or who may hereafter be committed for trial to the Sessions Court of Tinnevely shall be tried with the aid of Assessors and not by Jury, it was held that the trial held by the Sessions Judge with the aid of Assessors in pursuance of such a notification was valid as the offences connected with the outbreak were treated as a class of offences, and it was competent to the Government to revoke the previous notification as far as it related to that class, 23 M. 632.

Sub-section (3).—The words 'same trial' in this sub-section cannot be read as taking away the right of appeal given by S. 410, *infra*. This section uses the words in a distributive sense. 'Trial' has two meanings. In a case of trial by Jury and there is another charge tried by the Judge, right of appeal from the judgment of the Judge is retained in spite of the words 'same trial' used in this sub-section, 9 Cr. L. Rev. 187=18 Cr. L.J. 348=38 Ind. Cas. 730; where the Judge tried at one trial the accused charged with offences some of which were triable by Jury and others with the aid of Assessors, exception cannot be taken to the procedure adopted on the ground that the simultaneous disposal of the charges triable by Jury and of those triable with the aid of assessors had prejudiced the accused, as such a procedure is warranted by this sub-section, 2 L.W. 933=16 Cr. L.J. 771=30 Ind. Cas. 1003. When an accused is charged at the same trial with respect to offence

of which are triable by Jury and some with the aid of Assessors, the Judge was bound to constitute all the members of the Jury as Assessors for trying the non-jury offences and not two of them as Assessors, it was held that the Judge acted illegally and the conviction was set aside, 21 M.L.J. 520=10 M.L.T. 22=12 Cr. L.J. 239=10 Ind. Cas. 231 following 26 M. 593, see also Ratanlal 603. Similarly where the Judge convicted the accused without recording the opinion of the Jury as Assessors as required by this section, the conviction was held bad, Weir II, 331. S. 536 (1), *infra*, enacts that in trial by Jury of Assessor offences shall not on that ground only be invalid See 4 C.L.R. 425. The accused cannot in such a case be heard to complain unless he objects before the verdict is delivered, 33 B. 423. But after the verdict was taken the Judge is not entitled to correct his mistake by treating the verdict as opinion of Assessors 25 C. 553; 23 B. 698; 1 Bom. L.R. 114; 26 M. 243; 9 M. 42. No appeal lay on matter of fact in such cases but only on questions of law, 23 B. 680 (F.B.); 33 B. 423; 26 M. 243; 13 M. 626; S. 536 (2), *infra*, enacts that the trial with the aid of Assessors of offences triable by Jury shall not on that ground only be invalid unless objection is taken before the Court records its finding, see 23 M. 632 at 635. But where the Judge charged the Jury as a whole directing them to give a verdict on each of the charges and not taking their opinion individually as Assessors on the minor charges not triable by Jury, it was held the trial of all the offences was by Jury, 33 B. 423. Where an accused is tried by the Judge with a Jury for offences triable by Jury and the Jury return a verdict of not guilty but find the accused guilty of a minor offence triable by Assessors, the failure on the part of the Judge to take the individual opinion of the members of the Jury is only an irregularity cured under S. 536, *infra*, but this section cannot apply to a case where the accused is not charged in the first instance with the major offence triable by Jury and the Jury finds the accused guilty of an offence not charged and the conviction comes to be made under S. 238, *supra* without a charge 1927 M.W.N. 299. Where a preliminary register showed that the accused were either guilty of murder in dacoity under S. 396, I.P.C., an assessor case, or that they were not guilty of dacoity at all, and the Sessions Judge tried the case with a Jury, and on their returning a verdict of not guilty, referred the case to the High Court, it was held that the Sessions Judge ought to have tried the accused with the aid of Assessors for an offence under S. 396, I.P.C. The High Court further pointed out that the Judge might have empanelled a Jury and at the conclusion of the trial he might have under this section recorded their opinion as Assessors as to the guilt of the accused under S. 396 and the Judge should then have found the accused guilty or not guilty under that section. If he found them guilty he should have proceeded to conclude the case by passing sentence. If however, he found them not guilty, he should have then charged the Jury with respect of the dacoity under S. 393, I.P.C., and should have taken their verdict, 22 M. 13 at 18; [1911] 2 M.W.N. 197=12 Cr. L.J. 488; 23 M. 632. The High Court without ordering a retrial dealt with the case on the merits under S. 307, *infra*. Where an accused was tried by a Judge with a Jury who found them guilty of a non-jury offence and the Judge made a reference under S. 307, *infra*, to the High Court, it was held that the reference was not proper as the Judge ought to have treated the verdict as the opinion of Assessors under this section and he was competent to deal with the case finally as if the trial was with the aid of Assessors, 9 Bom. L.R. 1057=6 Cr. L.J. 236, see 6 Pat. 208 as to the effect of a retrial by the appellate Court on appeal from a conviction of the assessor-offences as re-opening the whole case including the jury-offences of which the accused had been acquitted. When retrial is ordered on the ground that the opinion of the jury was not taken individually as Assessors, the retrial will be confined only to offences triable with Assessors and not of the Jury offences already acquitted, 6 Pat. 208.

Assessors.—In the early days of British administration Judges who administered justice were not fully equipped with the knowledge of the customs and habits of parties and their witnesses. It was therefore thought necessary to appoint two or more respectable Indians possessing special knowledge to assist the Judge. See Bengal Regulation VI of 1832, Subsequently Act VII of 1843 extended the system to the Presidency of Madras and is now applicable to the whole of British India. The opinion of Assessors has lost much of its weight

since the passing of the Code of 1872 and is now in the same footing as the opinion of persons specially skilled. The law makes no distinction as to the procedure at the trial between a trial by Jury and one with the aid of Assessors except as to summing up in the case of the former and the manner in which the verdict in the former and the opinion of the Assessors in the latter are respectively taken. It is at this latter point there as a signature of the ways and if the accused who is tried, does not intervene at that crucial point and put the procedure applicable to trials with the aid of Assessors enforced, he cannot be heard to complain. But if that was not done and the Judge was allowed to deal with the whole case as one tried by a jury, it cannot be successfully urged subsequently that the Judge's action should be corrected, 23 B. 422 at 425-427.

Trial before Court of Session to be conducted by Public Prosecutor

270. In every trial before a Court of Session the prosecution shall be conducted by a Public Prosecutor.

Public Prosecutor.—For definition of Public Prosecutor see S. 4 (1), (2) *supra*, and see Chapter XXXVIII, *infra*, as to appointment, of duties and powers of Public Prosecutor.

Shall be conducted by a Public Prosecutor.—The word "shall" here is merely directory. An accused person will not be entitled to an acquittal merely on the ground that a public prosecutor did not conduct the prosecution or that there was a defect in his appointment, a defect which can be cured by S. 437, *infra*, 1837 P.R. (Cr. J.) 35. Counsel instructed by a private party cannot conduct the prosecution. A Public Prosecutor may avail himself of his services and once the assistance had been accepted that cannot be excluded at any stage of the trial, 11 B.H.C.R. 102. See S. 433, *infra*, no special permission of the District Magistrate is necessary for an Advocate of the High Court to appear on behalf of the prosecution and the High Court directed a Sessions Judge to permit the Advocate to appear and conduct the prosecution on behalf of the complaint, see 23 W.R. (Cr.) 14. The practice of allowing police officers to conduct prosecution in the Sessions Court is highly objectionable, 13 W.R. (Cr.) 18.

B—Commencement of proceedings.

Preliminary proceedings that are referred to as 'commencement of proceedings,' e.g., the swearing in of the Jury, the reading out of the charge to the Jury referred to in the heading of this section are not any part of the actual trial referred to in the heading of S. 286 as 'trial' of the case, 20 Bom. L.R. 204=28 Cr.L.J. 402=101 Ind. Cas. 178; 6 Lah. 262. But see 35 M. 701 at 703 and 15 D. 514.

271. (1) When the Court is ready to commence the trial, the accused shall appear or be brought before it, and the charge shall be read out in Court and explained to him, and he shall be asked whether he is guilty of the offence charged, or claims to be tried.

Place of guilty.

(3) If the accused pleads guilty, the plea shall be recorded, and he may be convicted thereon.

When the Court is ready to commence the trial.—When a Judge is of opinion that there is an absence of evidence to warrant a commitment of the accused to the Court of Session he has no power to withdraw the case, a power specially conferred on the High Court only, of withdrawing a case from the Jury. The proper procedure for the Sessions Judge in such a case is to make a reference to the High Court to have the commitment quashed under S. 416, *supra*, & C.W.N. 411. The hearing or trial must be taken to include all proceedings taken to determine a case and the first step in the hearing at a Sessions

trial is the reading and explaining of the charge to the accused, 35 M. 701 at 703, but it was held in 15 B. 514 that the actual trial does not begin until the charge has been read and explained to the accused and he claims to be tried. The trial begins only after the Assessors or Jurors have been chosen, 6 Lab. 262.

Trial with the aid of Assessors does not commence with the reading of the charge, for it is only when the accused has refused or does not plead to the charge and claims to be tried that the Sessions Court is to proceed to choose Assessors under S. 272, *infra*, 15 B. 514.

The accused shall appear.—The trial, conviction and sentence on an accused person by the Court of Session even in a case where the accused appeared before the committing Magistrate but absconded after commitment of the case to the Court of Session is not warranted by law and is wholly illegal and must be set aside, 23 Cr. L.J. 971=103 Ind. Cas. 633.

Charge shall be read out in Court and explained to accused.—The Judge is bound to read out and explain the charge to the accused and he ought to satisfy himself by interrogating the accused that he fully understands the responsibility he assumes by making a plea of guilty, 18 Cr. L.J. 742=40 Ind. Cas. 742. There must be a record of charge read out and explained in Court to the accused and where there is none, the record should contain an explanation for its absence and such absence of a written charge cannot be considered an irregularity cured by s. 537 *infra*, 21 Cr. L.J. 410=58 Ind. Cas. 53. The plea of the accused also should be recorded and when no plea is on record the conviction is bad and a new trial will be ordered, 1908 A.W.N. 54=5 A.L.J. 157=5 M.L.T. 75=7 Cr. L.J. 295. The ultimate responsibility of settling the charge vests on the Sessions Judge who can modify or alter the same, 16 Bom. L.R. 83=15 Cr. L.J. 292=23 Ind. Cas. 500. Mere reading out the charge is not sufficient but it must be explained to him, and where a charge is not explained to the accused the conviction is liable to be set aside, 9 M. 61 see also 19 A. 119 and 30 B. 611; 18 A.L.J. 812. When arraigning an accused person and before receiving his plea the Court should be careful to insure the explanation of the charge in a manner sufficiently explicit to enable the accused to understand thoroughly the nature of the charge he is called upon to plead, 5 C. 826; 7 C. 93; Weir, II, 336, 337 and 339; 3 Bom. L.R. 439. See S. 255, *supra*, and the notes thereunder at p. 491-492.

He shall be asked whether he is guilty or claims to be tried.—This and S. 272, *infra*, contain all that is necessary as to pleading, and there is no need to supplement their contents by a reference to any other system of judicature. The accused can plead "guilty" under this section, he can claim to be tried, or he can refuse to plead which is taken to be the same as claiming to be tried. The plea of "not guilty" is thus one not recognized by the Code and this has been the law since 1872 at least, and this is intentional and is designed to get rid of a great mass of English law relating to criminal pleadings which for more than half a century has been discredited and is in fact falling into oblivion. It is not open to the accused to make any answer to an indictment except "guilty" or "claim to be tried". If an accused claims to be tried, subject to special provisions he can take any objection to his trial or conviction at any time before verdict, at any rate and in any form that the Court sees fit to allow. S. 503, *infra*, has nothing to do with pleading, but is in terms a limitation on the jurisdiction of the Court, 41 C. 1072 at 1085. A plea of guilty must be a distinct admission of each and every fact necessary to constitute the offence charged and unless the Judge himself finds on the admission made that the offence charged is legally established, he should record evidence and come to a decision thereon Weir II, 336. After an accused had claimed to be tried, any admission made by him, admitting his guilt cannot be taken to be a plea of guilty and upon which the Judge could base a finding Weir II, 336; 7 Bom. L.R. 731. Where the accused instead of pleading guilty makes a rambling statement more or less admitting guilt, it would be much safer if the Judge recorded a formal plea of "not guilty" and proceeded with the trial in the ordinary way recording evidence, 1908 A.W.N. 54=5 A.L.J. 157=7 Cr. L.J. 295. Before a Judge makes up his mind to convict on a plea of guilty, it is his duty

since the passing of the Code of 1872 and is now in the same footing as the opinion evidence of persons specially skilled. The law makes no distinction as to the procedure at the trial between a trial by Jury and one with the aid of Assessors except as to summing up in the case of the former and the manner in which the verdict in the former and the opinion of the Assessors in the latter are respectively taken. It is at this latter point there is a departure of the ways and if the accused who is tried, does not intervene at that crucial point and get the procedure applicable to trials with the aid of Assessors enforced, he cannot be heard to complain. But if that was not done and the Judge was allowed to deal with the whole case as one tried by a jury, it cannot be successfully urged subsequently that the Judge's action should be corrected, 33 B. 423 at 424-425.

Trial before Court of Session to be conducted by Public Prosecutor.

270. In every trial before a Court of Session the prosecution shall be conducted by a Public Prosecutor.

Public Prosecutor.—For definition of Public Prosecutor see S. 4 (1), (i) *supra*, and see Chapter XXXVIII, *infra*, as to appointment, of duties and powers of Public Prosecutor.

Shall be conducted by a Public Prosecutor.—The word "shall" here is merely directory. An accused person will not be entitled to an acquittal merely on the ground that a public prosecutor did not conduct the prosecution or that there was a defect in his appointment, a defect which can be cured by S. 537, *infra*, 1887 P.R. (Cr. J.) 38. Counsel instructed by a private party cannot conduct the prosecution. A Public Prosecutor may avail himself of his services and once the assistance had been accepted that cannot be excluded at any stage of the trial, 11 B.H.C.R. 102. See S. 493, *infra*, no special permission of the District Magistrate is necessary for an Advocate of the High Court to appear on behalf of the prosecution and the High Court directed a Sessions Judge to permit the Advocate to appear and conduct the prosecution on behalf of the complaint, see 23 W.R. (Cr.) 14. The practice of allowing police officers to conduct prosecution in the Sessions Court is highly objectionable, 13 W.R. (Cr.) 18.

B—Commencement of proceedings.

Preliminary proceedings that are referred to as 'commencement of proceedings,' e.g., the swearing in of the Jury, the reading out of the charge to the Jury referred to in the heading of this section are not any part of the actual trial referred to in the heading of S. 286 as 'trial' of the case, 29 Bom. L.R. 204=28 Cr.L.J. 402=101 Ind. Cas. 178; 6 Lah. 262. But see 35 M. 701 at 703 and 13 B. 514.

271. (1) When the Court is ready to commence the trial, the accused shall appear or be brought before it, and the charge shall be read out in Court and explained to him, and he shall be asked whether he is guilty of the offence charged, or claims to be tried.

Commencement of trial.

Plea of guilty.

(2) If the accused pleads guilty, the plea shall be recorded, and he may be convicted thereon.

When the Court is ready to commence the trial.—When a Judge is of opinion that there is an absence of evidence to warrant a commitment of the accused to the Court of Session he has no power to withdraw the case, a power specially conferred on the High Court only, of withdrawing a case from the Jury. The proper procedure for the Sessions Judge in such a case is to make a reference to the High Court to have the commitment quashed under S. 215, *supra*, 5 C.W.N. 411. The hearing or trial must be taken to include all proceedings taken to determine a case and the first step in the hearing at a Sessions

trial is the reading and explaining of the charge to the accused, 35 M. 701 at 703, but it was held in 15 B. 514 that the actual trial does not begin until the charge has been read and explained to the accused and he claims to be tried. The trial begins only after the Assessors or Jurors have been chosen, 6 Lah. 262.

Trial with the aid of Assessors does not commence with the reading of the charge, for it is only when the accused has refused or does not plead to the charge and claims to be tried that the Sessions Court is to proceed to choose Assessors under S. 272, *infra*, 15 B. 514.

The accused shall appear.—The trial, conviction and sentence on an accused person by the Court of Session even in a case where the accused appeared before the committing Magistrate but absconded after commitment of the case to the Court of Session is not warranted by law and is wholly illegal and must be set aside, 23 Cr. L.J. 971=105 Ind. Cas. 633.

Charge shall be read out in Court and explained to accused.—The Judge is bound to read out and explain the charge to the accused and he ought to satisfy himself by interrogating the accused that he fully understands the responsibility he assumes by making a plea of guilty, 18 Cr. L. J. 742=40 Ind. Cas. 742. There must be a record of charge read out and explained in Court to the accused and where there is none, the record should contain an explanation for its absence and such absence of a written charge cannot be considered an irregularity cured by s. 537 *infra*, 21 Cr. L.J. 410=56 Ind. Cas. 58. The plea of the accused also should be recorded and when no plea is on record the conviction is bad and a new trial will be ordered, 1908 A.W.N. 54=5 A.L.J. 157=5 M.L.T. 75=7 Cr. L.J. 295. The ultimate responsibility of setting the charge vests on the Sessions Judge who can modify or alter the same, 16 Bom. L.R. 87=15 Cr. L.J. 292=23 Ind. Cas. 500. Mere reading out the charge is not sufficient but it must be explained to him, and where a charge is not explained to the accused the conviction is liable to be set aside, 9 M. 61 see also 19 A. 119 and 30 B. 811; 18 A.L.J. 812. When arraigning an accused person and before receiving his plea the Court should be careful to insure the explanation of the charge in a manner sufficiently explicit to enable the accused to understand thoroughly the nature of the charge he is called upon to plead, 5 C. 826; 7 C. 93; Weir. II, 336, 337 and 339; 3 Bom. L.R. 439. See S. 255, *supra*, and the notes thereunder at p. 491-492.

He shall be asked whether he is guilty or claims to be tried.—This and S. 272, *infra*, contain all that is necessary as to pleading, and there is no need to supplement their contents by a reference to any other system of judicature. The accused can plead "guilty" under this section, he can claim to be tried, or he can refuse to plead which is taken to be the same as claiming to be tried. The plea of "not guilty" is thus one not recognized by the Code and this has been the law since 1872 at least, and this is intentional and is designed to get rid of a great mass of English law relating to criminal pleadings which for more than half a century has been discredited and is in fact falling into oblivion. It is not open to the accused to make any answer to an indictment except "guilty" or "claim to be tried". If an accused claims to be tried, subject to special provisions he can take any objection to his trial or conviction at any time before verdict, at any rate and in any form that the Court sees fit to allow. S. 403, *infra*, has nothing to do with pleading, but is in terms a limitation on the jurisdiction of the Court, 41 C. 1072 at 1084. A plea of guilty must be a distinct admission of each and every fact necessary to constitute the offence charged and unless the Judge himself finds on the admission made that the offence charged is legally established, he should record evidence and come to a decision thereon Weir II, 336. After an accused had claimed to be tried, any admission made by him, admitting his guilt cannot be taken to be a plea of guilty and upon which the Judge could base a finding Weir II, 334; 7 Bom. L.R. 731. Where the accused instead of pleading guilty makes a rambling statement more or less admitting guilt, it would be much safer if the Judge recorded a formal plea of "not guilty" and proceeded with the trial in the ordinary way recording evidence, 1908 A.W.N. 54=5 A.L.J. 157=7 Cr. L.J. 295. Before a Judge makes up his mind to convict on a plea of guilty, it is his duty

to consider whether the plea is really one of "guilty" in other words, whether accused fully understands the nature of the charge and the consequences which will ensue if his plea of guilty is accepted, and it is not advisable to accept a plea of guilty in murder cases, 20 A.L.J. 326=23 Cr. L.J. 233=66 Ind. Cas. 427, followed in 26 Cr. L.J. 1316=89 Ind. Cas. 260. A plea of guilty by a pleader appointed by the Court to defend the accused on a charge of murder is not binding on the accused. The position of a pleader so appointed is the same as a pleader appointed by the accused, 2 Bom. L.R. 751. The section lays down that the accused may be convicted on a plea of guilty and thereby leave it open to the Court to refuse to accept the plea of guilty and have the question of the guilt of the accused tried by the Court, 13 C.W.N. 532=9 C.L.J. 291=10 Cr. L.J. 484=4 Ind. Cas. 57, where 19 B. 195; 28 A. 53 and 30 A. 540 are referred to; 19 A. 119. The accused should be asked to plead separately on each count and not alternatively, Ratanlal 327; 10 B. 124. It is not in accordance with the usual practice to accept a plea of guilty in a case where the natural consequence would be a sentence of death, 19 Bom. L.R. 356=18 Cr. L.J. 639=40 Ind. Cas. 699, following 8 Bom. L.R. 240=3 Cr. L.J. 337. A man may plead that he hit some one who thereby died and that he did it for the purpose of taking away the ornaments of the person injured without necessarily admitting he committed murder, 2 Bom. L.R. 240; 5 C. 824; 9 M. 61. As a matter of practice in Sessions trials, especially in murder cases many Judges very properly prefer not to accept the plea of guilty but proceed to take evidence just as if the plea had been one of not guilty and decide the case upon the whole evidence including the accused's plea, 23 M. 151 at 154; 19 B. 195; 22 M. 491. Where there is a doubt the Court will do well to proceed with the trial, 5 A.L.J. 157=1908 A.W.N. 54=7 Cr. L.J. 285. The statement must be taken as a whole, 11 C. 410; 25 W.R. (Cr.) 23; 7 W.R. (Cr.) 39; 14 B. 564; Ratanlal 532 and 668; 11 W.R. (Cr.) 53.

Sub-section (2).—Under this sub-section all that is incumbent on the Court is to record the plea of guilty. It is not obligatory on the Court to convict him thereon. When an accused pleads guilty if the Judge does not accept the plea and decides to proceed with the trial, the Code does not lay down explicitly that he should record reasons for so doing. Therefore it is not illegal for the Court to proceed with the trial of an accused who has pleaded guilty without previously placing on record its reasons for so doing, 18 Cr. L.J. 742 at 746=40 Ind. Cas. 742. The conviction on a plea of guilty is discretionary, 24 A.L.J. 318=27 Cr. L.J. 449=93 Ind. Cas. 241. The plea is to be recorded in the language in which it is conveyed to the Court by the interpreter, 5 C. 826, and the accused should be asked to plead by his own mouth and not through his counsel or pleader, 6 Bom. L.R. 861, referred to and distinguished in 50 B. 250 at 257; 15 W.R. (Cr.) 42. The Judge is not bound to convict on the plea of "guilty." The term used is "may" convict and a wide discretion is allowed to the Judge. Where the plea is not equivocal but a complete plea of "guilty" the Judge is entitled to act upon such a plea and convict the accused. If the Judge does not accept the plea of "guilty" and convicts the accused he should proceed with the trial and take all the evidence in order to determine whether he committed the offence charged, 4 B.L.R. Appx. 101. A trial does not end till the accused is convicted or acquitted, 23 M. 151. If the Court considers it is unsafe to accept the plea of guilty and to convict the accused on such plea no special procedure is laid down in the Code. As a matter of practice the trial proceeds as if the plea was one of not guilty and when the Judge decides to try the case he should direct the accused to enter a plea of not guilty as is the practice in England. The recording of a plea of guilty after the Judge had decided to try the case would be meaningless unless he accepts it. If on the other hand he accepted it there was nothing in issue between the Crown and the prisoner at the bar whom he has to try, 9 C.L.J. 55 at 72. The plea of guilty is a plea to the charge and does not necessarily amount to a confession of all the facts alleged. The Court is not bound to act on it but it may convict on such a plea. The plea operates as a bar in certain cases to the preferring of an appeal except to the extent and legality of the sentence under B. 412, *infra*. The plea of guilty may also stand by analogy in the accused's way of filing a revision, 43 Cr. L.J. 432 at 434.

May be convicted.—Under the Code the Court is not bound to convict an accused person on his plea of guilty, 23 M. 151 at 153; 13 C.W.N. 552. This section though it directs

that the plea shall be recorded does not direct that the accused shall be convicted thereon but only that he may be convicted, that is to say, it is left to the discretion of the presiding Judge by each particular case to determine whether in spite of the plea it is or it is not desirable to enter upon the evidence, 19 Bom. L.R. 355=18 Cr. L.J. 699=40 Ind. Cas. 619. The Judge has a discretion to convict the accused on his plea of guilty and that discretion ought to be exercised as soon as the plea of guilty is offered and recorded, 18 Cr. L.J. 742=40 Ind. Cas. 742. This section though it directs that the plea shall be recorded does not direct that the accused shall be convicted thereon but only that he may be so convicted that is to say, it is left to the discretion of the presiding Judge in each particular case to determine whether in spite of the plea it is or is not desirable to enter upon the evidence, It cannot too strongly be impressed upon learned Session Judges that in cases under S. 302, I.P.C., it is undesirable to accept a plea of guilty and to bring the trial to an end thereon, The trial does not necessarily end if the accused pleads guilty, but evidence may and should be taken in cases of murder as if the plea is one of not guilty and the case decided on the whole evidence including the accused's plea. It is not in accordance with usual practice to accept the plea of guilty where the natural consequence would be a sentence of death, 30 Cr. L.J. 508=115 Ind. Cas. 532 referring to 8 Bom. L.R. 245=3 Cr. L.J. 337; 19 A. 119; 19 Bom. L.R. 356=18 Cr. L.J. 699=40 Ind. Cas. 699. In 24 A.L.J. 318 it was held that the Magistrate has a discretion to accept the plea of guilty and convict the accused on such plea. If a Judge refuses to convict the accused on a plea of guilty the only alternative left is to proceed with the trial of the accused and cannot acquit the accused without a trial, 18 Cr. L.J. 742 at 745=40 Ind. Cas. 742.

272. If the accused refuses to, or does not, plead, or if he claims to be tried, the Court shall proceed to choose jurors or assessors as hereinafter directed and to try the case :

Refusal to plead or claim to be tried.

Trial by same jury or assessors of several offenders in succession.

Provided that, subject to the right of objection hereinafter mentioned, the same jury may try, or the same assessors may aid in the trial of, as many accused persons successively as the Court thinks fit.

Scope of the section.—A Court of session can proceed to trial of an accused person only in the circumstances specified in this section, that is to say when the accused either (1) refuses to plead (2) does not plead, or (3) claims to be tried. When the terms of S. 271, *supra*, are taken into consideration there is no possible way of avoiding the conclusion that where a Judge does not convict on the plea of guilty, the only course open to him is to try the accused, 18 Cr. L.J. 742 at 745=40 Ind. Cas. 742.

Refuses to plead.—An accused is not bound to answer any question put to him and if he likes decline to plead and if he does so the case goes on just the same. S. 179, I.P.C., has nothing whatever to do with the conduct of accused persons in Court, 47 M. 396. When the accused person refuses to plead, that is to be taken as equivalent to his claiming to be tried and the trial should proceed, 41 C. 1072 at 1084. The actual trial does not begin until the charge has been read and explained to the accused and his plea is recorded, 15 B. 514. If the accused refuses to plead or claims to be tried, then the Judge shall proceed to choose Jurors or Assessors to try the case.

Claims to be tried.—If an accused person pleads not guilty, it is after so pleading that he claims to be tried. In such cases if he confesses, a Judge is not entitled to convict him on the confession without taking the verdict of the jury after laying before them all the evidence including the confession.

Proviso to the section.—By this proviso, it is enacted that when one trial is to follow the other i.e., on the conclusion of one trial, the same Jury may proceed to try the accused in

the next case. The law does not contemplate that two trials should be conducted piecemeal in such a manner that at their conclusion the Jury shall be called upon to decide at one and the same time two distinct class of evidence which, though they have points in common, require careful determination as bearing upon the guilt or innocence of two sets of accused, no Jury ought to be placed in such an embarrassing position. It is only fair to the prisoners that the sole issues on which they are to be tried and the evidence bearing upon those issues should be laid before the jury and the minds of the Jury should not be encumbered by consideration of foreign and irrelevant matter 6 C. 96 at 99, but the hearing of the two cases should not be simultaneous, 23 Cr. L. J. 49=64 Ind. Cas. 833.

273. (1) In trials before the High Court, when it appears to the High Court, at any time before the commencement of the trial of the person charged, that any charge or any portion thereof is clearly unsustainable, the Judge may make on the charge an entry to that effect.

Entry on unsustainable charges.

(2) Such entry shall have the effect of staying proceedings upon the charge or portion of the charge, as the case may be.

Effect of entry.

Before the commencement of the trial.—The trial does not begin until the charge has been read out and explained to the accused and he claims to be tried. The hearing or trial must be taken to include all the proceedings taken to determine a case and the first step in the hearing of a sessions case is the reading and explaining the charge to the accused, 35 M. 701 at 703; 15 B. 514; but see 29 Bom. L.R. 204=28 Cr. L.J. 432=101 Ind. Cas. 178; 6 Lah. 262.

Effect of entry—An entry made under this section has not the effect of an acquittal which could be pleaded in bar to a subsequent trial under B. 403, *infra*, In 21 C 97 a charge under B. 379, I.P.O., when not made out, the learned Judge thought it was his duty to act under this section to stay the proceedings by making an entry as contemplated by this section and the accused was discharged from custody. The power under this section is to be invoked in the exercise of the ordinary original criminal jurisdiction of the High Court, 9 C. 397. Such an entry has the effect of postponing proceedings finally. For other instances of stay of proceedings, see Bs. 145 (5) 240, 464 (2), 465 (1) *infra*.

C—Choosing a Jury.

Trial by Jury is an ancient institution of almost all European races inhabiting Europe, and European Colonies in America and elsewhere where every criminal is tried by Jury. The origin of the trial by Jury is not traceable to any single Legislature or to any particular period. It seems to have had its beginnings in certain primitive customs of the Northern European races and received special developments from different nations. By the Anglo-Saxons, a person who was accused of crime, was permitted to summon twelve of his neighbours called *compurgators* who swore to his innocence. This was the origin of an institution which took settled and vigorous form after the Norman conquest gradually developing into its present form . . . In the United States, in Canada, and other British Colonies, Jury trials are essentially the same as in England. In France they are only applicable to criminal cases. Trial by Jury is in force in Italy and in the German Empire, 8 Lah. 262. The origin of the English Jury is attributed to a national recognition of the principle that no man ought to be condemned except by the voice of his fellow citizens, *Forsyth, His of Try by Jury*, p. 5. "With respect to jury system as a means of protecting innocence, it may safely be averred that it is the rarest of accidents when an innocent man is convicted in this country. To say that it never happens would be to give to a human tribunal the attributes of infallibility, and to fly in the face of recorded facts. But so long as a man's judgment is liable to err, such cases must now and then occur, whatever precaution is taken to prevent them. And before such a catastrophe can happen, how strong must be

the evidence which implicates the accused. . . . But it can with equal truth be asserted that Juries never acquit in ordinary cases when they ought to condemn. I fear not there is no doubt in the vulnerable point of the system, that feeling of compassion for the prisoner or of repugnance to the punishment which the law awards are sometimes allowed to overpower their sense of duty. But it is an error at which humanity need not blush; it springs from one of the purest instincts of our system and is a system of kindness of heart which as a national characteristic, is an honor. Consequently laws which are totally repugnant to the feelings of the community are changed. *Forsyth His trial by Jury* p. 430 431. The object of the provisions of the Code as to the choosing of Jury is to secure an impartial trial by rendering it impossible any intentional selection of Jurors to try a particular case and that an accused person has a right to claim to be tried by a Jury chosen with such regard to all the safeguards provided by law to secure perfect impartiality. 46 C. L.J. 160 at 166=31 C.W.N. 1102=25 Cr. L.J. 859=104 Ind. Cas. 903.

274. (1) In trials before the High Court
Number of jury. the jury shall consist of nine persons.

(2) In trials by jury before the Court of Session the jury shall consist of such uneven number, not being less than *five*, or more than nine, as the Local Government, by order applicable to any particular district or to any particular class of offences in that district, may direct :

Provided that, where any accused person is charged with an offence punishable with death, the jury shall consist of not less than seven persons, and, if practicable, of nine persons.

Amendment.—The word “three” has been changed into “five” and the proviso has been newly added by Act XII of 1923.

Jury.—The term “jury” generally signifies a body of men sworn to inquire into a matter of fact and to declare the truth upon such evidence as shall be delivered to them. Jury form a tribunal or body with a foreman and the verdict is the verdict of the body and when there is no unanimity among the members of the body, the opinion of the majority prevails as the verdict of the body. The jurors are sworn after the foreman is appointed, and after the Judge has finished his charge, the Jury may retire to consider their verdict and if they are not unanimous, he may require them to retire for further consideration. If in the course of a trial any juror unavoidably absents himself, or if it appears that any juror is unable to understand the language in which the evidence is given or the language in which it is interpreted, any new juror shall be added or the Jury discharged and a new Jury chosen. But in either case the trials shall commence anew, 24 M 523 at 536 537.

Sub-section (2).—When the Local Government by a notification under this sub-section has fixed the number of Jury at *five*, a trial held before Jury of *seven* persons in accordance with a cancelled notification was held to be wholly invalid, 23 A. 211.

The proviso is new. Under this section where an accused is charged with murder triable by jury in Calcutta, the Jury shall consist of not less than seven persons and if practicable, of nine persons. The number to be summoned by the District Magistrate should not be less than the double the number required for such trial 55 C. 791.

275. (1) In a trial by Jury before the High Court or Court of Session of a person who has been found under the provisions of this Code to be an European or Indian British subject, a majority of the jury shall, if such person before the first juror is called and accepted so requires, consist, in the case of an European British

Jury for trial of European and Indian British subjects and others.

subject, of persons who are Europeans or Americans and, in the case of an Indian British subject, of Indians.

(2) *In any such trial by jury of a person who has been found under the provisions of this Code to be an European (other than an European British subject) or an American, a majority of the jury shall, if practicable, and if such European or American before the first juror is called and accepted so requires, consist of persons who are Europeans or Americans.*

This section was amended by Act XII of 1923. The Racial Distinctions Act, and provides for mixed Jury for the trial of Europeans and Indian British subjects and Europeans and Americans. "The same law as to the composition of the Jury shall apply to Indians as to Europeans, that is to say, the majority of the Jury if an Indian accused so desires shall consist of persons who are not Europeans or Americans. This is already the law in Sessions Courts and S. 275, is so amended as to make it apply to the High Court also"—*Rept. Sel. Committee para. 23*. See S. 284A *infra* as to trial with the aid of Assessors of such persons. The right conferred by this section is a substantive right to be obtained not by a luck of the ballot but the process of challenging as of right, 52 C. 347 at 353. A claim to be tried as an Indian British subject is a different and distinct one from the claim to be tried by a majority of Indian Jury as mentioned in this section though it can only be put forward by a person who has in the language of the section been found under the provisions of the Code to be an Indian British subject and the section further requires that such a claim has to be expressly put forward before the first Juror is called and accepted before it can be listened to, 51 C 930; see also 5 Lah. 515 (F.B.). Where certain Mahomedan accused were charged with abduction of a Hindu girl applied to the Sessions Court for a mixed Jury of Hindus and Mahomedans alleging that Hindus bear a sort of instinctive hatred or prejudice against them in a case of this nature and would not get a fair trial before a Jury composed entirely of Hindus, the application was rightly rejected as there is no provision of law for a mixed jury of this character on communal basis and the accused were not entitled to get what they asked for, 29 C W.N. 526=26 Cr. L.J. 1009=87 Ind. Cas. 833.

Sub-section (2) This sub-section which deals with special privileges provides that the accused should not merely assert that he belongs to a particular nationality but he must be one who has been found under the provisions of the Code to belong to that nationality, 29 Cr. L.J. 721=110 Ind. Cas. 577.

276. The jurors shall be chosen by lot from the persons summoned to act as such in such manner as the High

Jurors to be chosen
by lot.

Court may from time to time by rule direct :

Provided that—

first, pending the issue under this section of rules for any Court, the practice now prevailing in such Court in respect to the choosing of jurors shall be followed ;

existing practice
maintained.

secondly, in case of a deficiency of persons summoned, the number of jurors required may, with the leave of the Court, be chosen from such other persons as may be present ;

persons not summoned
when eligible.

thirdly, in a trial before any High Court in the town which is the usual place of sitting of such High Court—

trials before special jurors.

(a) if the accused person is charged with having committed an offence punishable with death, or

(b) if in any other case a Judge of the High Court so directs, the jurors shall be chosen from the special jury list hereinafter prescribed ; and

fourthly, in any district for which the Local Government has declared that the trial of certain offences may be by special jury, the jurors shall, in any case in which the Judge so directs, be chosen from the special jury list prescribed in section 325.

Amendment.—The opening words of the third proviso are new.

Scope and object of the section.—The object of this section coupled with Ss. 279 and 326, *infra*, is to secure an impartial trial by rendering impossible any intentional selection of Jurors to try a particular case, and an accused person has a right to claim to be tried by a Jury chosen with strict regard to the safeguards provided by law to secure perfect impartiality. When the required number of Jurors not being present, the deficiency was made up from other persons who were present in Court, though they were not in the Jury list and were not chosen by lot, being called to serve as Jurors, the trial is not vitiated on that ground, 29 C.W.N. 652=26 Cr. L.J. 819=86 Ind. Cas 467. This section with all its provisos is a general section dealing with the general nature of the procedure and details of that procedure, 55 C. 371 (F.B.) ; 7 Pat. 61 & 50. The section means what it says, the Jurors are to be chosen from among the persons summoned to act as such, that is to say, it states the source from which and the method by which the Jurors are to be chosen, the sources, the persons

met by proviso 2 which enables the Judge to go to another source of supply, *viz.*, the other persons present in Court and in that event the method of chance is no longer used. S. 279, *infra*, indicates how the choice is to be exercised, the method being a rational method of selection, 7 Pat 61 *dissenting* from 44 C.L.J. 541. This section provides in the first instance, for a ballot among the persons summoned under S. 326, *infra*, all of whom may or may not be present. When their names have been exhausted, if a Jury has not been empanelled, the Court may, in its discretion, allow the number requisite to complete the Jury to be chosen from among the bystanders or may adjourn the case for a fresh Jury to be summoned. As each name is drawn and called aloud, if the person summoned answers or as each Juror is chosen from among the bystanders, should that point have been reached and that course be permitted, the accused shall be asked, if he objects to be tried by such Juror. Should the objection be allowed, the Court shall proceed as laid down in S. 279 (2) *infra* adopting the course prescribed according as there are or not persons left from among those summoned whose names have not been drawn, 55 C. 371 (F.B.) where 44 C.L.J. 541 and 46 C.L.J. 160 are *overruled*.

Shall be chosen by lot.—The name of each person summoned to act as a Juror under S. 326, Cr. P.C., shall be written in a slip of paper and the slips of paper bearing the names of persons so summoned shall be placed in a box or bag and shaken together. The proper ministerial officer of the Court shall then draw out the slips of paper, one by one from the said box or bag until the requisite number of Jurors has been obtained, *Mad. Cr. Rules of Pr. Rule 42*. The provision of choosing Jurors by lot is applicable only when the persons summoned to act as Jurors are present in such number as to make it possible to choose them by lot and when such number is not present the Judge is to take the help of persons present

in Court to form the Jury, 54 C. 1025. When instead of choosing jurors by lot and then hearing and deciding objections as provided by law the Judge proceeded at once to exempt some of the persons present merely on their own representation and tried the accused with the rest and no selection was made as required by S. 326, *infra*, it was held that such a grave irregularity in the selection of the Jurors affects the constitution of the Court and is not cured by S. 537, *infra*. 7 C.W.N. 188. where 8 C. 739 was distinguished, on the ground that in that case no objection was taken to the Judge himself selecting the jurors and no prejudice was shown by the accused. Jurors are judges of facts and the absence of a properly constituted Jury as required by the imperative provisions of this section is an illegality which cannot be cured by S. 537, *infra*, 33 A. 333 but there is nothing to show that any objection was taken in that case, see 44 C.L.J. 541=23 Cr. L.J. 191=93 Ind. Cas. 930 following 33 A. 385; 29 C.W.N. 652=26 Cr. L.J. 819=86 Ind. Cas. 467; the Full Bench decision in 55 C. 371 also held that the omission to choose jurors by lot was an illegality which vitiated the whole trial and the conviction and sentence was set aside and a retrial was ordered. See also 48 C.L.J. 479=30 Cr. L.J. 135=113 Ind. Cas. 328; but in 30 Cr. 537, *infra*.

Proviso second.—The position contemplated by the proviso is that out of the persons summoned a complete jury has not been obtained, whether it be by reasons of persons summoned having been excused or by reason of their having failed to attend and the jury box is short of a definite number of jurors to try the case. It is short by reason that there are no more persons whose names can be yielded by the ballot box. In that position it is open to the Court to adjourn the proceedings, re-summon a sufficient number and in this way obtain a jury in the ordinary course but this course will often be highly inconvenient and the power given by the proviso to fill up the Jury box to the necessary number by calling in the service of one or more of the bystanders and this process in no way defeats the right of the accused to object to any member of the Jury, 53 C. 371 (F.B.) This proviso clearly indicates that in case of a deficiency of persons summoned the procedure laid down in the first part of the section namely choosing by lot need not be followed and the number of jurors may be chosen from such persons as may be present. In other words, the provision as to choosing Jurors by lot is applicable only when the persons summoned to act as Jurors are present in such number as to make it possible to choose them by lot and when such number is not present the Judge is to take the help of persons present in Court to form the Jury, 54 C. 1026; this proviso is enacted to meet the difficulty which arises when the number chosen by lot is less than the number of Jurors required by enabling the Judge to go to another source of supply *viz*, the other persons present in Court, and in that event the method of chance is no longer to be used. S. 279 (2), *supra*, indicates how the choice is to be exercised in the case, the method being a rational method of selection, 7 Pat. 61. The words used in the first part of the section 'chosen by lot' and the word 'chosen' occurring in this proviso cannot be held to convey the same meaning, *viz*., selection by ballot and there is no logical justification for so holding. The two expressions cannot be regarded as synonymous unless there is no other possible construction to be placed upon them, 53 C. 371 (F.B.).

In case of deficiency of persons summoned, the number of jurors required.—The central idea is to have a Jury chosen by lot from the persons summoned to act as jurors. In ordinary cases five persons are to be chosen by lot to act as Jurors out of ten persons summoned and in case however of a deficiency of persons summoned, *i.e.*, where the persons attending in obedience to the summons are less than the number summoned, then the number required may with the leave of the Court be chosen from persons present in Court. The word 'deficiency' indicates the number by which the number of persons answering their names in Court and empanelled falls short of the number of persons of which the Jury should consist. It is only when such shortage occurs the proviso begins to operate and on that point being reached, the Court has to exercise a discretion to adjourn the case or to allow persons present in Court to be chosen in sufficient numbers to supply the deficiency.

This discretion should be exercised by the Court in such a way as to secure to the prisoner a fair and impartial trial, 53 C. 371 (F.B.).

With the leave of the Court.—These words give a wide discretion to the Court to proceed or not to proceed in the way indicated in this proviso namely by allowing persons present in Court to come in as Jurors according as it thinks fit and it is not difficult to imagine cases in which such a procedure will not be resorted to.

Chosen from such other persons as may be present.—The word used is 'chosen' and not chosen by lot. In case of deficiency in the required number of Jurors the Court is permitted to empanel other persons present in Court. The Court is not entitled to send for persons not present in Court to fill up the vacancy and such procedure is illegal, 30 Cr. L.J. 120 = 113 Ind. Cas. 250 followed in 43 C.L.J. 479 = 30 Cr. L.J. 133 = 113 Ind. Cas. 323 where it was held that persons who were asked to attend Court were not persons present in Court and so could not be chosen to serve as jurors and the whole trial was held illegal and a re-trial was ordered. See also 33 C.W.N. 722.

Special Jury.—As to the preparation of the list of Special Jurors, see S. 325, *infra*.

277. (1) As each juror is chosen, his name shall be called aloud, and, upon his appearance, the accused shall be asked if he objects to be tried by such juror.

Names of jurors to be called

(2) Objection may then be taken to such juror by the accused or by the prosecutor, and the grounds of objection shall be stated:

Objection to jurors.

Provided that, in the High Court, objections without grounds stated shall be allowed to the number of eight on behalf of the Crown, and eight on behalf of the person or all the persons charged.

Objection without grounds stated.

Name shall be called aloud.—The prisoner having put himself upon the country the next proceeding is to call the jury which an officer of Court does in the following or like terms "you good men, who are returned and empanelled to try the issue joined between our Sovereign Lord the King and the prisoner at the bar answer to your names and save your fines." *Arch. Cr. Pl. and Ev. Pr. p. 174*. Then the names of Jurors are called. No such formulae is used here but the name of each individual Juror is called aloud by an officer of Court and the Juror steps forward when his name is called.

Upon his appearance.—This may mean, either simultaneously with or after the act of the Juror appearing in the witness box. It cannot possibly refer to any act done before the Juror puts in his appearance. In England the challenge of a Juror either by the Crown or by the prisoner must be before he is sworn. As a matter of practice, here in India Counsel challenges the Juror immediately he hears the Juror's name called aloud and sees him emerging from the crowd collected in the Court room ready to get into the Jury-box.

Objection to jurors.—This section deals with what is known in England as challenges to the polls (capita), *viz.*, exception to the individual Jurors. They are classified under four heads (1) where a Lord of Parliament is empanelled on a Jury, (2) where an alien born who is incompetent is empanelled or one who is not possessed of sufficient estate to qualify as a juror is empanelled, (3) on the well grounded suspicion of bias or partiality (4) where one is convicted of some offence that affects his credit and renders him infamous is empanelled *Forsyth Hist. Trial by Jury p. 179 180*. The right of challenge is almost essential for the purpose of securing perfect fitness and impartiality in a trial. *Forsyth Hist. Trial by Jury, p. 175*. In the case of a prisoner challenging, he must do so as each Juror comes to the box and before he is sworn. But the King need not assign his cause of

challenge until the whole panel is gone through and unless there cannot be a full Jury without the persons so challenged, and it is then that the Counsel for the Crown must show cause, otherwise the Juror shall be sworn. The practical effect of this rule is that the Crown has the benefit of peremptory challenge provided it takes care that a sufficient number are left on the panel unchallenged so as to make up a full Jury, *Forsyth Hist. of Trial by Jury*, p. 232.

Accused shall be asked if he objects.—The omission to ask the accused whether he has any objection to each Juror whose name is called aloud and upon his appearance, is a very serious one, though it may not necessarily vitiate a conviction unless the accused has been actually prejudiced, 13 C.W.N. cxi.

Proviso—This proviso enables the accused as well as the Crown in the High Court Sessions only, to peremptorily challenge without grounds stated to the extent of eight persons, but this principle of peremptory challenge is not allowed in trials before Court of Session. "In charges of treason and felony a prisoner is entitled to a peremptory challenge, because he may challenge peremptorily upon his own dislike without showing any cause," *Forsyth Hist. of Trial by Jury*, p. 231.

278. Any objection taken to a juror on any of the following grounds, if made out to the satisfaction of the Court, shall be allowed :—

Grounds of objection

- (a) some presumed or actual partiality in the juror ;
- (b) some personal grounds, such as alienage, deficiency in the qualification required by any law or rule having the force of law for the time being in force, or being under the age of twenty-one or above the age of sixty years ;
- (c) his having by habit of religious vows relinquished all care of worldly affairs ;
- (d) his holding any office in or under the Court ;
- (e) his executing any duties of police or being entrusted with police-duties ;
- (f) his having been convicted of any offence which, in the opinion of the Court, renders him unfit to serve on the jury ;
- (g) his inability to understand the language in which the evidence is given, or when such evidence is interpreted the language in which it is interpreted ;
- (h) any other circumstance which, in the opinion of the Court, renders him improper as a juror.

If made to the satisfaction of the Court.—The burden of proof of a challenge is on the person who makes it and he is not entitled to question a Juror before challenging him when a challenge has been made, the trial proceeds by witnesses called to support or defeat the challenge, *Arch Cr. Pl. Ev. and Pra.*, p. 190

Presumed or actual partiality.—A Court is bound to allow an objection by the accused to a Juror where there are reasonable grounds for presuming partiality in the Juror. There need not be actual partiality, 7 Pat. 50 ; 28 Cr. L.J. 843=104 Ind. Cas. 459.

Holding any office in or under the Court.—This refers to the Court trying the case. The words "in or under the Court" are significant. The fact that a person is a clerk in the District Magistrate's office is no ground for objection for his sitting on the Jury in the Sessions Court, 7 Q. 42.

Any other circumstance which in the opinion of the Court renders him improper.—The Court even without challenge, may and ought to excuse a Juror on the panel when called, if he is obviously unfit to perform his duty from physical or mental infirmity or *seems* from expressed indifference, *Arch. Cr. Pl. Ev. and Pr.* p. 192 (25th Ed.).

279. (1) Every objection taken to a juror shall be decided by

Decision of objection. the Court, and such decision shall be recorded and be final.

(2) If the objection is allowed, the place of such juror shall be

Supply of place of juror against whom objection allowed. supplied by any other juror attending in obedience to a summons and chosen in manner provided by section 276, or if there is no such other juror present, then by any other person present in the Court whose name is on the list of jurors, or whom the Court considers a proper person to serve on the jury :

Provided that no objection to such juror or other person is taken under section 278 and allowed.

Scope of the section.—The position when a successful objection to a Juror has been made is dealt with by this section. In the first instance, the place, of the Juror is to be supplied by any other Juror attending in obedience to a summons and chosen as S. 276 provides that is by ballot. If no such Juror is present, the place of the Juror to be supplied shall be filled up by another person present whose name is on the jury list or whom the Court considers a proper person to serve on the jury, subject of course to a successful objection, as stated in the proviso to this section. Here no ballot is possible, 55 Q. 371 (F.B.).

Shall be decided by the Court.—In India every objection taken to a Juror shall be decided by the Court. But in England, it is otherwise. If the challenge is to the first juror called, the Court may select any two indifferent persons as triers. If they find against the challenge, the Juror will be sworn in and be jointed with the triers in determining the next challenge. But as soon as two Jurors have been found indifferent and have been sworn every subsequent challenge will be referred to their decision. The burden of proof of a challenge for cause is on the person who makes it and he is not entitled to question a Juror before challenging him. When the challenge has been made the trial proceeds by witnesses called to support or defeat the challenge; the Juror objected to may also be examined on the *voir dire* as to his qualification or the leaning of his affection, but he cannot be interrogated as to matters which tend to his own discredit, as whether he had been convicted of felony, etc., nor whether he has expressed a hostile opinion as to the guilt of the defendant. *Arch. Pl. Ev. and Pr.* p. 190 (25th Ed.). This section says that when objection is taken to a Juror by a party the place of such Juror shall be supplied by another Juror attending in obedience to the summons or if there is no such other Juror by any other person present in Court whose name is in the list of Jurors, or whom the Court considers to be a proper person to serve on the jury, 54 Q. 1026.

Sub-section (2).—This sub-section contemplates an ordinary normal case of Jurors summoned attending but by reason of challenges or other causes such as some of them being excused, no summoned Juror is left to take the place of the last challenged Juror. In such an eventuality some other persons present in Court may be empannelled. This sub-section introduces an exception to the general rule but it is only in exceptional conditions

challenge until the whole panel is gone through and unless there cannot be a full Jury without the persons so challenged, and it is then that the Counsel for the Crown must show cause, otherwise the Juror shall be sworn. The practical effect of this rule is that the Crown has the benefit of peremptory challenge provided it takes care that a sufficient number are left on the panel unchallenged so as to make up a full Jury, *Forsyth Hist. of Trial by Jury*, p. 232.

Accused shall be asked if he objects.—The omission to ask the accused whether he has any objection to each Juror whose name is called aloud and upon his appearance, is a very serious one, though it may not necessarily vitiate a conviction unless the accused has been actually prejudiced, 13 C.W.N. cxi.

Proviso—This proviso enables the accused as well as the Crown in the High Court Sessions only, to peremptorily challenge without grounds stated to the extent of eight persons, but this principle of peremptory challenge is not allowed in trials before Court of Session. "In charges of treason and felony a prisoner is entitled to a peremptory challenge, because he may challenge peremptorily upon his own dislike without showing any cause," *Forsyth Hist. of Trial by Jury*, p. 231.

278. Any objection taken to a juror on any of the following

Grounds of objection grounds, if made out to the satisfaction of the Court, shall be allowed :—

- (a) some presumed or actual partiality in the juror ;
- (b) some personal grounds, such as alienage, deficiency in the qualification required by any law or rule having the force of law for the time being in force, or being under the age of twenty-one or above the age of sixty years ;
- (c) his having by habit of religious vows relinquished all care of worldly affairs ;
- (d) his holding any office in or under the Court ;
- (e) his executing any duties of police or being entrusted with police-duties ;
- (f) his having been convicted of any offence which, in the opinion of the Court, renders him unfit to serve on the jury ;
- (g) his inability to understand the language in which the evidence is given, or when such evidence is interpreted the language in which it is interpreted ;
- (h) any other circumstance which, in the opinion of the Court, renders him improper as a juror.

If made to the satisfaction of the Court.—The burden of proof of a challenge is on the person who makes it and he is not entitled to question a Juror before challenging him when a challenge has been made, the trial proceeds by witnesses called to support or defeat the challenge, *Arch Cr. Pl. Ev. and Pra.*, p. 190

Presumed or actual partiality.—A Court is bound to allow an objection by the accused to a Juror where there are reasonable grounds for presuming partiality in the Juror. There need not be actual partiality, 7 Pat. 50 ; 28 Cr. L.J. 843=104 Ind. Cas. 459.

Holding any office in or under the Court.—This refers to the Court trying the case. The words "in or under the Court" are significant. The fact that a person is a clerk in the District Magistrate's office is no ground for objection for his sitting on the Jury in the Sessions Court, 7 C. 42.

Any other circumstance which in the opinion of the Court renders him improper.—The Court even without challenge, may and ought to excuse a Juror on the panel when called, if he is obviously unfit to perform his duty from physical or mental infirmity or *semble* from expressed indifference, *Arch. Cr. Pl. Ev. and Pr. p. 192 (25th Ed.)*.

279. (1) Every objection taken to a juror shall be decided by the Court, and such decision shall be recorded and be final.

(2) If the objection is allowed, the place of such juror shall be supplied by any other juror attending in obedience to a summons and chosen in manner provided by section 276, or if there is no such other juror present, then by any other person present in the Court whose name is on the list of jurors, or whom the Court considers a proper person to serve on the jury :

Provided that no objection to such juror or other person is taken under section 278 and allowed.

Scope of the section.—The position when a successful objection to a Juror has been made is dealt with by this section. In the first instance, the place of the Juror is to be supplied by any other Juror attending in obedience to a summons and chosen as § 276 provides that is by ballot. If no such Juror is present, the place of the Juror to be supplied shall be filled up by another person present whose name is on the jury list or whom the Court considers a proper person to serve on the jury, subject of course to a successful objection, as stated in the proviso to this section. Here no ballot is possible, 55 C. 371 (F.B.).

Shall be decided by the Court.—In India every objection taken to a Juror shall be decided by the Court. But in England, it is otherwise. If the challenge is to the first juror called, the Court may select any two indifferent persons as triers. If they find against the challenge, the Juror will be sworn in and be jointed with the triers in determining the next challenge. But as soon as two Jurors have been found indifferent and have been sworn every subsequent challenge will be referred to their decision. The burden of proof of a challenge for cause is on the person who makes it and he is not entitled to question a Juror before challenging him. When the challenge has been made the trial proceeds by witnesses called to support or defeat the challenge; the Juror objected to may also be examined on the *voir dire* as to his qualification or the leaning of his affection, but he cannot be interrogated as to matters which tend to his own discredit, as whether he had been convicted of felony, etc., nor whether he has expressed a hostile opinion as to the guilt of the defendant. *Arch. Pl. Ev. and Pr. p. 190 (25th Ed.)* This section says that when objection is taken to a Juror by a party the place of such Juror shall be supplied by another Juror attending in obedience to the summons or if there is no such other Juror by any other person present in Court whose name is in the list of Jurors, or whom the Court considers to be a proper person to serve on the jury, 54 C. 1028.

Sub-section (2).—This sub-section contemplates an ordinary normal case of Jurors summoned attending but by reason of challenges or other causes such as some of them being excused, no summoned Juror is left to take the place of the last challenged Juror. In such an eventuality some other persons present in Court may be empanelled. This sub-section introduces an exception to the general rule but it is only in exceptional conditions

stated and in emergent circumstances, 31 C.W.N. 1102-23 Cr. L.J. 839-104 Ind. Cas 905. This sub-section deals with a case where there is no effective lot, the case where the Jurors present are all exhausted without completing the number and it provides how the number is to be completed. The method to be adopted here is a rational method of selection and not the method of chance contemplated by S. 276, *supra*, 7 Pat. 61.

Foreman of jury.

280. (1) When the jurors have been chosen, they shall appoint one of their number to be foreman

(2) The foreman shall preside in the debates of the jury, deliver the verdict of the jury and ask any information from the Court that is required by the jury or any of the jurors.

(3) If a majority of the jury do not, within such time as the Judge thinks reasonable, agree in the appointment of a foreman, he shall be appointed by the Court.

281. When the foreman has been appointed, Swearing of jurors. the juror shall be sworn under the Indian Oaths Act, 1873.

The oath to be administered is in the following form :—" You shall well and truly try and true deliverance make between our Sovereign Lord the King-Emperor of India and the prisoner at the bar and true verdict give according to the evidence. So help you God." S. 6 of the Indian Oaths Act enacts that where a Juror is a Hindu or a Mahomedan or a person who has objection to taking an oath, shall, instead of making an oath, make an affirmation and the form prescribed is as follows : " I solemnly affirm in the presence of Almighty God that I will judge truly between the King-Emperor of India and the prisoner at the bar and will give a true verdict according to the evidence "

282. (1) If, in the course of a trial by jury at any time before the return of the verdict, any juror, from any sufficient cause, is prevented from attending throughout the trial, or if any juror absents himself and it is not practicable to enforce his attendance, or if it appears that any juror is unable to understand the language in which the evidence is given or, when such evidence is interpreted, the language in which it is interpreted, a new juror shall be added, or the jury shall be discharged and a new jury chosen.

Procedure when juror ceases to attend, etc.

(2) In each of such cases the trial shall commence anew.

Scope of the section.—This section does not permit the discharge of the Jury in the middle of a trial and commencing the trial anew with a fresh Jury when an adjournment is asked for on account of the absence of a defence witness who was summoned to appear, 4 Bom. L R. 839. This and the next section do not provide for the discharge of the Jury for improper conduct during the trial. Where the question of misconduct on the part of the Jury or other sufficient cause arises, a Sessions Judge has inherent power to discharge the Jury and empanel another. The Code does not provide for such circumstances. The presumption that Jurors will discharge their duties without impropriety may explain the omission. Such a power is not to be exercised lightly unless the Judge on inquiry finds reasonable grounds for exercising such a right. Unless the Judge had the power to discharge

the Jury in cases of misconduct, great difficulties must arise and in many cases a serious miscarriage of justice will happen. 50 C. 872. See also 55 C. 279 where it was held referring to 50 C. 872 that during the course of a Sessions trial exception is taken to the conduct of a Juror, the Judge has undoubtedly jurisdiction to inquire into the conduct of the Juror. See also *Arch. Cr. Pl. Ev. & Pr.*, p. 214 (25th Ed.) where it is stated discovery of misconduct on the part of a Juror or Jurors before verdict is a good ground for discharging the Jury. If a Jurymen is taken ill so as to be in the opinion of a competent witness incapable of attending through the trial, the Jury may be discharged and the prisoner tried *de novo*; another Jurymen may be added to the rest but in that case the prisoner should be offered his challenge over again as to the eleven and the eleven should be sworn and that trial begun *de novo*, *Ros. Cr. Ev. & Pr.*, p. 168 (13th Ed.). When a trial has begun with a Jury and a Juror is unable to attend on account of illness, the Judge may postpone the hearing to enable the Juror to attend or discharge the Jury and empanel a fresh Jury. It is undesirable to re-summon Jurors after considerable lapse of time except on very special circumstances. If a Judge exercises his discretion under this section and discharges the Jury, the High Court will not interfere in revision with the exercise of that discretion. 31 C.W.N. 144=23 Cr. L.J. 141 (2)=99 Ind. Cas. 349 (2). This section refers only to absence of a juror and not to witness, 4 Bom. L.R. 939. This section applies to the case where the Judge in the course of the trial found out that a Juror was deaf and partly blind and the Judge was entitled to try the case afresh with another Jury, 19 M. 375. On a trial by a Jury after two witnesses have been examined one of the Jurors was discovered to be deaf and was discharged by the Judge and another Juror sworn in his place, the trial was not commenced afresh but the evidence given by the two witnesses were read over and admitted by them to be correct, held that the procedure adopted by the Judge contravened the provisions of this section and therefore the trial was invalid, 36 A. 431. See 11 Cr. L.J. 402=6 Ind. Cas. 777 as to the temporary illness of a Juror during trial.

Sub-section (2).—This sub-section enacts an important direction that when a new juror is added or when the Jury is discharged and a new Jury is chosen, the trial commences anew. If during the trial the prisoner be taken so ill that he is incapable of remaining at the bar the Jury may be discharged without verdict and a different Jury empanelled on his recovery, *Ros. Cr. Ev. & Pr.*, p. 180 (13th Ed.).

Discharge of jury in case of sickness of prisoner.

283. The Judge may also discharge the jury whenever the prisoner becomes incapable of remaining at the bar.

Where a prisoner was by sudden illness rendered incapable of remaining at the bar the Jury were discharged and the prisoner on recovering was tried before another Jury, *Arch. Cr. Pl. Ev. & Pr.* pp. 201-02 (25th Ed.).

D—Choosing Assessors.

284. When the trial is to be held with the aid of assessors, *not less than three and, if practicable, four shall be chosen.* Assessors how chosen.

Assessors—their duties and functions.—Assessor means one who sits beside, the assistant of a Judge and comes from the word *assidere*, one who sits by another as next in dignity or as an assistant or advisor; an associate. The principle underlying the institution of Assessors which is the same as that in England, is this: Europeans administering justice in a foreign land, and being deficient in their knowledge of the customs and habits of the parties and witnesses appearing before them and also deficient in judging their demeanour in the witness box should have the benefit of the opinion of two or more respectable natives of the land as Assessors possessing such knowledge and judgment. Their opinion stands on the same footing as opinion evidence of a person specially skilled

in foreign law, science or art, 24 M. 523 at 543-544. Assessors are not chosen by lot as Jurors and there is no provision made for challenging them as in the case of Jurors. There is no express provision for objecting to the selection of Assessors but there is no reason why an objection of presumed or actual partiality should not be allowed at the time of the selection, 22 Cr. L. J. 282=60 Ind. Cas. 662. In choosing Assessors the Judge must have regard to the nature of the case, to the person who is to be tried, to the nature of the evidence to be brought against him and to the public feeling which must have been caused by the occurrence. The Assessors ought not to be young men fresh from college, devoid of experience and rather theoretical than practical men. They ought to be persons of independent condition in life, men of judgment and of experience 23 W.R. (Cr) 36 at 39. It is not surely too much to ask from Indian Gentlemen of position and rank that they should assist in the administration of justice as the sitting as an Assessor can, if the list be properly prepared, occur very rarely and probably only once in the course of three or four years, 35 A. 570 at 571. It is very desirable to maintain the position of Assessors in public estimation and to make their duties as little irksome as possible. No Assessor should be summoned too frequently. Notice should be sent to him in a regular and formal manner and they should be treated with consideration and respect. A proper place should be provided for them to wait in, when their presence in Court is not necessary *Bom. H.C. CrI, Circular*. A Court constituting a Judge and two or more Assessors by which every person must be tried before a Court of Session when he is not tried by Jury, appears to be a compromise between a trial by Judge and Jury and by a single Judge. It is a constitutional privilege, the benefit of which is not confined to the subject, for in an appeal by a person convicted in an Assessor's case, the Crown can as well rely on the opinion of the Assessors if it is in favour of a conviction as the prisoner can when their opinion is the other way, 24 M. 523 at 531. Assessors do not form members of the Sessions Court and that therefore the Sessions Court was not illegally constituted if an Assessor who had absented himself for some days when the trial went on was allowed to resume his seat as an Assessor subsequently. *Ibid* at 533. In trials with the aid of Assessors, it is imperative that the Judge should commence his trial with the aid of at least two Assessors and that at least one of them should continue to attend the trial throughout, this being mandatory, the jurisdiction of the Sessions Judge to commence the trial, and his jurisdiction to continue the trial are dependent upon his choosing at least two assessors to aid him and on the continuation of at least one of them throughout the trial. The above two requisites are conditions precedent to the exercise of his jurisdiction and therefore any finding or sentence passed in contravention of either of those requisites will not be one passed by a Court of competent jurisdiction and the defect is not one which can be cured by B. 537, *infra*, or by S. 167, Indian Evidence Act, *Ibid* at 533. The object and purpose of the provisions of the Code with regard to the summoning and selection of Assessors is that there must be no room for suspicion that any one of the Assessors sitting on a particular trial has been "planted" on the Court by any one interested in the success or failure of the prosecution, 7 Cr. L. Rev. 267=17 Cr. L. J. 17=32 Ind. Cas. 145. Assessors do not form a body and each acts and expresses his opinion individually and the Judge is to invite the opinion of each separately and record it. The Judge is the sole Judge of law and fact, the responsibility of the decision rests only with him, though in the decision of the case he is expected to take into consideration the individual opinion of each Assessor and during the trial he may also consult them on any point in connection with examination of the witnesses, or otherwise. Assessors are not to retire for consultation and form their opinion. The Judge should have before him the individual and independent opinion of each Assessor, 24 M. 523 at 527.

Assessors, like Jurors, are not members of the Court. They are appointed to assist the Court and the discussion and statement of points by a Judge sitting with Assessors cannot be said to be otherwise than in furtherance of the object of getting at the best assistance for the proper adjudication of the case, 7 B. L. R. 63 at 68. When a trial commences with only one Assessor, there is no legal trial as required by this section and the error vitiates the whole proceedings, B. 537, *infra*, does not apply as there was no properly constituted Court to hold a trial, 25 B. 694 at 696. A trial properly commenced with two Assessors does not become

invalid if one Assessor absents himself during the trial. The absent assessor ceases to occupy the position of one aiding the Court and his opinion ought not to be taken, 6 C.W.N. 715, but if he was permitted to be present subsequently and to give his opinion and the Judge took his opinion into consideration, it was held that it was merely an irregularity cured by S. 537 *infra*, 24 M. 523. See S. 321 as to the preparation of the list of Assessors. Where after commencing trial it was discovered that one of the Assessors chosen is interested and unfit to sit as an Assessor the proper procedure for the Judge is to refer the matter to the High Court for orders, to have his order in choosing the Assessors set aside and then proceed a *de novo* trial after receiving the order of the High Court, [1912] M.W.N. 378=13 Cr. L.J. 473=15 Ind. Cas. 313.

Chosen from persons summoned to act as such.—Where in a trial only one Assessor was summoned to act as such at the Sessions, the trial is illegal as there is no lawful trial before a lawful tribunal and the conviction cannot stand, 35 A. 570 where 1894 A.W.N. 207 is followed. See also 11 Cr. L.J. 724=3 Ind. Cas. 874 and notes under S. 326, *infra*.

Not less than three, etc.—The section as amended requires that there shall at least be three Assessors. It has always been held that a trial commenced and held throughout with less than the minimum number of Assessors prescribed by law is not a Court properly constituted and S. 537, *infra*, cannot apply to such a case, 26 Cr. L.J. 359=84 Ind. Cas. 711. It is even necessary if practicable four assessors should be chosen to aid the Court and where four Assessors are not chosen, it is proper the Judge gives his reasons in the order sheet explaining the omission. A trial held without four but with three Assessors without recording reasons is still in accordance with law and does not offend against provisions of this section, 26 Cr. L.J. 713=86 Ind. Cas. 153.

284A. (1) *In a trial with the aid of assessors of a person who has been found under the provisions of this Code to be an European or Indian British subject, if the European or Indian British subject accused, or, where there are several European British subjects accused or several Indian subjects accused, all of them jointly, before the first assessor is chosen so require, all the assessors shall, in the case of European British subjects, be persons who are Europeans or Americans or, in the case of Indian British subjects, be Indians.*

Assessors for trial of European and Indian British subjects and others.

(2) *In a trial with the aid of assessors of a person who has been found under the provisions of this Code to be an European (other than an European British subject or an American, all the assessors shall, if practicable and if such European or American before the first assessor is chosen so requires, be persons who are Europeans or Americans.*

This section is new and was added by Act XII of 1923—The Racial Distinctions Act.

This section is analogous to the provisions contained in S. 275, *supra*, which relate to trial by Jury before the High Court or Court of Session of an European or Indian British subject with this distinction that in the case of trial with the aid of Assessors the accused whether European or Indian British subject may claim that all, not one half before the amendment, the Assessors shall be European British subjects or Indians as the case may be. Similar right is conferred on Europeans and Americans also whenever such a course is practicable.

285. (1) If in the course of a trial with the aid of assessors, at any time before the finding, any assessor is, from any sufficient cause, prevented from attending, throughout the trial, or absents himself, and it is not practicable to enforce his attendance, the trial shall proceed with the aid of the other assessor or assessors.

(2) If all the assessors are prevented from attending, or absent themselves, the proceeding shall be stayed, and a new trial shall be held with the aid of fresh assessors.

Sub-section (1).—A trial to be valid should commence with not less than two Assessors. When one Assessor is from sufficient cause, prevented from attending throughout the trial, or it is not possible to enforce his attendance, the trial held with the aid of the other assessor alone is valid in law. The trial cannot begin and end with one Assessor, for, in that case, there is no properly constituted Court to hold the trial, 25 B. 694, 21 A. 106. If an assessor who was absent during the course of the trial was allowed to resume his seat as an Assessor and to give his opinion which the Judge took into consideration it was held that the procedure adopted was only an irregularity and did not affect the jurisdiction of the Court, 24 M. 523. See also pages 406-407.

Sub-section (2).—A trial held when both the Assessors who were absent during the course of the trial was held bad as the law contemplated the continuous attendance of at least one Assessor throughout the trial, 13 A. 337; 6 C.W.N. 715. A conviction based on evidence recorded after the discharge of the Assessors was held bad on the ground that the evidence was recorded by a Court not properly constituted to record the same, 15 A. 135.

The proceeding shall be stayed.—The stay contemplated here is only till a new trial is held. In B. 933, *infra* the stay may result in the discharge of accused and such discharge may amount to an acquittal if the presiding Judge so declares. But that section is a special provision applicable to the High Court only.

DD.—Joint trials.

285A. In any case in which an European or American is accused jointly with a person not being an European or American, or an Indian British subject is accused jointly with a person not being an Indian, and such European, Indian British subject or American is committed for trial before a Court of Session, he and such other person may be tried together, but if he requires to be tried in accordance with the provisions of section 275 or section 284A and is so tried, and the other person accused requires to be tried separately, such other person shall be tried separately in accordance with the provisions of this chapter.

This section is new and was added by Act XII of 1923—The Racial Distinctions Act, and allows separate trials to European, or American or Indian British subjects when accused jointly, at their option, in accordance with the provisions of *ss. 275 or 284A, supra*.

E.—Trial to Close of Cases for Prosecution and Defence.

286. (1) When the jurors or assessors have been chosen, the prosecutor shall open his case by reading from the Indian Penal Code, or other law the description of the offence charged, and stating shortly by what evidence he expects to prove the guilt of the accused.

(2) The prosecutor shall then examine his witnesses.

When Jurors or Assessors have been chosen.—The trial of an accused person in the Court of Session begins after the Jurors or Assessors have been chosen, 6 Lah 282 following 15 B. 514. After the Jurors or Assessors have been chosen and sworn, the trial cannot be postponed to enable the prosecution to examine a witness on commission. The case must be proceeded with, 19 C. 113, wherein a trial before the High Court sessions, the Jury were chosen and sworn, the charge was read over and the counsel for the prosecution had opened the case by reading the sections of the Penal Code and stating some of the material facts of the case but before he could proceed further the Court rose for the day and the learned Judge could not attend Court the following day owing to illness and another Judge was deputed to preside at the trial by the Chief Justice which was commenced from the point where it was left the previous day, it was held that the trial on the following day from the point it was left the previous day was regular and the omission to proceed with the trial *de novo* was at the most an irregularity cured by S. 537, *infra*, 29 Bom L R. 204=28 Cr L.J. 402=101 Ind. Cas. 178.

The prosecutor shall then open his case.—It is usual except in simple cases where the prisoner is undefended for Counsel to make an opening statement. When the prisoner is given in charge to the jury, the Counsel for the prosecution, or if there are more than one, the senior Counsel to open the case to the Jury, states the leading facts upon which the prosecution rely. In doing so he ought to state all that is proposed to prove, as well as declarations of prisoners as facts, so that, the Jury may see if there are any discrepancies between the opening statements of counsel and the evidence afterwards adduced in support of them. Declarations amounting to confessions should not be placed in the opening of the case before the Jury. The reason for this rule is that the circumstances under which the confession is made may render it inadmissible in evidence. General effect only any confession said to have been made by the prisoner ought therefore to be mentioned in the opening address. When any additional evidence mentioned in the opening address is discovered in the course of the trial, Counsel is not allowed to state it in a second address. In opening a case for murder Counsel for prosecution may put hypothetically the case of an attack upon the character of any particular witness for the Crown and say that should any such attack be made, he shall be prepared to meet it *Arch. Cr. Pl. Ev. & Fr. p. 194 (25th Ed.)*. A prosecutor should in fairness to the accused in his opening address state the names of the witnesses whom he proposes to call, who have not already been examined under S. 208 or, 219, *supra*, and what each is going to depose 1889 P R. (Cr.) 10. The opening for the prosecution should always be confined to matters which are necessary to enable the jury to follow the evidence when it is brought before them. This is not the stage of a case at which doubtful questions of admissibility should be either raised or decided. Whether a document is admissible or inadmissible is a matter which should always be ruled upon at the time the document is being proved or put in or the question asked of the witness. In many cases the thing may be good evidence at one stage of the case and inadmissible at another. It is frequently necessary to give evidence to lay the foundation which justifies a question or the putting in of a document. The opening speech of the Counsel for the prosecution does not afford a proper occasion for the determining of such questions, 50 C.L.J. 106 (F.B.) at 116.

Stating shortly by what evidence he expects to prove guilt of accused.—The object is to prevent new evidence being sprung on the accused. The prosecutor should state in his opening of the case for the prosecution the names of the witnesses he proposes to call and the purpose for which each witness is to be produced. S. 203, *supra*, refers to the taking of evidence of the prosecution witnesses before the Committing Magistrate and S. 213, *supra*, empowers the Magistrate to examine supplementary witnesses after commitment.

Sub-section (2).—The examination of the witnesses contemplated by this section is the oral examination of the witnesses present in Court. The demeanour of the witnesses may be important for the Assessor or Juror of the Judge for forming an opinion as to their credibility. It is unnecessary to go into the many reasons why the rules should be followed. It is sufficient to say "it is the rule, and is founded on reason and justice," 9 M. 83 at 85. Reading the depositions taken before the Committing Magistrate as examination in chief of the prosecution witnesses and allowing the accused's Attorney to cross-examine the witnesses in the Sessions Court without examining the witnesses is not permitted by law although the accused's Attorney requested the Court to adopt such a procedure, and the Public Prosecutor also consented to the same, 9 M. 83; 43 M. 766; Weir II, 360. When the accused is on his trial on a capital charge it is inexpedient that he should be convicted on a plea of guilty recorded before the trial of the Court itself. As a matter of practice the Court should read and consider evidence putting aside the plea of the accused not only as to the guilt of the accused but as to the precise nature of the offence committed and the appropriate sentence to be passed, 20 A. L. J. 669 and 326. There is no provision of law in the Code authorising a Judge to allow all the prosecution witnesses to be examined one day and permitting the cross-examination of those witnesses to be reserved to a subsequent date and such a practice is irregular and inconvenient, Weir II, 361. But in 41 C. 299, a slightly different view was taken. There in a charge of murder the defence counsel applied after the examination-in-chief of the first prosecution witness for a postponement of the cross-examination of the witness till the next day on the ground of his unpreparedness but did not ask for an adjournment of the trial itself, it was held that the application was a reasonable one which the Judge should, under the circumstances have allowed, though the accused is not entitled to such postponement as of right. The Court may in a proper case grant the indulgence when the result of such a refusal has been that the first six witnesses for the prosecution were not cross examined at all and of these at least four were important witnesses and the remaining witnesses had not been efficiently cross-examined owing to the circumstances under which Counsel who defended the accused undertook their defence, the accused were prejudiced inasmuch as they lost the opportunity of a cross examination and a trial was ordered by another Judge. As a general rule, the prosecution is bound to call all the witnesses who were actually present at the commission of an offence and he is not free to choose how much evidence he will bring before the Court, 8 C. 121 at 124; 14 A. 521, 18 A. 84; Ratnial 581; 10 Cr. L. J. 321 = 3 Ind. Cas. 522 = 21 Cr. L. J. 83 = 54 Ind. Cas. 241. All persons who are alleged to have personal knowledge of a crime ought to be brought before the Court and examined, 10 C. 1070; 11 Cr. L. J. 410 = 6 Ind. Cas. 817; 21 Cr. L. J. 733 = 58 Ind. Cas. 247. The practice of tendering important eye witnesses cited by the prosecution is not a practice which should be encouraged. An eye-witness to the occurrence when he would *prima facie* be able to speak to important facts material to the case from his personal knowledge and observation should not merely be tendered for cross-examination instead of being put into the witness-box. The proper procedure to follow is to put him into the witness box and ask him to give evidence on oath as to the facts known to him even though other witnesses might have spoken to the same facts. Merely tendering a witness for cross-examination is not a practice which should be encouraged especially in murder cases as it would be very unfair to the accused and the practice in vogue in the Districts should be put an end to, 30 L.W. 701 at 709-10 = 1929 M.W.N. 799 at 806, where 10 C. 1070 at 1072 is referred to. A Public Prosecutor is not bound to call witnesses who in his opinion will not speak the truth or will not support the prosecution case, 7 A. 904; 15 A. 6; Weir II, 378; 11 Bom. L.R. 1162 = 10 Cr. L. J. 833 = 4 Ind. Cas. 273; 80 C. 318; 2 Pat. 309; 17 Cr. L. J. 267 = 34 Ind. Cas. 987; 3 Lah. 144.

Sub-section (2).—A conviction of an accused person by a Sessions Judge on the evidence recorded by an Assistant Sessions Judge is illegal as he had no jurisdiction to do so, 35 A. 63.

287. The examination of the accused duly recorded by or before the Committing Magistrate shall be tendered by the prosecutor and read as evidence.

Examination of accused before Magistrate to be evidence.

Examination of accused duly recorded shall be tendered.—The examination of the accused before the Committing Magistrate must be given in evidence at the Sessions trial whether it tells for or against the accused, and it is not optional with the prosecution to put in such statements. If it is not tendered the Judge is bound to call for the same, 15 M. 352. The statement of an accused person before the Committing Magistrate should be read as part of the case for the prosecution and marked as an exhibit before the case for the defence is entered upon. A note to that effect that this has been done should be entered upon the Record *Rule 211 Mad. Cr. R. of Pr.* It seems to have been the intention of the Legislature that the examination of the accused should be received as evidence whether it told for or against the prisoner and if the Counsel for the prosecution did not produce it the Judge ought to call for it and require it to be put in, 13 W.R. (Cr.) 63. This section refers only to the examination of the accused duly recorded and it should not be confounded with the deposition of an approver. This section permits the examination of the accused before the Committing Magistrate to be read as part of the prosecution case. This refers only to the statement relating to the subsequent offence and not to a previous conviction, 5 Pat. L.J. 706 at 708. It is advisable that Sessions Judges themselves should examine carefully the accused persons even in cases where they are satisfied that the Committing Magistrate has examined them with great care. It makes a considerable difference to listeners like the Jury whether a statement made in the lower Court is read over by the Court interpreter or whether the accused is carefully examined in the presence of the Jury and his answer and demeanour noted by them so that the defence of the accused and its hollowness where it is untenable, may be fully impressed on the mind of the Jury, 28 Cr. L.J. 1576=90 Ind. Cas. 536. A written statement filed by the accused with the Superintendent of Jail with a request that it might be placed on record and with regard to which he was examined by the Magistrate can be read in evidence under this section, 32 M. 3 at 15. Where a Committing Magistrate admitted a confession not admissible in evidence and then examined the accused with respect to it; it was held that such examination, the questions put and the answers elicited were not duly recorded within this section and so inadmissible in evidence at the trial, 8 Cr. L.J. 62=4 L.B.R. 244. Though it is not imperative on a Magistrate to examine the accused, yet this section and S. 342, *infra*, contemplate such an examination for the purpose of enabling the accused to explain any circumstances appearing in evidence against him, and such examination should be filed before the accused is called upon to enter on his defence, *Weir II*, 381; 46 M. 449 (F.B.)

Before the Committing Magistrate—The phrase "Committing Magistrate" in this section is merely a compendious way of referring to the Magistrates or Magistrate who held the preliminary inquiry on which the committal is made. Where a Sub-Magistrate who inquired into a case discharged the accused, but the District Magistrate under S. 437 *infra* committed the accused for trial, the examination of the accused and the statements of the witnesses before the Sub-Magistrate were held to be recorded by or before the Committing Magistrate within the meaning of this and S. 288, *infra*, 31 M. 40. See also 7 Lah. 70. Where the accused when asked by the Committing Magistrate if he wished to make a statement said he had none but subsequently made one to the superintendent of the Jail and asked him to place it on record and it was sent to the Magistrate who on the next day sent for the accused and examined him with reference to the statement and the accused wanted it to be placed on record it was held that the statement in the circumstances was admissible in evidence under this section, 32 M. 3 at 15.

And read as evidence.—The whole of the examination taken before the Magistrate must be read as evidence, 5 M.H.C.R. (Appx.) 4; 15 M. 352. But it is not necessary for the Judge to read out to the accused confessions made by them before the Magistrate and ask them if they have any objection to their reception as evidence. The attestation of the Magistrate is sufficient proof of the circumstances under which they were made, 14 W.R. (Cr.) 9. The statement must be taken in its entirety especially when it is to be used against the accused 8 W.R. (Cr.) 33; 25 W.R. (Cr.) 15 & 18 A. 73; 9 M.L.T. 315=[1911] M.W.N. 12 Cr. L.J. 142=9 Ind. Cas. 793; 5 M.H.C.R. Appx. 4.

288. The evidence of a witness *duly recorded* in the presence of the accused *under chapter XVIII* may, in the discretion of the presiding Judge, if such witness is produced and examined, be treated as evidence in the case for all purposes subject to the provisions of the Indian Evidence Act, 1872.

Evidence given at preliminary inquiry admissible.

Amendment.—The additions newly made define more clearly the use which may be made at the Sessions trial of the evidence of a witness duly recorded in the presence of the accused under chapter XVIII. The words under chapter XVIII have been newly inserted instead of the words before the committing Magistrate to cover the case of evidence recorded by a Magistrate other than the committing Magistrate under S. 219, *supra*.

Scope and object of the section.—The object of the Legislature in framing this section is merely to authorise the Court to take a particular statement made by a witness before the Committing Magistrate as the true statement, notwithstanding his denial or making a statement inconsistent therewith by the witness before the Court itself, if the Court could see from the evidence of that same witness before itself or other witnesses before itself that the original statement was worthy of belief, not that the Court should discard wholly the testimony of the witness before it and have the testimony of some persons given elsewhere. The discretion is to be exercised upon substantial materials rightly placed before the Court and reasonably sufficient to guide the Judgment of the Court to the truth of the matter and not upon mere speculation and conjecture, 12 B.L.R. Appx. 15=21 W.R. (Cr.) 49 at 51. This section applies only to evidence taken in the presence of the accused under Chapter XVIII, *viz.*, inquiries into offences triable by the Sessions Court. The evidence recorded in the absence of the accused is inadmissible under this section, 35 A. 250. An exception is made in S. 512 *infra*, when the accused is absconding. The object and effect of this section is to place the deposition in the committal inquiry on exactly the same footing as the deposition in the Sessions Court, 43 M. 766 at 768. This section is intended to provide for the contingency which may arise when a witness produced in the Sessions Court withholds information and evidence and gives a different story from what he gave at the preliminary inquiry. It is only in extreme cases of delay or expense that personal attendance of witnesses in the Sessions Court ought to be dispensed with and the evidence given before the Magistrate to be referred to, 2 A. 645. This section has no application to the evidence of a witness not produced and examined before the Court of Session, 21 Cr. L.J. 455=55 Ind. Cas. 582, nor can the provisions of the section apply to statements of witnesses recorded under S. 164, *supra*, which is admissible in evidence for the purpose of impeaching the credit of the witness by virtue of Ss. 145 and 151 of the Ind. Ev. Act and cannot be used for any other purpose, *e.g.*, as substantial evidence against the accused. Statements under S. 164, *supra*, are made behind the back of the accused when he had no opportunity of cross-examination and this section enacts a special provision for admitting as evidence against the accused at the sessions trial of statements made by witnesses before the Committing Magistrate after the accused has had a reasonable opportunity of cross-examination, 25 A.L.J. 691. See also 8 Pat. 625. This section makes the previous evidence of a witness taken before the Committing Magistrate admissible at the subsequent trial and the limitation imposed on such admission by the introduction of the words "Subject to the

provisions of the Indian Evidence Act "merely means as laid down in 3 Pat. 781, that such evidence can be used for all purposes so long as the evidence is evidence within the meaning of the Indian Evidence Act. In other words the deposition recorded by the Committing Magistrate can be utilized at the trial if the matter contained therein is in accordance with the rules laid down by the Indian Evidence Act as to evidential value. To limit the admissibility of such evidence at the trial only to cases where the evidence is admissible under the Indian Evidence Act is to frustrate the object of this section. The law has been correctly laid down in 47 M. 232, as to the weight to be attached to such evidence, 27 Cr. L.J. 591=81 Ind. Cas. 233. This section is not an exception to the rule in S. 286, for it contemplates that the evidence taken in the presence of the accused by the Magistrate may in the discretion of the Judge, if the witness is produced and examined, be treated as evidence and there is abundant authority for holding that this evidence once admitted at the discretion of the Judge stands on exactly the same footing as any other evidence in the case, 43 M. 753 at 771 and 43 B. 97 following 28 A. 633; 24 M. 414; and 11 B.H.C.R. 231; 13 L.W. 703=26 Cr. L.J. 1033=83 Ind. Cas. 7; 6 Lah. 199, followed in 29 Cr. L.J. 73=100 Ind. Cas. 583; 1837 P.R. (Cr.) 31. This section does not dispense with the examination of the witnesses as directed by S. 286. The examination contemplated by this section is examination of a witness in the ordinary way, *vis*, orally in reference to the case. The provision is not that the evidence before the Magistrate may be put in as the evidence of the witness if he is tendered for cross-examination but it is that such evidence before the Magistrate may be treated as evidence in the case, if the witness is examined; that is examined as a witness and not if he was cross-examined or tendered for cross-examination. The rule appears to contemplate that the witness shall first have been examined and that after that his evidence before the Magistrate may be treated as evidence, 9 M. 83 at 85. This section does not extend to Magistrates other than the Magistrate, who held the inquiry under Chapter XVIII *infra* and the deposition must be taken in the presence of the accused, see 31 M. 127; 7 A. 862; 21 A. 111; 22 A. 443; 23 C. 36.

Evidence duly recorded in the presence of accused under Chapter XVIII.—The words "duly recorded in the presence of the accused under Chapter XVIII" have been newly substituted by the amending Act of 1923 for the words "duly taken in the presence of the accused before the Committing Magistrate." The amendment is intended to cover cases where evidence may be recorded by the Committing Magistrate but not for the purpose of commitment as under S. 219, *supra*. There is no special procedure laid down in Chapter XVIII for recording evidence and any evidence recorded by a Magistrate before commitment whether recorded with a view to commitment or in the ordinary course of trial is evidence recorded in the presence of accused under Chapter XVIII, 53 C. 181. Evidence of the witnesses must be duly recorded in the presence of the accused, 35 A. 260 at 263. Any statement recorded in the absence of the accused is inadmissible in evidence, 16 Cr. L.J. 132=27 Ind. Cas. 196. If no opportunity is allowed to the accused to cross-examine witnesses for the prosecution the evidence of such witnesses cannot be said to have been *duly recorded* in the presence of the accused. Where the accused who had been given an opportunity of cross-examining, declined to do so on the ground that he was unwell and when the witnesses were tendered again and been cross-examined they resiled from their first statements and supported the accused it was held that the first statements made by the witnesses were duly recorded within the meaning of this section and they could be treated as evidence at the trial, 28 Cr. L.J. 33=99 Ind. Cas. 63. To require the presence of the accused merely to hear the *ex parte* statements of witnesses without allowing him to show by cross-examination that they are untrue or unreliable, defeats the real object of the law, for it deprives the accused of any substantial benefit of being present, 21 C. 612 at 663; 7 A. 852. An exception is made in S. 512, *infra*, to record evidence behind the back of the accused if he is absconding, and in all other cases evidence must be recorded in the presence of the accused in Court, 7 A. 862; 22 A. 443; 23 C. 351. To expedite a Sessions trial, the Attorney for the accused suggested that the depositions of the witnesses for the prosecution taken before the Committing Magistrate should be read out in Court and treated as examina-

tion-in-chief of the witnesses and he should be allowed to cross-examine the witnesses. The Public Prosecutor also consented to such a course and the Court adopted the procedure suggested. It was held by the High Court that the procedure was illegal but inasmuch as it had not occasioned a failure of justice a retrial was not ordered, 9 M. 83. See 1915 M.W.N. 534=6 Cr. L. Rev. 65=16 Cr. L.J. 615=30 Ind. Cas. 439 where a witness examined before the Committing Magistrate was merely tendered for cross-examination and the evidence before the Magistrate was marked as an exhibit in the Sessions Court, it was held that the procedure was illegal. See also 45 M. 766; 11 Bom. L.R. 1162=10 Cr. L.J. 538=4 Ind. Cas. 273. see the weighty remarks condemning the practice of tendering important prosecution witnesses for cross examination in the Sessions court instead of examining them in chief in 30 L.W. 701 at 709-10=1923 M.W.N. 789 at 806.

For the expression "*before the Committing Magistrate*" the words "*under Chapter XVIII*" have been substituted. Where a witness makes a statement to a police-officer or to an investigating Magistrate it is no evidence against the accused. Even if the statement to the investigating Magistrate is made in the presence of the accused this section will not apply as it was not made under Chapter XVIII, 31 M. 127 at 130. The testimony of a witness given before the Committing Magistrate alone can be accepted as substantive evidence if the witness is examined at the Sessions trial and his testimony before the Committing Magistrate may be preferred to the evidence which he gives at the trial. But any statement made by him on any other occasion cannot be treated as evidence., e.g., the statement made by a witness during a search which he subsequently retracts cannot be used as evidence under this section, 36 M. 159. The expression "*Committing Magistrate*" which existed before in this section and now retained in S. 287 means merely a compendious way of referring to the Magistrate or Magistrates who hold the preliminary inquiry under Chapter XVIII on which the committal was made. Where, therefore, a District Magistrate himself commits for trial in the exercise of his powers under S. 437, *infra*, setting aside an order of discharge, the evidence of the witnesses and the statement of the accused recorded by the Committing Magistrate who discharged the accused will be receivable in evidence under this section or S. 287, *supra*, 31 M. 40. See S. 350, *infra*, which permits a committal to be drawn up by a Magistrate who succeeds the Magistrate who held the preliminary inquiry and recorded the evidence. The statement of an approver made before the Committing Magistrate and retracted in the Sessions Court is admissible under this section, 21 A. 178.

May in the discretion of the presiding Judge.—The discretion is to be exercised upon substantial materials rightly before the Court and reasonably sufficient to guide the judgment of the Court of the truth of the matter, and not upon mere speculation or conjecture, 21 W.R. (Cr.) 49 at 51. Where a Sessions Judge directed the previous statement of a witness to be transferred to the record of the trial under this section the moment the witness denied having made any such statement without calling upon him to explain the discrepancy and considering whether any satisfactory explanation for the discrepancy was forthcoming, it was held that the procedure adopted was not proper, 29 Cr. L.J. 1047=112 Ind. Cas. 371. Before a Judge can use as evidence the statement of a witness before the committing Magistrate he is bound to let his intention or the possibility that he may do so, be known to the accused and the prosecution in order to afford both sides an opportunity of testing such evidence by cross-examination or otherwise dealing with the statement as part of the case which may be taken into consideration by the Judge; otherwise it is impossible for the prosecution or for the defence to deal with the matters which may influence the Judge's mind in coming to a conclusion 1836 A.W.N. 258. There must be great caution on the part of the Judge before acting under his section, 4 C.W.N. 49 at 55; 22 A. 443; 27 C. 295 at 300. Such a statement should be accepted with great caution like every other statement of a person who has changed his story at different stages, 45 M. 766 at 769. The exercise of the discretion by a Judge under this section considering it, as a matter of fact or law, is open to review by the High Court in appeal, and the High Court may order a new trial in special cases on the ground that there has been a misuse by the Sessions Judge of his discretion which may have caused a failure of justice, 11 B.H.C.R. 231. See 53 C. 191 which practically overrules the decisions in 21 W.R. (Cr.) 49 and 27 C. 295.

If such witness is produced and examined.—Unless the witness is produced and examined at the trial this section has no operation, 24 W.R. (Cr.) 11. The previous deposition cannot be filed and treated as evidence in the case if the witness is merely tendered for the purpose of cross-examination at the Sessions trial but not produced and examined, 1915 M.W.N. 544=16 Cr. L.J. 615=30 Ind. Cas. 439. See 30 L.W. 701=1929 M.W.N. 799 where the practice of tendering important prosecution witnesses for cross-examination without examining them in chief is condemned as illegal and improper. This section is not an exception to S. 286, *supra*. It does not dispense with the production and examination of the witness at the trial, 9 M. 83. The former deposition ought not to be read until the examination of the witness in Court, 1 W.R. (Cr.) 14. See also 21 Cr. L.J. 486=56 Ind. Cas. 582.

Be treated as evidence in the case.—Statements made before Committing Magistrate when a witness retracts them in the Sessions Court may be used as evidence, 46 B. 97; 43 M. 766. A statement when once duly admitted in evidence was on the same footing as any other piece of evidence on record, 47 M. 232. There is nothing in the section which prescribes the value or weight to be attached to the evidence so admitted. Once admitted, the power given by this section is exhausted and the evidence is on the same footing as rest of the evidence in the case, i.e., it is to be considered by the Jury or by the Assessors and the judge according to the nature of the trial. Its value is beyond the scope of this section, 1887 P.R. (Cr.) 51. Its value as evidence is a question in each particular case for the Jury and for the Assessors subject to the directions of the Judge in summing up, or for the Judge in cases where he is the sole Judge of facts. Whether any portion or the whole of the evidence so admitted is entitled to credit and if so, to such a degree that a conviction may be based on it wholly or in part are important questions for the Jury or Assessors or the Judge as the case may be but they are in no way affected by this section. It may be treated as substantive evidence on which a conviction can be based, 28 A. 683. It was contended in 24 M. 414, that such a statement could not be used as substantive evidence but only be used to contradict evidence on record, but the Court held that if this view was accepted the provision would be quite unnecessary and superfluous inasmuch as such evidence could be adduced for the purpose stated under the Indian Evidence Act. A Sessions Judge would not be justified in basing a conviction solely on the statements made before the Committing Magistrate and retracted before him, more especially when the evidence given at the Sessions trial has been found to be false, 21 W.R. (Cr.) 49; 27 C. 295; 12 M. 123; 47 M. 232. Such statements are admissible in evidence and if the High Court is satisfied that they are true and the subsequent statements before the Sessions Judge are false, it is open to the High Court to uphold the conviction relying on such previous statements, 47 A. 276 where 21 A. 111; 22 A. 443 and 28 A. 683 are referred to. The evidence of a medical witness duly taken before the Committing Magistrate ought not to be admitted in evidence under this section unless the witness resiles from his original deposition, 4 C.W.N. 49 at 53.

For all purposes.—The addition of these words newly made must be with a set design and for the purpose of attaining a definite object. These words are added to remove the limitation to the value of that evidence as fixed by the cases such as 27 C. 295; 3 Pat. 781; 22 A. 445; 28 A. 683; 5 Lah. 324; 6 Lah. 199; 29 Cr. L.J. 73=106 Ind. Cas. 583; 27 Bom. L.R. 113=26 Cr. L.J. 705=86 Ind. Cas. 445. The use of the words 'for all purposes' was clearly intended to remove the previous conflict and make the statements admissible in evidence for all purposes and not for the limited purpose of corroboration or contradiction, 49 A. 251; 25 A.L.J. 126=27 Cr. L.J. 1365=98 Ind. Cas. 485. But statements made before the Magistrate including the statement before the Committing Magistrate which has not been transferred to the Sessions record under the provisions of this section can only be used to corroborate or contradict the statement of the witness at the Sessions trial, 27 Cr. L.J. 239=92 Ind. Cas. 577; 29 Cr. L.J. 73=106 Ind. Cas. 583; where a witness before the Committing Magistrate admits having made a certain statement under S. 164, *supra*, and his deposition before the Committing Magistrate is put in under this section, the statement admitted by him to have been made under S. 164, *supra*, cannot thereby be treated as substantive evidence in

the case and be used as evidence to base a conviction of the accused, 28 Cr. L.J. 279=100 Ind. Cas. 359. Under the present section as amended it must be held that the evidence received by the Committing Magistrate if admitted under this section must be treated as evidence for all purposes, even as a basis of a finding or verdict and on a par with any other evidence before the Sessions Court or as substantial evidence on which a verdict of the Jury or a judgment of the Judge can be based, 42 C.L.J. 205 at 210. The rule that in the absence of corroboration in material particulars the evidence admitted under this section should not form the basis of a conviction is a mere rule of practice and not a rule of law, 47 M. 232 at 213; 6 Lah. 199 and 171. A Judge is bound to put to the witness whom he proposes to contradict by his previous statement made before the Committing Magistrate the whole of his deposition as he intends to rely on in his decision so as to afford him an opportunity of explaining their meaning or denying that he made such statement, 7 M. 862. So also if a Counsel for the defence desires to use previous statements made before the Committing Magistrate by prosecution witnesses, he must have drawn their attention to such contradictions so as to afford them an opportunity to explain them, 31 C. 142 (F.B.), 7 A. 862; [1922] Pat 159=23 Cr. L.J. 218=65 Ind. Cas. 1002.

Subject to the provisions of the Indian Evidence Act.—These words were newly added merely to prevent the admission of irrelevant evidence inadvertently recorded by the Committing Magistrate, 49 A 251=26 Cr. L.J. 1063=88 Ind. Cas. 7. These words mean nothing more than that such statement should not contain matters which would be irrelevant or inadmissible under the Ind. Ev. Act, 27 Cr. L.J. 1365=93 Ind. Cas. 485, where 3 Pat. 781 is followed. The question of the admissibility of such evidence should be determined first and reasons should be recorded if the Judge decides to admit the evidence taken before the Committing Magistrate, 1 Bom. L.R. 156. Where a deponent denies having made the statement before the Magistrate, the presumption raised by S. 80, Ind. Ev. Act, cannot be availed of but it is incumbent to prove by direct testimony that the conditions of S. 80; Ind. Ev. Act, have been complied with, 21 W.R. (Cr.) 5. It is certainly difficult to understand correctly what the amendment intended to effect. Sections 22, 33, 145, 155 and 157 of the Evidence Act cannot have any bearing. There is indeed in the Evidence Act nothing at all which permits the use of the evidence taken before a Magistrate as evidence at a trial. What however is really meant by the amendment is that evidence duly taken before a Magistrate can be used for all purposes in a trial Court so long as the evidence is evidence within the meaning of the Indian Evidence Act, or in other words, that Magisterial deposition can be utilised in a trial Court as of evidential value, only if the matter contained therein is according to the rules of evidence laid down in the Indian Evidence Act, of evidential value, e.g. hearsay evidence in a Magisterial deposition cannot be used by the Sessions Judge as of evidential value at the trial, [1926] Pat. 167=27 Cr. L.J. 593=9 Ind. Cas. 258. This section as it now stands does not prevent the Sessions Judge from utilising the Magisterial depositions subject to the provisions laid down in the Evidence Act as to evidential value. But unless there is clearly present, besides the evidence given before the Magistrate, evidence which will show that the evidence given before the Magistrate should be preferred to and substituted for that given before the Sessions Judge, the evidence given before the Magistrate cannot be effectively utilised in support of the conviction, 3 Pat 781 where 7 A. 862; 27 C. 293; 24 M. 414; 7 C.W.N. 343; 28 A. 683, 45 B. 97 are referred to; 37 A. 276; 5 Lah. 324; 27 Cr. L.J. 438=93 Ind. Cas. 230; 42 C.L.J. 111=26 Cr. L.J. 1533=90 Ind. Cas. 433; 26 Cr. L.J. 1063=87 Ind. Cas. 7. Before a Judge can exercise his powers under S. 83, Ind. Ev. Act, there must be independent evidence to prove that a witness is dead or his presence cannot be secured without unreasonable delay or expense, 28 M.L.J. 329=17 M.L.T. 214=16 Cr. L.J. 294, 41 C. 601, 2 A. 846; 3 M. 5. The addition of the words 'for all purposes' by the new amendment removes the limitation to the value of the evidence and the evidence recorded by the Committing Magistrate, if admitted under this section must be treated as evidence for all purposes even as the basis of founding a verdict and on a par with any other evidence before the Sessions Court or as substantial evidence on which the verdict of a Jury or judgment of the Judge can be based, 53 C. 181. See also 47 M. 232; 6 Lah. 199; 27 Bom. L.R. 113=26 Cr. L.J. 705=86 Ind. Cas. 145; 29 Cr. L.J. 73=106 Ind. Cas. 595.

Procedure after examination of witnesses for prosecution.

289. (1) When the examination of the witnesses for the prosecution and the examination (if any) of the accused are concluded, the accused shall be asked whether he means to adduce evidence.

(2) If he says that he does not, the prosecutor may sum up his case; and, if the Court considers that there is no evidence that the accused committed the offence, it may then, in a case tried with the aid of assessors, record a finding, or, in a case tried by a jury, direct the jury to return a verdict of not guilty.

(3) If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is no evidence that the accused committed the offence, the Court may then, in a case tried with the aid of assessors, record a finding, or, in a case tried by a jury, direct the jury to return a verdict of not guilty.

(4) If the accused, or any one of several accused, says that he means to adduce evidence, and the Court considers that there is evidence that he committed the offence, or if, on his saying that he does not mean to adduce evidence, the prosecutor sums up his case and the Court considers that there is evidence, that the accused committed the offence, the Court shall call on the accused to enter on his defence.

Scope of the section.—The language of sub-sections (1) and (2) suggests that they contemplate the case where there is only a single accused, while sub-sections (3) and (4) contemplate the case of more than one accused when one or more of them express an intention to adduce evidence. Where there is only one accused before the Court the procedure laid down by this section is quite clear, but when there are more than one accused and they adopt different defences and mean to adduce evidence, a real difficulty arises as to the procedure to be adopted by the Court. Where there are several accused and one of them stated that he meant to adduce evidence, the procedure to be followed so far as his case is concerned must be adopted also in the case of all the other accused who did not want to adduce evidence and the prosecutor will not be entitled to sum up under sub-section (2) of this section even against those who did not want to adduce evidence; and the prosecutor will have a right of reply under S. 292, *infra*, even in the case of those who did not want to adduce evidence, 18 B. 354. This section lays down the procedure to be followed in a Sessions trial and it clearly says that the Judge has no power to withdraw a case from the Jury but in certain circumstances he is entitled to direct the Jury to return a verdict of not guilty on the ground specially mentioned in sub-section (2), namely, when there is no evidence, 30 Cr. L. J. 519 at 520=115 Ind. Cas. 692.

Examination (if any) of the accused is concluded.—After examination of the prosecution witnesses, under S. 342, *infra*, the Court may examine an accused for the purpose of explaining any circumstances appearing in evidence against him, but the Court should not do so until all the prosecution evidence is taken and the accused called upon to enter upon his defence. The result of such examination of the accused by the Court should appear on the record and the nature of the defence entered on behalf of the accused should be indicated and duly considered by the Court, 9 M. 224 at 244. This section relates to the procedure to be followed after the examination of the prosecution witnesses. The words "if any" are significant. It is not imperative for a Sessions Judge to examine an accused under S. 342, *infra*, especially when the accused admits his guilt. The words "if any"

clearly indicate that such an examination is not necessary in all cases, 9 C.L.J. 55=10 Cr. L.J. 325=3 Ind. Cas. 623, but Sessions Judges will do well if they examine the accused persons in their own Courts even in cases where the Committing Magistrate has examined the accused with great care. It makes considerable difference to listeners like the Jury whether a statement is read over by the Court Interpreter or whether the accused person is examined carefully in the presence of the Jury and his answers and demeanour noted by them so that the defence of the accused and its hollowness, if untenable, may be fully impressed in the mind of the jury, 26 Cr. L.J. 1576=90 Ind. Cas. 536. The examination of the accused and recording the same close the case for the prosecution and after that the prosecution is not entitled to call further evidence except through Court under S. 540, *infra*. When it is intended to use against an accused person a letter not proved to be in his handwriting it is fair that in the exercise of the powers conferred by this section and S. 342, *infra*, to examine the accused about it and put such questions as will enable him to explain its significance and where such a course is not followed, the letter must be ignored or the fairest construction possible should be put upon it, 36 M. 159.

Accused shall be asked whether he means to adduce evidence.—When, on being asked under this section the accused stated he meant to adduce evidence but on further consideration did not do so, the Court is not entitled to make a presumption adverse to the accused from his failure to adduce evidence, 10 C. 140. The question whether the accused has any evidence to adduce should be put to the accused himself and not to his pleader and the question and answer of the accused should be recorded as required by S. 364, *infra* Rule 242, *Mad. Cr. Rules of Pr.*

Sub-section (2).—This sub-section deals with the case of the accused who says he does not mean to adduce evidence and the prosecutor is entitled to be heard before the accused is acquitted. Even though an accused says he does not mean to adduce evidence and the prosecutor sums up his case under this sub-section he is not precluded from changing his mind and adducing evidence. When the accused is called upon to enter upon his defence under sub-section (4) and enters on it, he may call defence evidence although the prosecutor had disclosed all his points at the earlier stage. The right to sum up under this sub-section is quite distinct from that given under S. 292, *infra*, which though termed reply, is a summing up of the whole case, 18 B. 364. The right under S. 292, *infra*, arises after the accused has been called upon to enter on his defence and adduces evidence in support of his defence under S. 290, *infra*. A Judge is not entitled to ask the Jury after all the direct evidence had been taken whether they wish to hear further evidence. No final opinion as to the falsity or sufficiency of the evidence for the prosecution ought to be arrived at by the Judge or Jury until the whole evidence is before them and has been considered, 20 M. 345.

There is no evidence.—The words "no evidence" must not be read as meaning no satisfactory trustworthy or conclusive evidence. A Jury may be satisfied with the minimum of proof and it is beyond the power of the Court in such cases to interfere with its verdict but when there is nothing which can, if believed, amount to proof, the case should not be put to the Jury at all as a verdict of guilty in such circumstances cannot be sustained, 16 W. R. (Cr.) 19; 7 W. R. (Cr.) 39. In such a case it is not necessary to record the opinion of the Assessors, 7 B. H. C. R. (Cr. Cn.) 82. If there is evidence, the trial must go on to its close. When the trial is by Jury, the Jury and in other trials the Judge after consulting the opinion of the Assessors have to find on the facts, 16 B. 414 at 422-423; 10 A. 414; Weir II, 382; 12 A. 531; 1888 A. W. N. 153. When all the evidence recorded even if true would not amount to legal proof of the offence charged, then the Judge is entitled to record a finding of not guilty without consulting the Assessors, 10 A. 414. When there is no evidence, it is not clear what purpose will be served in asking the accused whether he means to adduce evidence without which he is entitled to an immediate acquittal. A scientific of evidence is not sufficient. There must be some evidence from which a Jury could reasonably come to a conclusion, 19 C. W. N. 653. "It is for the Jury to say whether and how far the evidence is to be believed. And if the facts as to which evidence is given are such that from them a further inference of fact may legitimately be drawn, it is for the Jury to say whether that inference is to be drawn. But it is for the Judge to determine, subject to review, as a

matter of law, whether from those facts that further inference may legitimately be drawn" *per Lord Blackburn* in 3 A.O. 193 at 207. There may arise any one of the four different situations, (1) There may be no evidence at all not even a *scintilla*, (2) there may be some evidence, a *scintilla* perhaps, yet none that ought reasonably to satisfy the Jury, (3) there may be evidence which is not of the standard of certitude desired but on which the Jury may reasonably and properly conclude the fact in question established, (4) the evidence may approach the standard of certitude. The evidence need not be satisfactory, trustworthy and conclusive before a Jury can be asked to arrive at their verdict, 7 Pat. 15 *relying on* 10 A. 414; 16 B. 414; 15 W.R. (Cr.) 46; 16 W.R. (Cr.) 19.

Sub-section (3).—If the accused says he means to adduce evidence, the prosecutor is not given at this stage a right to sum up as in sub-section (2). The Court proceeds at once to consider whether there is any evidence to support the charge. This section applies only where there is no evidence and cannot apply to a case where the Court considers the charge to be improper, 12 A. 551 at 552. If the Court is of opinion that there is no evidence, it will record an order of acquittal, but if it considers that there is evidence, it will call upon the accused to enter upon his defence. This sub-section therefore permits an abrupt termination of the trial in the middle, and a consequent acquittal of the accused. There is no warrant under the Code to record a finding of "*not proven*." The proper course is to record a finding of "*not guilty*," *Watr. II*, 331. A Sessions Judge is not competent to exclude the Assessors from their share of the trial before him without consulting the opinion and using the judgment of the Assessors by finding the evidence was not to be believed and by directing an acquittal. It is clear that it is not the intention of the Legislature that the Judge should have such a power, or that the Assessors might be confined to the function of giving their opinion on the evidence in those cases only in which the Judge was inclined to believe the evidence for the prosecution, 10 A. 414 at 416. An accused person cannot be convicted solely on the evidence adduced by his co-accused, where there is no evidence for the prosecution that he committed the offence charged against him, 5 M.L.T. 75=10 Cr. L.J. 68=2 Ind. Cas. 525. See 1929 M.W.N. 391; 42 A. 323.

Sub section (4).—The expression 'the Court shall call upon the accused to enter on his defence,' the context shows what it means. It means that if the accused calls no witnesses, the accused (or his pleader if any) is to make his final address to the Jury. If he is calling witnesses he may open his case and proceed to call them 28 Cr. L.J. 297=100 Ind. Cas. 377. If the Court does not act under sub-sections (2) and (3) it is bound to call upon the accused to enter upon his defence. This is not a mere formality but is an essential part of a criminal trial. Non-compliance with this sub-section must be deemed to have occasioned a failure of justice, 23 C. 252 but see 16 A.L.J. 41. The close of the prosecution and the entering of the accused upon his defence is a well-known stage in a criminal trial after which the prosecution is not entitled to adduce evidence except through Court under S. 540, *infra*, 4 C.L.R. 338 at 340. Once the accused has entered on his defence his right to call evidence is unaffected by the fact that at an early stage he stated that he did not mean to adduce evidence under sub-section (2) of this section. S. 290, *infra* governs the case at this subsequent stage.

290. The accused or his pleader may then open his case, stating the facts or law on which he intends to rely, and making such comments as he thinks necessary on the evidence for the prosecution. He may then examine his witnesses (if any) and after their cross-examination and re-examination (if any) may sum up his case.

The accused or his pleader may open the case. It is the right of the accused under, S. 540, *infra*, to be defended by a pleader and once a pleader has been retained, the conduct of the case should be left to him by the accused. Under this section the case may be opened by stating the facts on which it is intended to rely, the commenting on the prosecution

evidence and examining the witnesses. The right to have the last word with the Jury really depends on what the accused does under this section. If there are more accused than one and if one of them adduces evidence, the prosecutor gets a right of reply by the action of several accused. It is contrary to the administration of justice and practice of criminal law that Counsel for prisoners should state to the Jury as alleged existing facts, matters which are told to them in their instructions, on the authority of the prisoner but which they do not propose to prove in evidence, *Arch. Cr. Pl. Ev. and Pr.*, p. 197 (25th Ed.) A prisoner's Counsel in addressing the Jury will not be allowed to state anything which he is not in a position to prove or which is not already in proof. After his Counsel has addressed the Jury, the prisoner will not be permitted to make any statement to the Jury; both cannot be heard. *Roscoe Cr. Pl. and Ev.* p. 185; See also 15 Cox, 122. "The duty of Counsel for the defence is to act as an Advocate and not to any extent as a Judge. His object is to get an acquittal of the accused. He is to put himself in the place of the accused and is not under any obligations which the accused would not be under. Thus he is not obliged to divulge facts which he may be acquainted with but which are unfair to the prisoner." See also notes under S. 340, *infra*, 'Duty of Advocate appearing for defence.'

291. The accused shall be allowed to examine any witness not previously named by him, if such witness is in attendance; but he shall not, except as provided in sections 211 and 231, be entitled of right to have any witness summoned, other than the witnesses named in the list delivered to the Magistrate by whom he was committed for trial.

Right of accused as to examination and summoning of witnesses.

May examine his witness if any.—An accused person owes no duty to any one but himself and therefore he cannot be convicted because he has not tried to explain the circumstances by adducing legal evidence sufficiently clear, say in a charge of murder how death was caused, *Ratanlal 686*; 41 C. 350; an accused is not bound to account for his movements at about the time of the commission of a particular offence, 10 C. 970 and no inference adverse to him can be drawn from his failure to adduce defence evidence, 8 C. 121 at 125. The burden of proof in a criminal prosecution is on the Crown and unless the prosecution evidence is such as to enable the Court to come to a definite conclusion as to the guilt of the accused, the accused ought not to be called upon to make his defence and much less a Judge to convict the accused, *Ratanlal 772 and 779*; 4 C.L.R. 338; 7 W.R. (Cr.) 45. An accused in a criminal case is merely on the defensive and unless there is any positive admission of fact by him, omission on his part to explain what indeed cannot be explained without his explanation should not be pressed against him, 28 B. 533.

Right of accused to obtain summons for his witnesses is subject to the restriction contained in this and proviso to S. 216, *supra*. It is not open to a Judge to decide on the credit to be attached to the evidence of witnesses before he had an opportunity of hearing the same, 19 M. 375 at 381. Nor can a Magistrate inquire generally as to the nature of the defence with a view to abstain from summoning the witnesses after knowing the nature of the defence, 3 C. 573 at 583; *Weir II*, 263. A Judge is not entitled arbitrarily to limit the quantity of evidence that shall be adduced by the accused who alone is to decide the question affecting his interest, 7 C.W.N. 188. A Judge has power if he thinks it proper to summon witnesses other than those whose names were given in the list to the committing Magistrate, 8 A. 668. See 16 W.R. (Cr.) 13. It is the duty of the Judge to secure the attendance of the witnesses once summoned and served and he cannot discharge a Jury in the middle of the trial simply because a defence witness is absent, 4 Bom. L.R. 939. The Magistrate is bound to summon the witnesses mentioned in the first list given by the accused, 11 C. 762; 12 W.R. (Cr.) 22; 23 W.R. (Cr.) 54. A party has a right to call upon the Court to compel the attendance

of his witnesses who had been summoned but neglected to attend, 6 G.W.N. 548 ; 10 C. 931 ; 4 M. 329 ; Ratanlal 593. If before the conclusion of the trial the accused requests for a short adjournment to secure the attendance of his witnesses who were not present not being properly served, such application should be granted, Welr II, 393 ; 15 W.R. (Cr.) 34 ; 18 W.R. (Cr.) 20 ; 4 Bom. L.R. 939 ; 47 C. 758. A Court will exercise a wise discretion in allowing a well-known treatise such as *Taylor on Medical Jurisprudence* to be referred to on behalf of the accused in cases depending upon medical evidence, 10 C. 140.

Prosecutor's right of reply.

292. The prosecutor shall be entitled to reply—

(a) if the accused or any of the accused adduces any oral evidence ;

or

(b) with the permission of the Court, on a point of law ; or

(c) with the permission of the Court, when any document which does not need to be proved is produced by any accused person after he enters on his defence:

Provided that, in the case referred to in clause (c) the reply shall, unless the Court otherwise permits, be restricted to comment on the document so produced.

Amendment—The words in italics are newly added. The words "any evidence" has been altered into "any oral evidence" thereby overruling 10 C. 140 and other decisions giving a right of reply in cases where documentary evidence is produced for cross-examining prosecution witnesses. The new amendment seeks to define more clearly as to the circumstances, in which the prosecution is entitled to reply and to reconcile the various conflicting rulings. The amendment is to do away with the objectionable practice of having a right of reply to the prosecution when the accused in cross-examining a prosecution witness puts in a document in the shape of a previous statement contradicting his evidence or otherwise proves a document produced before the Committing Magistrate but withheld by the prosecution.

Object of the Section.—The object of the law as laid down in this section is that each side should have an opportunity of commenting upon the evidence of the other side, 10 C. 140 ; 30 B. 421 at 425. This section is intended to give a right of reply to the prosecution whenever, at any stage evidence is recorded, for the defence of which the prosecution cannot be deemed to have had notice, and the prosecution is presumed to have had notice of all relevant facts within the knowledge of its witnesses. This dictum has no application to those cases where the accused actually leads evidence under S. 289, *supra*. In such cases, the section directly applies and the question of notice to the prosecution is immaterial, 8 Cr. L.J. 215. The right of reply would seem to depend not in what may be said, but on what is done and if no evidence is produced there should be no right of reply by the prosecutor, Ratanlal 938. The right of reply is now confined to the three cases mentioned in this section as amended.

Entitled to Reply.—The word "reply" in this section must mean reply generally on the whole case. It cannot be that the prosecutor is to sum up as to such of the accused as do not call evidence and reply only on the evidence that may have been adduced by the others, 18 B. 363 at 365.

All or any of the accused adduces Oral Evidence.—To adduce evidence is to lead evidence and not merely an intention to adduce evidence which was not eventually done, 30 B. 421 at 425. Mere putting in a document through a witness for the prosecution in the course of ordinary cross-examination is not adducing any evidence within this section, 11 Bom. L.R. 177 at 190 = 9 Cr. L.J. 234 = 1 Ind. Cas. 280, but tendering documents not forming part of the record sent up by the Committing Magistrate may constitute adducing evidence,

31 C. 1030. When documents are put in by defence under S. 155 (3) of the Indian Evidence Act to contradict a prosecution witness while under cross-examination, this is not adducing evidence. This section and S. 289, *supra* should be read together. The right to reply arises only if the accused or any of the accused takes advantage to adduce evidence after the case for the prosecution is concluded. The right of reply is not lost by putting in some documents in cross-examining a prosecution witness, 43 C. 426; with the permission of the Court, the prosecutor is to have the right to reply on a point of law and also in a case where a document which need not be proved is produced by any accused after he enters on his defence. In these cases there can possibly be no prejudice to the defence by the right of reply being granted by the Court; on the other hand such a course will further the ends of justice.

Proviso to the section.—The proviso makes it clear that when an accused in cross-examining any witness for the prosecution either proves a previous statement of such a witness for contradicting him or proves any document produced either before the committing Magistrate or at the trial, such accused shall not be deemed to have adduced evidence within this section so as to give the prosecution a right to reply. 31 C. 1030; 10 Cr. L.J. 24. But if a document not coming under either of these two categories is proved by the defence by prosecution witnesses while under cross-examination, that would be adducing evidence within this section entitling the prosecution a right to reply, 16 A. 88 at 101; 11 M. 339; 30 B. 321; 43 C. 426.

293. (1) Whenever the Court thinks that the Jury or Assessors should view the place in which the offence charged is alleged to have been committed, or any other place in which any other transaction material to the trial is alleged to have occurred, the Court shall make an order to that effect, and the Jury or Assessors shall be conducted in a body, under the care of an officer of the Court, to such place, which shall be shown to them by a person appointed by the Court.

View by Jury or Assessors.

(2) Such officer shall not, except with the permission of the Court, suffer any other person to speak to, or hold any communication with, any of the jury or assessors, and, unless the Court otherwise directs, they shall, when the view is finished, be immediately conducted back into Court.

If a view of the place of alleged occurrence is thought necessary or desirable, the Judge should give notice to the parties and should proceed thither with the Assessors and the parties, and not after the close of the case and after recording the opinion of Assessors, 1 C.L.R. 153. If in the course of a trial the Judge was of opinion that the Assessors should view the place of occurrence, he is at liberty to make an order under this section and he might have himself accompanied them but once the Assessors had given their opinions, it only remained for the Judge to give judgment according to S. 309 (2), *infra*. He is not entitled thereafter to visit the locality alone with the record of the case and plans filed before him and to draw conclusions from what he saw and use them to discredit the defence evidence, 17 Cr. L.J. 500=36 Ind. Cas. 368. The Jury should be conducted in a body under the care of an officer of the Court. A Judge cannot delegate his function of examining witnesses on the spot to the Assessors, 5 W.R. (Cr.) 39. It is competent to the Judge even without the consent of the prosecutor to permit the Jury to view the *locus in quo* at any time during the trial. *Arch. Pl. Ev. & Pr.* p. 200 (25th Ed.). See 37 C. 343 as to the object of local inspection, *viz.*, better understanding of the evidence adduced in Court.

294. If a juror or assessor is personally acquainted, with any relevant fact, it is his duty to inform the Judge that such is the case, whereupon he may be sworn, examined, cross-examined and re-examined in the same manner as any other witness.

May be sworn and examined.—Jurors are no longer allowed to give verdicts upon their own knowledge and it is laid down as a rule that where they were acquainted with any facts material to be known, they ought to inform the Court, so that they may be sworn as witnesses and it has been said that "a fair way is to tell the Court before they are sworn that they have evidence to give" *Forsyth His, Tr. by Jury*, p. 165. A Juror may give evidence of any fact material to be communicated in the course of the trial but, of course, he must be sworn. Generally it is most undesirable that any one appearing in one capacity at a trial should appear in any other, *Ros. Cr. Ev. & Pr.* p. 108. It is undoubtedly a well established rule that a Juryman may be sworn and examined as a witness and is not disqualified by reason of his having given evidence from continuing to sit as a Juryman or taking part in delivering the verdict, 4 B.L.R. (Ap. Cr.) 15 at 17=13 W.R. (Cr.) 60.

295. If a trial is adjourned, the jury or assessors shall attend at the adjourned sitting, and at every subsequent sitting, until the conclusion of the trial.

Jury or Assessors to attend at adjourned sitting. A Judge is not justified in discharging a Jury merely on the ground that a defence witness who was summoned was absent, 4 Bom. L.R. 939, but he may adjourn the case when the witness summoned is absent, especially if he is a material witness in the case, *Weir II*, 383; 6 B.L.R. Appx. 89; 15 W.R. (Cr.) 34; 18 W.R. (Cr.) 20; 23 W.R. (Cr.) 53. Sections 318 and 332 provide punishments for non-attendance of Juror or Assessor and the Court is also empowered to remit the fine wholly or in part for sufficient cause being shown. See S. 344, *infra* which empowers the Court to postpone or adjourn proceedings on account of the absence of a witness or any other reasonable cause.

296. The High Court may, from time to time, make rules as to keeping the jury together during a trial before such Court lasting for more than one day; and subject to such rules, the presiding Judge may order whether and in what manner the jurors shall be kept together under the charge of an officer of the Court, or whether they shall be allowed to return to their respective homes.

In England under 60 and 61 Vict. Ch. 18 (*Juries Detention Act*, 1897), the Court may allow a Jury in a criminal case to separate, if the charge is not one of murder treason, or treason felony, but in India such a rule is not observed and Jurors in all cases are allowed to return to their respective homes every day without any restriction whatever. The Jury are not entitled to talk to persons connected with the accused during the progress of the trial and even apart from the provisions of Ss 293 to 300; 78 Cr. L.J. 783=104 Ind. Cas 111.

F.—Conclusion of Trial in Cases tried by Jury.

297. In cases tried by Jury, when the case for the defence and the prosecutor's reply (if any) are concluded, the Court shall proceed to charge the Jury, summing up the evidence for the prosecution and defence, and laying down the law by which the jury are to be guided.

Scope and object of the section.—The object of the heads of charge is to inform the Court of Appeal, should occasion arise, of what direction the Judge gave in law to the Jury and the nature of his summing up the evidence not only for the prosecution but also for the defence. The heads of charge are not intended to be an exhaustive detail of every particular which the Judge might have addressed the Jury. The Judge is not bound to address himself in every particular and in every detail to every suggestion put forward by the defence. It is the duty of the Judge, fairly and candidly to point out the main and salient features of the case from the point of view of the prosecution and the defence respectively. In doing so he is entitled to take into consideration the speeches made on both sides in presenting the evidence to the Jury. The heads of charge should record in an intelligible form and with sufficient fulness the points of law and the directions given by the Judge to the Jury, and the record should represent with accuracy the substance of the charge, 47 C. 794 followed in 3 Pat. 626, 7 Pat. 361; 53 C.L.J. 537; 26 C.W.N. 996; 32 C.L.J. 504. Speaking generally the summing up should be such that it ought not to be said that the Judge found the facts for himself and left the law to the Jury as was said of a summing up in England, 31 C.W.N. 171=45 C.L.J. 584=28 Cr. L.J. 201=99 Ind. Cas. 937; 31 C.W.N. 387=28 Cr. L.J. 431 (1)=101 Ind. Cas. 606 (1) An eminent writer describes the duty of summing up to the Jury thus: "The Judge states the substance of the charge, divesting it of all technical phraseology which may encumber, direct the attention of the Jury to the precise issue they have to try and applies the evidence to that issue." Sir James Fitz James Stephen says "After the evidence is concluded the Judge sums up. His position from first to last is that of a moderator between two litigants. He permits or forbids certain things to be done; but he originates nothing. His summing up may and generally does indicate his opinion but it is an opinion which is the result of the evidence laid before him and not of an independent inquiry." The charge must be recorded in such a way as would enable a Court of Appeal to say whether the facts and circumstances of the case are properly placed before the Jury, as also whether the law has been correctly explained, 34 C. 638; 25 C. 735; 47 C. 46; 53 C. 373; 31 C.W.N. 387=28 Cr. L.J. 418=101 Ind. Cas. 626 (1); 33 C.W.N. 84=33 Cr. L.J. 912=118 Ind. Cas. 331.

When case for defence and Prosecutor's reply (if any) are concluded.—"In summing up a case the Advocate should endeavour to convince the Jurors by logical argument of the justice of his cause. He should confine his address to the evidence in the case, should point out any discrepancies in the testimony of witnesses on the opposing side and bring out clearly the points which have been established in favour of his client. Advocates often soar away over the heads of the Jury, are too diffuse and wander far afield from the real issues involved in the case. Facts must be marshalled in a convincing manner avoiding lofty style and very lengthy arguments. Speeches must not be long winded, but pithy and concise and directly to the point." There is nothing illegal in adjourning a case after the prosecutor and the defence Counsel have addressed the Jury if such adjournment is necessitated by the intervention of certain holidays, or the Judge sent off on special duty. In such cases there is no provision of law under which a fresh address of Counsel at the resumption of the hearing can be had, 28 Cr. L.J. 950=105 Ind. Cas. 662.

Court shall proceed to charge Jury.—The Court in summing up the case after the conclusion of the evidence and arguments, usually directs the Jury, as to the law applicable and may go through and comment on the absence of evidence given and may even comment on the absence of evidence which might have been given. But a summing up is not an essential part of the trial where the facts are clear and the law simple that the Court of Appeal will necessarily quash the conviction where there has been no summing up. The facts must be left to the Jury to decide and the Judge must not usurp their function but he is entitled to express his opinion strongly in a proper case provided he leaves the issues to the Jury, Arch. Cr. Pl. Ev. and Pr. p. 202 (25th Ed.), 12 Cr. App. Cas. 211. Every party to a trial by Jury has a legal and constitutional right to have the case which he made, either in pursuit or in defence fairly submitted to the consideration of that tribunal, 1896 A.C. 44. The summing up by the Judge as contemplated by law is a fairly full and distinct statement of the evidence with such advice as to the legal bearing of that evidence and the weight which properly attaches to the several parts of it, as a sound judicial

discretion would suggest. The Judge in a proper summing up must formulate and specify simple issues for consideration, and collate the evidence *pro* and *con* bearing upon the issues in order to assist the Jury to arrive at the correct decision thereon. Merely summarising the evidence, examination-in-chief, cross-examination, and re-examination of the different witnesses who have deposed at the trial and putting before the Jury all that has been said by the witnesses or by the lawyers appearing on the two sides and huddling together important facts as well as trivial points without any attempt at discrimination, instead of aiding the Jury only confuse them, 29 C.W.N. 526=26 Cr. L.J. 1009=87 Ind. Cas. 833. As the term 'heads of charge' itself implies it means that the Judge must faithfully record the lines upon which he addressed the Jury, both on the evidence and on the law and the object of these heads of charge is to inform the High Court should occasion arise, of what direction he gave in law to the Jury and the nature of the summing up of the evidence on both sides. They do not purport nor are they intended by Statute to be exhaustive detail in every particular of what the Judge may have addressed to the Jury. It is undoubted law that it is the sole function of the Judge to direct the Jury on all matters of law and they must take their directions in law from the Judge. It is equally certain that the Judge must present the main case for the prosecution and for the defence fairly for the consideration of the Jury. But this does not mean that he must in every particular and in every detail address himself to every suggestion put forward by the defence. His duty is fairly and candidly to put out the main and salient features of the case from the point of view of the prosecution and the defence. And in doing so he is entitled to take into consideration the speeches made upon both sides, in considering his presentation of the evidence to the Jury. The function of these heads of charge is for the guidance and the information of the High Court and it is for the Judges in appeal to construe them as prepared by the Judge and to see if from such heads the Judge has fairly and properly directed the Jury in point of law and whether he has fairly and properly reviewed the evidence in support of the prosecution and of the defence. The heads of charges should record in an intelligible form and with sufficient fairness the points of law and the direction given by the Judge to the Jury and the record should present with accuracy the substance of the charge. In considering the language used one must not peruse the heads of charge as if they were an indictment. The method of expression and its form may be unsatisfactory but if in substance one can see from the frame of the heads of charge what were the directions given and that they were right and proper, then there can be no ground of complaint even though the phraseology and form adopted may be open to question. What one has to see and consider from the heads of charge used, is the directions given and to see whether they were fair and right. Mere informality in expression or in form would not be sufficient. The charge is to be construed by the High Court as best it can and the High Court must bring its reason and common sense when considering the document. 1 P L J. 317 at 320-22=17 Cr. L.J. 353 at 355=35 Ind. Cas. 657 following 34 C. 693; 36 C. 281; 12 A L.J. 143=14 Cr. L.J. 638=21 Ind. Cas. 656. A Judge in charging the Jury shall endeavour to speak in a manner simple and direct. The charge must not be involved and in extravagant language, 11 Cr. L.J. 538=7 Ind. Cas. 915. Intemperate language should be avoided, 53 C. 372. The duty of the Judge is to state the principal points in the evidence and how they bear for or against the accused. In short to render the Jury every assistance in his power towards coming to a correct conclusion 6 W.R. (Cr.) 72. The heads of charge must be in such a form as to enable the Court of appeal to say that it was delivered with sufficient fullness to the Jury and that it was such as to enable the Court of Appeal to say that all the points of law and facts were clearly and correctly explained to the Jury having regard to the evidence adduced in the case, 31 C.W.N. 387=28 Cr. L.J. 478 (1)=101 Ind. Cas. 606 (1). It is not necessary that a charge should be reduced to writing before delivery but should represent with absolute certainty the substance of what was charged by the Judge to enable the High Court in the event of an appeal to see that the case was fairly and properly placed before the Jury, 23 W.R. (Rules) 7; 23 W.R. (Cr.) 32; 34 C. 658; Weir II, 385; 1 Pat. L.J. 317=17 Cr. L.J. 353 at 355=35 Ind. Cas. 657; 36 C. 281; 12 A L.J. 143=14 Cr. L.J. 638=21 Ind. Cas. 656; 33 C.W.N. 84=30 Cr. L.J. 912=118 Ind. Cas. 351. The Judge in his charge to the Jury should not be dogmatic as to the view of the evidence nor is it his province to ridicule the defence story. Even when

-expresses his own opinion, he must warn the Jury that it is not binding on them but they are entitled to form their own opinion. He must not make an appeal or exhortation to the Jury and he is bound to direct the attention of the Jury on all the salient features of the case, 25 Cr. L.J. 781=81 Ind. Cas. 249; 26 Cr. L.J. 567=83 Ind. Cas. 711; 28 Cr. L.J. 278=100 Ind. Cas. 358; 27 Cr. L.J. 1038=96 Ind. Cas. 990 following 34 C. 693; 36 C. 281; 26 C.W.N. 996=35 C.L.J. 437=24 Cr. L.J. 8=71 Ind. Cas. 56. "Every summing up must be regarded in the light of the conduct of the trial and the questions which have been raised by the Counsel for the prosecution and for the defence respectively. This Court does not sit to consider whether this or that phrase was the best that might have been chosen, or whether a direction which has been attacked might have been fuller or more conveniently expressed or whether other topics which might have been dealt with on other occasions should be introduced" *per Lord Alverstone C.J.*, in 73 J.P. 352. "We do not criticise summing up by saying something has been omitted which might have been said or that some statement has been made which it would have been better to omit or saying that we ourselves should not have said what was in fact said. We do not criticise summing up from those points of view. But when we find in a summing up substantial misdirection that may have led to injustice then this Court will interfere" *per Lord Alverstone, C.J.*, in 73 J. P. 223. "It is not fair to criticise and this Court never does criticise summings up as if the Judge were writing an accurate treatise on the branch of criminal law with which he was then dealing"—*per Pickford, J.*, in 73 J. P. 250. A Judge's record of his heads of charge to the Jury is not a matter to be treated cavalierly or lightly thrown away on the ground of insufficiency or misdirection. S. 537 *infra* expressly provides that no finding, sentence, or order on account of the faulty nature of a charge to the Jury shall be set aside unless a failure of justice was occasioned, while S. 423 (2) states that a verdict of a Jury shall not be altered or reversed on appeal unless the appellate Court regards such verdict as erroneous owing to misdirection by the Judge or misunderstanding by the Jury of the law as explained to them by the Judge & Pat. 626. An appellate Court will naturally be cautious in treating an omission in the heads of charge to the Jury as amounting to misdirection for two reasons; (1) In order to constitute misdirection the point omitted must be of such importance that an omission to refer to it renders the summing up unfair. (2) The Judge is not required to make a verbal transcript of his summing up. It is only the heads of charge to the Jury which he is required to record. Heads of charge must indicate the matters on which he proceeded but many matters which find a place in the charge will not find a place in the record. 27 Cr. L.J. 785=95 Ind. Cas. 333 where 1 Pat. L.J. 317=17 Cr. L.J. 353=33 Ind. Cas. 657, is referred to. Expressions in the charge verging on politics should not be used. It will be an evil day for the administration of justice if political considerations should, influence the judicial mind of the Judge which should be free from all taint of bias on political, racial, social or personal grounds, 30 C.W.N. 693=49 C.L.J. 537. Lord Meadowbank's charge to the Jury as to what the Jury should do is worth reproducing "Our business is to do justice and you in particular have to weigh the evidence calmly and deliberately and should you doubt of that evidence being sufficient to bring the charges here made home to the prisoner, to give him the full benefit of that doubt. But to entitle you to do so, these doubts must be well considered and circumstances on which they are founded deliberately weighed. To doubts that are not reasonable you have no right whatever to yield. You are not entitled to require at the hands of the prosecution direct proof of the facts laid in the charge. In no case such be exacted. The circumstances laid in evidence must be put together and it is your duty then to consider what is the rational and reasonable inference to be drawn from the whole of them. In short whether it be possible to explain them upon grounds consistent with the innocence of the party accused or whether on the contrary they do not necessarily lead to the result directly the reverse." *see Forsyth Hist. of Tr. by the Jury* 338-339. This section specifically enacts that the Judge shall only charge the Jury when the case for the defence and the prosecutor's reply are concluded *i.e.*, after all the evidence had been taken on both sides and Counsel on both sides have finished addressing the Jury. Where therefore a Judge heard arguments and took verdict as regards the remaining accused, it was held that the procedure adopted by the Judge was illegal although the Judge was no doubt swayed by the laudable desire to save time which object admittedly not obtained, 36 M. 583 at 588. A charge which is

one calculated to suggest to the Jury that there was no use in considering the matter from any point of view other than the one presented by the prosecution and in the events which had happened, there was only one course open to them viz to return a verdict of guilty offends against the most elementary rules to be observed in summing up to the Jury and the accused are entitled, as a matter of right, to proper summing up. 46 C.L.J. 31=23 Cr. L.J. 742=104 Ind. Cas. 790. Where certain persons were tried for the offence of dacoity, the Judge after examining five witnesses asked the Jury whether they wished to hear any more evidence and on their stating that they did not believe the evidence and wished to stop the case, the Judge recorded a verdict of acquittal, it was held that the procedure adopted by the Judge was not warranted by any provision of law, as the Judge could not ask the opinion of the Jury until he had duly recorded the whole of the prosecution evidence. The High Court further remarked that no final opinion as to the falsehood or insufficiency of the prosecution evidence ought to be arrived at by the Judge or Jury until the whole of that evidence is before them and has been considered, and the Jury ought to have been cautioned by the Judge to that effect. If however at the end of the prosecution evidence, the Public Prosecutor waives his right to sum up the evidence where he has such right, and the Jury then express their opinion that the evidence is incredible, and the Judge agrees with them it may not be necessary for the Judge to go through the formality of summing up the case to the Jury, and their opinion might in that case be accepted as a verdict, 20 M. 445 at 446. Nor is it open to a Judge after hearing one witness for the prosecution to tell the Jury that it would be unsafe to convict, and there is no necessity to hear further evidence. Unless the Public Prosecutor withdraws the charge with the leave of the Court, the Judge is bound to allow the evidence to be placed before the Jury, Weir II, 381. To allow a Jury to pronounce their verdict before the accused is called upon to enter on his defence is illegal although the Judge omits to charge the Jury at all under this section. S. 537 *infra* will not cure such a defect, 23 G. 252.

The Court shall proceed to charge the Jury.—The right course for a Judge is to charge the Jury himself but in cases where the Judge was not sufficiently acquainted with the vernacular say *urdu*, so as to be understood by the Jury and the Judge did not feel competent to address the Jury himself with any confidence that they would understand what he had to say in view of the technical language necessary to describe the offence when he wrote out the charge in English which was translated into *Urdu* and read over to the Jury by the Public Prosecutor it was held that there was illegality as an officer who cannot express himself in vernacular must resort to some other means, 28 Cr. L.J. 950=105 Ind. Cas. 662. It is necessary that the Court interpreter or the Judge should explain the charge to the Jury who do not know English or understand it imperfectly, 47 C. L.J. 449=29 Cr. L.J. 638=109 Ind. Cas. 910. To a charge to the Jury in the mufassal it is not correct to apply the criticism which would apply to a charge of a Judge in England. It is sufficient to see the general tendency of the charge as a whole, 12 W.R. (Cr.) 80, 4 C.W.N. 196; 10 B.H.C.R. (Cr.) 75.

In summing up a case a Judge is allowed a certain amount of latitude. It is not necessary for him "to repeat all the evidence and to give a precis of the argument of Counsel. His actual duties are laid down in this and the next section but these sections are not exhaustive. They must be read together with the numerous judicial decisions which have found defects in the summing up of Judges. The first point which a Judge should observe is whatever he says to the Jury must be true. If he states that such and such fact is contained in the evidence, the Jury are bound to believe him. It is also necessary that the Judge should obtain from the Jury a decision on all the material points which go to establish a particular offence. He should not omit to call the attention of the Jury to matters of prime importance especially if they favour the accused, merely because they were discussed by his Advocate, 23 Cr. L.J. 683=103 Ind. Cas. 411; 5 W.R. (Cr.) 80 (F.B.); 17 Bom. L.R. 1059; 18 C.W.N. 180.

Summing up the evidence for prosecution and defence.—Mere reading of the evidence *in extenso* is not sufficient for a proper summing up. The Judge should sum up the evidence on both sides and place the case succinctly before the Jury an analysis of the evidence and place before the Jury such points as can legitimately arise in favour of the

accused, 46 C.L.J. 21=28 Cr. L.J. 742=103 Ind. Cas. 790. The duty of the Judge in summing up, is to place the entire evidence, for or against the accused before the Jury and leave the ultimate decision of the question of fact to them. He is not debarred from expressing his own opinion upon the evidence but it should be done in such a way as not to create any impression in the mind of the Jury that it was a direction from the Judge which they should follow; and such opinion should not be expressed as has been observed in 34 C. 693; 36 C 281; 26 C.W.N. 996, strongly and dogmatically. Under this section it is the duty of the Judge to sum up the evidence for the prosecution and the defence. He should explain to the Jury the issues of fact, which the Jury are to determine upon the charge on which the prisoner is being tried and having made the Jury understand these issues, the more convenient mode of summing up the case for him to adopt is, to present to the Jury as materially and impartially as he can, a summary of the evidence and the considerations and inferences to be drawn from the evidence as they appear both on the negative and the affirmative side of the case. It is impossible, of course, for any Judge to state every item of evidence or to draw the attention of the Jury to every fact which has been deposed; but he is without difficulty to give a summary of the leading points of the evidence and the considerations and inferences to be drawn from the evidence on one side or the other. Merely telling the Jury that there are material discrepancies without telling them that they are material is a clear misdirection. Further telling the Jury over and over again about their moral conviction as to the guilt of the accused is also a misdirection as they have not to return verdict of guilty upon their moral conviction but upon legal proof of facts constituting the offence, 49 A. 201. It is not the business of a Judge to assume the part of the defence counsel. His duty is to place the evidence before the Jury as he found it and though the reasonable inference to be drawn from the evidence is to disbelieve it, still it is open to the Jury to believe the evidence and act upon it 29 Cr. L.J. 497 at 499=109 Ind. Cas. 225. A charge to the Jury should be read as a whole; a Judge should give a fair summary of the evidence in his address and it is not to be expected that he would go on repeating what he had already said in a previous part of the charge when dealing with the case of individual accused, 54 C 539. A charge should be construed reasonably and see whether the evidence has been placed properly before the Jury, 10 Bom. L.R. 565, 1903 A.W.N. 132, 34 C. 693. In a case where a charge to the Jury he no doubt open to criticism yet the verdict will not be set aside unless the charge taken as a whole cannot be supported, 48 C.L.J. 473 at 476. A careful summing up may often change the hasty and superficial impression of a Jury, Ratnaul 288. Any advice from the Judge to ignore or neglect any evidence is improper. The entire evidence should be left for consideration to the Jury, 43 C.L.J. 433=27 Cr. L.J. 1038=96 Ind. Cas. 990, 33 C.W.N. 451. The summing up must give a fair summary of the evidence, on both sides pointing out to the Jury the flagrant contradictions in the evidence naturally recalling to them any explanation of the contradiction which has been suggested and leaving it to them to decide on its adequacy, 24 A.L.J. 506=27 Cr. L.J. 785=95 Ind. Cas. 385. A Judge is not bound to point out to the Jury every bit of evidence and it is enough if he directs their attention to the salient portion of the evidence for prosecution and defence, 23 Cr. L.J. 47. Where the Judge does not sum up the evidence at all, the conviction cannot be sustained and a new trial will be ordered on the ground of misdirection, 9 W.R. (Cr.) 51; 23 C. 551; 30 C. 822; 4 C.W.N. 193. The Judge is bound to lay carefully and plainly before the Jury the evidence as recorded by him, noting discrepancies and inconsistencies and pointing out generally the way in which it is favourable or unfavourable to the accused, 25 W.R. (Cr.) 54. A Judge in summing up is entitled to have regard to the elaboration and skill with which the rival contentions have been placed before the Jury by the Advocates on both sides, but he should not in doing so omit pointedly to call the attention of the Jury to matters of prime importance, especially if they favour the accused, merely because they have been discussed by the Advocate. Such an omission would amount to non-direction on the part of the Judge in summing up the evidence, 27 B 544 at 545, but omission to draw the attention of the Jury to matters of prime importance which affect the truthfulness of the important witnesses amounts to a misdirection, 25 L.W. 487=23 Cr.L.J. 307=100 Ind. Cas. 531; 44 C.L.J. 233=28 Cr. L.J. 19=99 Ind. Cas. 51. A Judge is to put to the Jury a case in

favour of the accused which arises on the evidence whether such a case is raised by or on behalf of the accused or not. A particular line of defence adopted by the accused or his Counsel will not relieve the Judge of his duty, 19 C.W.N. 653 (F.B.)=16 Cr. L.J. 561=30 Ind. Cas. 113; 17 Cr. L.J. 19=32 Ind. Cas. 147; [1915] 1 K.B. 13; [1915] 2 K.B. 431; 43 C.L.J. 133 at 142. See 29 C. 379 where it was held that it was immaterial how often the Jury may have been addressed by the pleaders on both sides upon the law, and the responsibility of laying down the law for the guidance of the Jury lay entirely with the Judge and in the absence of such a direction the verdict was invalid. It is absolutely the duty of the Judge to give a narrative and history of the case and to place before the Jury the facts and evidence in a clear way so as to enable them to grasp the details and to come to a right decision, 6 Bom. L.R. 31. Where the charge as a whole is distinctly in favour of the defence it is not enough for establishing misdirection that more stress could have been laid by the Judge on the defects in the prosecution case, 27 Cr. L.J. 176=91 Ind. Cas. 960. In every case of a serious nature, the evidence of the principal, if not of all, the witnesses should be read over to the jury. This is a practice universally adopted by English Judges to preclude the possibility of the Jury coming to a decision without having all the facts fresh in their memory, 5 B.H.C.R. (Cr. Ca.) 85, but it was held in 35 C. 231 that there is nothing that makes it incumbent upon any Judge to read the whole of the depositions of the witnesses to the Jury. Failure on the part of the Judge to read material portions of the evidence to the Jury in itself is not sufficient for a reversal of the verdict of the Jury, and the question in such a case will be, whether the omission was such as to mislead the Jury, and the Court of appeal will not interfere unless the accused is prejudiced thereby, 27 Cr. L.J. 217=92 Ind. Cas. 169. It would be a clear misdirection if the Judge calls the attention of the Jury to all the evidence against the prisoner and omits altogether to allude or call attention to the evidence in his favour, 5 W.R. (Cr.) 30 (F.B.), but where the charge is on the whole favourable to the accused and most of the points of importance in his favour were more or less dealt with by the Judge, the mere fact that some of the points were omitted or not dealt with sufficiently will not render the verdict bad. 27 B. 626. When important witnesses for the prosecution have not been called as witnesses, it is the duty of the Judge to point out that fact to the Jury 6 Pat. 50. Where the Judge omitted to call specific attention of the Jury to the defence evidence in the case, it was held to be a misdirection as he failed to comply with the provisions of this section, 33 C. 531; 18 M.L.J. 541. It is a misdirection if the defence is not adequately put before the Jury and admission of evidence which ought not to have been admitted, 27 Cr. L.J. 176=91 Ind. Cas. 960. So also if the Judge fails to mention to the Jury the case of each of the accused, 30 C. 822; 18 M.L.J. 250, and the evidence against each of the accused, 29 C. 782; 30 M. 44. Putting the accused's case to Jury does not mean putting to the Jury every argument and comment of the counsel for the defence, 38 C.L.J. 411; 27 Cr. L.J. 735=93 Ind. Cas. 383. When directing a Jury the Judge is clearly entitled to express his own opinion on the facts of the case, provided he leaves the issues of fact to the Jury to determine 12 Cr. App. Cas. 221; 28 Cr. L.J. 177=99 Ind. Cas. 849; 26 A.L.J. 296 at 297; 23 B. 316; 4 C.W.W. 576; Ratanlal 743; 1 W.R. (Cr.) 2 and 23; 10 C. 970; 25 C. 320; 35 C. 531; 29 Cr. L.J. 721=110 Ind. Cas. 577. But he should not express his opinion on the facts too dogmatically and too unqualified a manner 28 Cr. L.J. 843=104 Ind. Cas. 459; 1 W.R. (Cr.) 2 and 25. The Judge is only to sum up the evidence for the prosecution and defence, and he is not entitled to express an unqualified opinion of his own. If a Judge attempts to take the case out of the province of the Jury by something in the nature of imposing his own view upon them, it is a case of misdirection but if he simply states his opinion which the law allows him to state in such a manner that an intelligent Jury should see for themselves it is not necessary to add as a safeguard that it was only his opinion and they are perfectly at liberty to form their own opinion, 29 Cr. L.J. 721 (2)=110 Ind. Cas. 577 (2). The question of believing the evidence is for the Jury, 7 C.L.J. 246; 35 C. 531. A direction by the Judge in the beginning of his charge to the Jury that they are the Judges of facts and they are not bound by his opinion cannot cure the defects in the charge which has the effect of withdrawing the determination of the facts from the jury, 31 C.W.N. 831=46 C.L.J. 31=23 Cr. L.J. 742=103 Ind. Cas. 790. See also 13 W.R. (Cr.) 31; 1 W.R. (Cr.) 2, 10 C. 970; 4 C.W.N. 195; 14 A. 23; 23 B. 316. The Judge's

duty is to present the facts in their natural aspect, and not to suggest farfetched explanations on points that tell in favour of or against either party, *Weir II*, 386. It is very improper on the part of the Judge to suggest to the jury when a witness's answer is in favour of the defence that the answer might have been given without properly understanding the question put. If a witness possibly misunderstood a question put to him the facts which led to the inference that the witness might have so misunderstood should be placed on record and then submit the same for the jury's consideration, 30 Cr. L.J. 120=113 Ind. Cas. 280. It is improper for a Judge to tell the Jury that there is no sufficient evidence to establish the plea of the accused, 20 B. 215 at 224. Nor can a Judge direct the Jury to neglect any portion of the evidence as they are to give their verdict upon the whole evidence recorded, 6 Bom. L.R. 31; 43 C.L.J. 488. Non-direction when it consists in omission to put material facts or to put the defence to the Jury is sufficient to cause the Court to quash the conviction if the Court comes to the conclusion that it is reasonably probable that the verdict of the Jury was affected thereby. A grave omission to direct the Jury to a cardinal point in the case cannot be made good by Counsel calling attention to it at the termination of the summing up, 50 C.L.J. 106 (F.B.) at 126. It is one thing to indicate agreement with a submission made by Counsel. It is another thing to direct Jury effectively. The line of defence adopted by Counsel does not relieve the Judge of his duty to draw the attention of the Jury to what appears to be a possible answer to the charge against the accused even on the prosecution evidence notwithstanding it may have escaped the attention of the Counsel for the accused. Even in a case where the defence counsel did not press seriously the defence evidence it will not relieve the Judge of his duty to sum up the evidence for the defence, 38 C.L.J. 411; 19 C.W.N. 653 (F.B.) In giving a warning to a Jury not to disbelieve a mass of otherwise consistent evidence because in one or two minor immaterial points the witnesses made contradictory statements, a Judge exercises a wise discretion and affords no ground for objection, 1 W.R. (Cr.) 17. Where there is no evidence against the accused it is the duty of the Judge to charge the Jury for an acquittal and not to leave it to the Jury whether the accused is guilty or not 7 Pat. 15; 16 W.R. (Cr.) 19; 19 C.W.N. 653=21 C.L.J. 377=16 Cr. L.J. 561=30 Ind. Cas. 113 but he should not tell the Jury that there is no evidence when the prosecution wanted an adjournment to produce their witnesses to prove their case, 30 C.W.N. 190, where the evidence is purely circumstantial it is the duty of the Judge to point to the Jury that the accused cannot be found guilty unless the circumstances are such that there can be no reasonable possibility of the innocence of the accused, 30 Cr. L.J. 120=113 Ind. Cas. 280.

Laying down the law by which the Jury are to be guided.—Summing up the evidence is distinct from laying down the law. What does laying down the law mean? The offence charged is given in technical terms in the charge which convey little to the Jury. The Presiding Judge is to lay down the law by which the Jury are to be guided. If the Jury have heard discussions of the law applicable to the offence charged from the opposing counsel and have heard detailed criticism of the evidence to the essential ingredients of the offence, it is obvious that it is inoperative that the possibility of doubt and confusion in their minds should be removed and they should be told authoritatively what the law is. They must for a proper understanding of the evidence and a due appreciation of its bearing on the offence be told what the law is and what constitutes the offence charged and what matters must be produced to their satisfaction to constitute the offence. This the Legislature has provided in this section and this is why it is imperatively necessary for the Judge to expound the law, 11 Cr. L.J. 340 at 342=5 Ind. Cas. 981. It is the duty of the Judge to explain the application of the law to the facts of the case while laying down the law, to enable the Jury to return a correct verdict, 19 C.W.N. 653=27 C.L.J. 377 (F.B.). Laying down the law does not signify laying down the whole law on the subject irrespective of the facts of the particular case. A reasonable construction of this section is that the judge should lay down the law so far as it bears upon the evidence adduced in the particular case. The mere fact that the defence Counsel failed to present to the Court a particular aspect of the case cannot justify an omission on the part of the judge to draw the attention of the Jury to what appears to be a possible answer to the charge against the accused, 19 C.W.N. 653 (F.B.)=21 C.L.J. 377; 16 Cr. L.J. 561=30 Ind. Cas. 113. It is no doubt attended with difficulty to bring before

the Jury all the combinations of which numerous facts are susceptible and to place in a distinct point of view the application of the rule of law according as all or some only of the facts and inferences from the facts are made out to their satisfaction ; but the task is not impracticable and it must be performed by the Judge who endeavours correctly to administer the law. *Forsyth His. of Tr. by Jury*, p. 285. It is a serious misdirection vitiating the charge to tell the Jury that finding of recently stolen property in accused's possession is sufficient to prove they were thieves or dacoits, a rebuttable presumption which by adducing sufficient proof the accused are to establish their innocence, 53 C. 157 where 52 C 223 and 24 C.W.N. 619=31 C.L.J. 310 are followed. It is necessary for a Judge to read the very words of the section itself to the Jury, if he purports to give what are the provisions of the section, and then, if necessary, to explain what is the meaning of the section, 36 C.L.J. 171 at 174. It is not sufficient for the Judge merely to read to the Jury the definition of the offence from the statute and leave it to them to find out whether the evidence for the prosecution made out a case against the accused. It is his duty to call their attention to the elements constituting the offence and to deal with the evidence by which it is proposed to make the accused liable, 25 C. 711. It should appear on the face of the record that the law bearing on the charge under trial has been explained to the Jury. It is incumbent, on the Judge to explain the law to the Jury, mere reference to sections unless Jurors are trained men cannot be of much assistance to them, 25 C. 561 ; 4 C.W.N. 193 ; 8 M.L.T. 82=11 Cr. L.J. 432=7 Ind. Cas. 431 ; 11 Cr. L.J. 222=6 Ind. Cas. 14 ; but it is not his duty to explain to the Jury questions of law which do not arise on the facts or on the plea set up, 31 C.W.N. 314=45 C.L.J. 131=29 Cr. L.J. 334=100 Ind. Cas. 718 ; 7 Pat. 361. Where the Judge charged the Jury to the effect "nature of the charge is no doubt familiar to you all. It must be proved that there was robbery committed by five people or more and also that each of the accused took part in the robbery," it was held that this amounted in no sense to laying down the law by which the Jury are to be guided within the meaning of this section and the omission is not merely an irregularity but the failure to comply with an express provision of law which vitiated the trial and conviction, 25 Cr. L.J. 1129=81 Ind. Cas. 953. It is the duty of the Judge to explain to the Jury the offence with which the accused is charged and in doing so he should keep before him the words of the section defining the offence, 27 Cr. L.J. 1181=97 Ind. Cas. 951. Where several persons are tried for rioting and other offences the Judge should tell the Jury the common object alleged by the prosecution and the defence of each accused should be separately dealt with, 27 Cr. L.J. 1164=97 Ind. Cas. 748 ; 6 Pat 572. Omission to give a detailed definition of the offence charged does not amount to misdirection when it is clear that the nature of the offence has been described in detail and its constituent factors fully understood by the Jury, 25 Cr. L.J. 1032=81 Ind. Cas. 808. The Judge in his heads of charge to the Jury should state at length how he explained the various relevant sections of the I.P.O. to the Jury and not merely state that those sections had been read and explained. He should also explain the sections by applying them to the facts of the case and also tell them what is necessary for them to find with reference to the facts of the case in order to give a verdict on the various charges, 26 Cr. L.J. 1279=83 Ind. Cas 1055. The duty of the Judge is to lay down the law in reference to the case presented to the Court and not to perplex the mind of the Jury with the considerations that are outside the legitimate scope of the inquiry. It is also his absolute duty to keep the Jury in proper limits and to simplify the issues fairly and properly before the Court, to direct their mind to those issues and to them alone, 19 C.W.N. 653 (F.B.)=21 C.L.J. 377 ; 7 Pat. 361. It is not sufficient for the Judge to state in the records of the heads of charge to the Jury that he referred to certain sections of the I.P.O. and explained to the Jury the law in regard to the offence charged. He should set out the directions which he in fact, gave to the Jury with regard to the law, 7 Pat. 361 following 47 C. 795. The Judge must give sufficient direction on the law as bearing upon the fact and the explanation must be sufficiently comprehensive to enable them to decide the particular issue, 5 C. 739. In laying down the law for the guidance of the Jury it is sufficient if he informs them what facts must be found by them before they can bring a verdict of guilty. It matters not whether he tells the Jury that the offence consists of such and such elements

or that such and such elements are necessary to constitute the offence. The Jury are not concerned with the law, except to know what facts are necessary for them to find for the offence to be established. They are not concerned with the reasoning by which the Judge is led to the conclusion of law which he lays down before them. The misdirection in law is that the Jury could not have been sufficiently informed as to what facts they had to find in order to bring a verdict of guilty. There are cases to show that stating the law to the Jury is a misdirection unless the Jury are given to understand what facts they must find in order to bring a verdict of guilty, but there is no cases in which a verdict has been set aside on the ground of misdirection in law, where all the facts which are in dispute and which were necessary to constitute the offence were clearly put to the Jury, 11 Cr. L.J. 340 at 344= 5 Ind. Cas. 981. Where the charge as a whole is distinctly in favour of the defence it is not enough for establishing misdirection that more stress could have been laid by the Judge on the defects in the prosecution, 27 Cr. L.J. 176= 91 Ind. Cas. 960. It is immaterial how often the Jury may be addressed by the pleaders on both sides upon the law. The responsibility of laying down the law for the guidance of the Jury rested entirely with the Judge, and the verdict arrived at by the Jury in the absence of such direction on the law by which they should be guided cannot be accepted as a valid verdict, 29 C. 379. Where a charge to the Jury stated that the law on the subject has already been presented to them by the Public Prosecutor and that in the opinion of the Judge no different point of law arose in the case, it was held that it was not a sufficient compliance with this section which required the Judge to lay down the law by which the Jury are to be guided, 26 Cr. L.J. 1090= 83 Ind. Cas. 178. The mere fact that the Counsel for the defence thought it unnecessary to place reliance on the defence evidence and failed to present to the Court a particular aspect of the case cannot justify the omission on the part of the Judge to what appears to be a possible answer to the charge against the accused even on the prosecution evidence, 19 C.W.N. 653 (F.B.)= 21 C.L.J. 377; 23 C.W.N. 426. If there is evidence from which a right of private defence could possibly be raised, the Judge must put the case of private defence to the Jury even though the accused had not expressly set up that plea, 43 C.L.J. 139 at 142; 53 C. 990. A Judge should not hand over a copy of the Penal Code to the Jury nor allow them to study a commentary on the law but should himself explain any point on which they might have expressed and he had given an opinion on them. Where the Jury is in need of directions, and the Judge made over to them a copy of the Indian Penal Code leaving them to decide under what sections the offence fell it was held that he had failed in his duty of 'laying down the law,' 6 Bom. L.R. 258 at 260-261. It is the duty of the Judge to ascertain their doubts and explain the law applicable to the facts of the case, 14 C. 164 and 43 C.L.J. 537. Where the principles or rules of law on any matter have been laid down in general terms by the Legislature, a Judge will in most cases be wise to refer to the exact terms of the law and then instruct the Jury with regard to its application to the facts of the case before them, instead of adopting as principles passages from text-books, (however eminent the writer may be) which briefly refer to what is laid down (or is supposed to be laid down) in reported cases or even to passages from judgments of reported cases themselves which may mislead by not being correctly understood in relation to the facts of the particular case, or possibly even by not containing an accurate exposition of the law, 26 M. 1 at 16. A large number of cases should not be cited to the Jury, for such a course is calculated to confuse them and to lead to a miscarriage of justice, 1 C.L.J. 159= 2 Cr. L.J. 157. Rulings are not to be cited to the Jury asking them to differentiate between them. It is for the Judge and the Judge only to lay down the law. The minds of the Jury should never be confused by having a number of conflicting authorities or any authorities laid before them. By confusing the Jury by laying before them a number of conflicting authorities and leaving it to them to choose between them amounts to a misdirection, 16 C.W.N. 46= 13 Cr. L.J. 26= 13 Ind. Cas. 218. The Judge ought not to discuss and argue points of law with the Jury but he is merely to state the law as it stands; such discussion and argument, however careful and learned as to what the law is, invariably tend to confuse and mislead the Jury, 8 W.R. (Cr.) 87; 19 W.R. (Cr.) 71 at 73. There is no prohibition in law forbidding a Judge to read to the Jury in his charge from a judgments. In practice it is not desirable to refer and to read from several law reports as it may have the effect of confusing the minds of laymen. But in explaining the dividing

line between *murder* and culpable homicide not amounting to murder, Judges have frequently read, in their charge, a passage from some wellknown judgments as accurately illustrating the distinction. In so doing they are acting very properly, 4 *Ran.* 438 (F.B.). Omission (1) to state the elements of theft, 6 *M.L.T.* 324, or (2) to explain what constitutes robbery, 30 *M.* 44; 2 *Cr. L. Rev.* 210-11 *Cr. L.J.* 164-4 *Ind. Cas.* 1081; 23 *C.* 379, or (3) to explain the difference between murder and culpable homicide not amounting to murder, 35 *C.* 531; 36 *C.* 281, or (4) omission to direct Jury as to right of private defence of property under S. 103, *I.P.O.*, 33 *C.L.J.* 525, or (5) to lay down the elements which constitute fraudulent possession of a forged document, 16 *B.* 163, or (6) omission to explain wrongful gain and loss showing intention in a case of breach of trust, 15 *Cr. L.J.* 257-23 *Ind. Cas.* 465, or (7) omission to state that accused is not bound to call defence evidence but can rely on the weakness of the prosecution, 15 *C.W.N.* 198-11 *Cr. L.J.* 557-8 *Ind. Cas.* 52, or (8) to give directions as to accomplice's testimony, 5 *W.R.Cr.* 80 (F.B.); 12 *M.* 196; 5 *M.L.T.* 355-1 *Ind. Cas.* 547; 29 *C.* 782; 10 *B.* 319; 12 *Cr. L.J.* 537-12 *Ind. Cas.* 513; 8 *A.* 306 and 509 (but it has been held in 52 *C.* 595 that an approver need not be corroborated as regards every single statement and if the Judge directs the Jury that if the approver was corroborated on some points they might act on his evidence, it is no misdirection), or (9) omission to warn Jury to pay attention to the result of previous proceedings; 31 *C.L.J.* 305-21 *Cr. L.J.* 554-56 *Ind. Cas.* 558 or (10) to state the value to be attached to retracted confessions, 21 *M.* 83; 26 *M.* 33; 31 *M.* 127; 20 *A.* 133; 11 *Cr. L.J.* 538-7 *Ind. Cas.* 915; 33 *M.* 46; 26 *Cr. L.J.* 360-84 *Ind. Cas.* 712; 26 *Cr. L.J.* 1146-83 *Ind. Cas.* 453; 4 *Cr. L.J.* 502, or (11) to direct a Jury to give benefit of doubt to the accused 1 *M.L.T.* 350, but in 27 *Cr. L.J.* 217-92 *Ind. Cas.* 169, it was held that such omission is not a misdirection vitiating the trial although as a matter of practice it is usual to end the charge with these words (12) omission to put to the Jury the law as to right of private defence arising on admitted facts and to direct their attention as to whether the accused was and if so, how far justified in attacking his opponent to save himself, 53 *C.* 980; 43 *C.L.J.* 138 at 142; 19 *C.W.N.* 653 (F.B.) (13) omission to draw pointed attention of the Jury to the considerable time which had elapsed between the theft and the recovery of stolen property from the possession of the persons charged, 1929 *M.W.N.* 577; (14) failure to mention to the Jury that a witness was an accomplice, 28 *Cr. L.J.* 278-103 *Ind. Cas.* 358, will be non-compliance with this section amounting to misdirection. But failure to mention to the Jury when dealing with individual accused's case that approver's evidence should be received with caution but when he had mentioned it previously it is no misdirection), 54 *C.* 539, when 'reasonable doubt' was explained as *lacuna* in the prosecution evidence and at the same time the Judge mentioned to the Jury that the prosecution evidence was full and sufficient in all particulars not giving rise to any reasonable doubt but if the Jury were of opinion that something was lacking in the evidence there would be room for reasonable doubt, it was held that there was no misdirection 31 *C.W.N.* 410-101 *Ind. Cas.* 661. It was held to be a misdirection for the Judge to tell the Jury that there was no evidence and ask them to return a verdict of not guilty, when he refused an adjournment applied for by the Public Prosecutor, empannelled a Jury and asked the Public Prosecutor to open the case, the Public Prosecutor stating that he had no witnesses present in Court, 30 *C.W.N.* 190. Omission to point out all the points in the accused's favour on the question of identification of property is not a non-direction justifying the reversal of the verdict when the evidence has, on the whole been, fairly put to them, 52 *C.* 223. A mere omission or a mis-statement in a summing up is not itself a mis-direction when the case has been fully heard by the Jury but it will be otherwise if a mis-carriage of justice has occurred by such omission or mis-statement, the Jury having been probably misled by it, 23 *Cr. L.J.* 177-99 *Ind. Cas.* 849. Mere non-direction is not necessarily misdirection. Those who allege misdirection must show that something wrong was said or that something was not said which was left to be understood. Every summing up must be regarded in the light of the conduct of the trial and the questions raised by Counsel on both sides, 19 *C.W.N.* 693 (F.B.)-21 *C.L.J.* 377-16 *Cr. L.J.* 561-30 *Ind. Cas.* 113; 17 *Cr. L.J.* 353 at 360-35 *Ind. Cas.* 657-1 *Pat. L.J.* 317. The charge to the Jury must be read as a whole. If there are salient propositions of law in it, these will of course be the subject of separate analysis. But in a protracted narrative of

fact, the determination of which is ultimately left to the Jury, it must needs be, that the view of the Judge may not coincide with the views of others who look upon the proceedings in black type. It would however not be in accordance either with usual or with good practice to treat such cases as misdirections, if upon the general view taken, the case has been fairly left within the Jury's province . . . These observations are made in order to discountenance the idea that in the region of fact unless something gross amounting to a complete misdescription of the whole hearing of the evidence has occurred, there should not be any interference, 41 C. 1023 (P.C.) at 1062-63 followed in 29 Cr. L.J. 721=110 Ind. Cas. 577. Omission to charge the Jury on points of capital importance telling in favour of the accused, 17 Bom. L.R. 1059; 18 C.W.N. 180=15 Cr. L.J. 147=22 Ind. Cas. 723; 11 Cr. L.J. 13=4 Ind. Cas. 597 or omission to direct the Jury on an important point which may serve to help the defence, 44 C.L.J. 253, is a misdirection. See also 28 Cr. L.J. 19=99 Ind. Cas. 51. A Judge should tell the Jury that absconding is a matter which is equally consistent with innocence as with guilt and it could be considered only with the rest of the evidence and that by itself, it is of no weight, 11 Cr. L.J. 557=8 Ind. Cas. 52.

Appeals.—S. 418 lays down that where the trial was by Jury, appeal shall be on a matter of law only and S. 423 (1) (b), *infra*, deals with the powers of the Appellate Court. Where the Appellate Court is satisfied that there was a misdirection to the Jury, it is not bound to order a retrial solely on the ground of misdirection. The question for further consideration is whether the accused has been in fact prejudiced thereby and whether upon a proper summing up of the entire evidence, the Jury would have come to a different conclusion, 8 W.R. (Cr.) 80 (F.B.) at 90; 1 W.R. (Cr.) 51; 25 M. 1; 25 C. 230; 30 C. 822; 29 C. 782. In a case where the Judge had not sufficiently explained the law to the Jury, a retrial need not necessarily be ordered if the Court is of opinion that the Jury accepted the evidence which was placed before them and on the evidence the Jury had returned a proper verdict, 7 Pat. 361.

Duty of Judge.

298. (1) In such cases it is the duty of the Judge—

(a) to decide all questions of law arising in the course of the trial, and especially all questions as to the relevancy of facts which it is proposed to prove, and the admissibility of evidence or, the propriety of questions asked by or on behalf of the parties; and, in his discretion, to prevent the production of inadmissible evidence, whether it is or is not objected to by the parties;

(b) to decide upon the meaning and construction of all documents given in evidence at the trial;

(c) to decide upon all matters of fact which it may be necessary to prove in order to enable evidence of particular matters to be given;

(d) to decide whether any question which arises is for himself or for the jury, and upon this point his decision shall bind the jurors.

(2) The Judge may, if he thinks proper, in the course of his summing up, express to the jury his opinion upon any question of fact or upon any question of mixed law and fact, relevant to the proceeding.

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(a) It is proposed to prove a statement made by a person not being a witness in the case on the ground that circumstances are proved which render evidence of such statement admissible.

It is for the Judge, and not for the Jury, to decide whether the existence of those circumstances has been proved.

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Province of the Judge and Jury.—"The distinction between the province of the Judge and that of the Jury is in the English law, clearly defined and observed with jealous accuracy. The Jury must in all cases determine the value and effect of evidence which is submitted to them. They must decide what degree of credit is to be given to a witness, and hold the balance between conflicting probabilities. The law throws upon them the whole responsibility of ascertaining *facts* in dispute and the Judge does not attempt to interfere with the exercise of their unfettered discretion in this respect. But on the other hand the Judge has his peculiar duty in the conduct of a trial. He must determine whether the kind of evidence offered is such as ought or ought not to be submitted to the Jury and what liabilities it imposes. Where any questions of law arise he alone determines them, and their consideration is absolutely withdrawn from the Jury who must in such cases follow the direction of the Judge, or if they perversely refuse to do so, their verdict will be set aside and a new trial granted. If in order to determine this, it is necessary to have recourse to evidence, as for instance to show that a proposed witness is incompetent, this evidence must be received by the Judge, and adjudicated upon by him alone. The rule cannot be better or more concisely enunciated, than as laid down in a recent case. . . . If the evidence offered at the trial by either party is evidence by law admissible for the determination of the question before a Jury, a Judge is bound to lay it before them and to call upon them to decide upon the effect of such evidence. But whether such evidence when offered is of that character and description which makes it admissible by law, is a question for the determination of the Judge alone and is left, solely to his discretion. Whether there is any evidence is a question for the Judge but whether the evidence is sufficient is a question for the Jury. So when a question arises, as to the admissibility of evidence the facts on which its admissibility depends are to be determined by the Judge and not by the Jury," *Forsyth His. of Tr. by Jury*, pp. 282-83. Where the Judge charges the Jury to the effect that there is not sufficient evidence to establish the plea of the accused he is really trenching upon the peculiar province of the Jury who are the sole judges of fact, 29 B. 215, what the Jury are to receive is for the Judge and what they are to believe is for the Jury, *Ratanlal* 452; when there is no evidence against the accused the Judge ought to charge the Jury for an acquittal and not to leave it to the Jury to say guilty or not guilty, 7 W.R. (Cr.) 39. A jury may be satisfied with minimum proof but where there is nothing which amounts to proof the case should not be put to the Jury, 16 W.R. (Cr.) 19. It is for the Judge to say that such and such witness does in fact corroborate. That is the function of the Jury and depends upon whether they believe the particular witness or not, 32 C.W.N. 245 at 950. It is for the Jury to say how far the evidence is to be believed and if the facts as to which evidence is given are such that from them a further inference of fact may legitimately be drawn, it is for the Jury to say whether that inference is to be drawn or not. But it is for the Judge to determine subject to review as a matter of law whether from these facts that further inference may legitimately be drawn—per *Lord Blackburn* in 3 A.C. 193. What a Judge says to the Jury upon the law is absolute and binding direction on them. What he addresses to them upon the facts are only such observations, as he thinks necessary and proper, in assisting them to arrive at a conclusion upon the evidence which is wholly their province to deal with as they think—per *Markby, J.*, in 20 W.R. (Cr.) 41. The Jury should take the law from the Judge, 6 Bom. L.R. 258; 14 C. 164. The Jury, as has been pointed out in several cases are the only persons who can pronounce a definite opinion on the guilt or innocence of the accused who are tried before them. They cannot abdicate their function in favour of the Judge. They cannot return a verdict to the effect that they agree with whatever opinion the Judge may form as to the guilt or innocence of the accused, 43 C.L.J. 477=30 Cr. L.J. 54 (1)=113 Ind. Cas. 70 (1).

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tried with a Jury both in the course of the trial and in the summing up. It is laid down at the close of the section that the Judge may, if he thinks proper, express to the Jury his opinion on a question of fact or upon any question of mixed law and fact relevant to the case. Many of the Indian decisions have laid down qualifications which are in the nature of legislation than interpretation of the section. A Judge has a right to express his opinion and if such expression of opinion is unfair and prejudices the accused, the appellate Court can and should interfere to remove the consequences of such action by finding misdirection; but to this clear and sound rule of law some Courts have added the condition in effect that every word that a Judge says wherein he expresses his opinion should be qualified by most elaborate safeguards pointing out to the Jury that it was for them to decide a particular fact, 29 Cr. L.J. 721=110 Ind. Cas. 577. The law of evidence is a part of general law. The question of what is or what is not evidence, that is to say what amounts to or does not amount to in law to evidence is a question to be decided by the Judge, as is the question whether there is any evidence in law to go to the Jury. Similarly the question as to what is or what is not, what amounts or does not amount to corroborative evidence in law is a question to be decided by the Judge. Similarly it is the duty of the Judge to direct the attention of the Jury to those portions of the evidence confirming or corroborating the accomplice's testimony which corroborates or does not corroborate in some material particulars tending to show that the accused committed the offence charged, 32 C.W.N. 913 at 919-50. What the Jury are to receive it is for the Judge to decide and what they are to believe is for the Jury, Ratanlal 452.

Judge to decide questions of Law.—The questions (1) whether a communication is privileged, 10 W.R. (Cr.) 14; Ratanlal 730; (2) whether the offence of rape was committed when complainant was found to be a consenting party, 19 B. 735; (3) whether a child is competent to give evidence, are questions of law, for the Judge to decide; but a question as to a previous conviction of the accused is a question of fact for the Jury to decide, 8 W. R. (Cr.) 60; 20 W. R. (Cr.) 40. It is the duty of the Judge to decide all questions of law arising in the course of a trial. If his decision is erroneous it is liable to be corrected by a superior tribunal in appeal or in revision; but as long as the case is before the Judge, he is responsible for the decision and he cannot relieve himself of that responsibility by seeking advice or instructions even from a superior Court. It is on this principle the Privy Council in 28 C. 621 disapproved, the procedure adopted by the Judges of the High Court consulting a brother Judge as to the construction of a Bengali document 18 Cr. L. J. 913=42 Ind. Cas. 145. Whenever from a given state of facts found by the Jury to be true, the law has settled that a certain inference shall be drawn, it is the duty of the Judge to pronounce what the legal inference is and not to leave it to the Jury to determine. In other words, if a statutory enactment or uniform course of decisions has put a particular construction on proved or admitted facts, it is the province of the Judge to declare that construction where the circumstances of the case are such that it applies to them, *Forsyth His. Tr. by Jury*, p. 287. See also *ibid.* pp. 284 & 285.

Judge to decide questions as to relevancy of facts.—It is for the Judge and not for the Jury to decide all questions as to the relevancy of facts. As to relevancy of facts see Es. 4 to 16 of the Indian Evidence Act. The question as to the relevancy of a confession is for the Judge to decide, 28 M. 33.

The admissibility of evidence.—In a Sessions trial what the Jury are to receive is for the Judge and what they are to believe is for the Jury. The question whether a confession was voluntarily made or not, has to be decided by the Judge for admitting or excluding it in evidence. The Judge must admit it if it was made voluntarily and not caused by inducement, threat or promise, 11 Bom. L. R. 332=10 Cr. L. J. 63=2 Ind. Cas. 517. Whether there be any evidence is for the Judge and whether sufficient evidence is for the Jury, *Roa. Cr. Ev. & Pro.*, p. 98 (13th Ed.), see also 20 B. 215. So also whether the accused was in police custody so as to make the confession admissible in evidence, 31 M. 127. It is also for the Judge to determine whether confessions retracted at the trial are admissible, Ratanlal 730. The admissibility of a confession is for the Judge and its truth or falsity is for the Jury. If a confession is voluntary but false, the Judge must admit it in evidence and

put it to the Jury with proper directions as to its falsity for the purpose of appraisal of its worth. If the Court doubts the voluntariness of a confession, it must be excluded from evidence, 52 C. 67. It is in the province of the Judge to judge the intention of the accused as it is in the province of the Jury to weigh the evidence as to the truth or falsity of the same, 3 W. R. (Cr.) 59. Under this section it is the duty of the Judge to decide the admissibility of the evidence and he has to discharge this duty irrespective of the question whether objection has or has not been taken by the parties. When a confession is retracted, he has to decide whether it has been duly recorded and free from infirmities and made voluntarily, 26 Cr. L. J. 606=85 Ind. Cas. 830. Where a Judge said that if the confession were true it was enough to warrant a conviction without stating its relevancy or otherwise, it was held that the Judge had misdirected the Jury, 26 M. 33. See also Ratanlal 812.

Propriety of questions asked—In this connection see (1) Ss. 141 to 143 Indian Evidence Act as to leading questions, (2) S. 146 as to lawful questions in cross-examination, (3) S. 151 as to indecent and scandalous questions, (4) S. 152 as to questions intended to insult or annoy, (5) S. 121 questions regarding conduct as Judge or Magistrate.

In his discretion prevent production of inadmissible evidence.—It is the duty of the Judge to prevent the production of inadmissible evidence whether objected to by the parties or not. That duty will be best fulfilled in cases of confessions, by the Judge inquiring from the accused or if he is represented by a pleader from his pleader whether the confession proposed to be put in is or is not objected to. If objected it is for him to decide its admissibility or otherwise. He ought not in any circumstances to throw on the Jury the duty of saying whether the confession is voluntary or not. It may be that the Jury in considering all the circumstances may take the question of the voluntariness of the confession into consideration but the question of the voluntary character of the confession and its admissibility is not to be left to them by the Judge. The weight to be attached to a confession admitted in evidence by the Judge may be left to the Jury, 11 Bom. L.R. 332=10 Cr. L.J. 63=2 Ind. Cas. 517. The Judge is given a discretion to prevent the letting in of inadmissible evidence. The moment a witness begins to give hearsay evidence which is inadmissible, it is the duty of the Judge to stop the witness. It is not enough if the Judge subsequently asks the Jury to reject such hearsay evidence and decide on legal evidence, 7 W.R. (Cr.) 23; and 8 M.L.T. 372=11 Cr. L.J. 633=8 Ind. Cas. 573. It is the duty of the Judge to see that the evidence which should not be allowed to go in, say a privileged communication under Ss. 126 and 127 of the Indian Evidence Act, statement to a pleader or his clerk, is not let in, though no objection is raised by the accused, 25 C 736; 52 C 67 at 77. Where material evidence which ought not to have been admitted is allowed to go in along with other legally admissible evidence, it would be mere speculative refinement to hold that the Jury must have relied upon the latter and rejected the former, 27 B 626 at 633. There are certain exceptions to the law regulating the admissibility of evidence which apply only to criminal trials and which have acquired their force by the constant and invariable practices of Judges when presiding in criminal trials. They are rules of prudence and discretion and have become so integral a part of the administration of the criminal law as almost to have acquired the full force of law. A familiar instance of such a practice is to be found in the direction of the Judges to Juries strongly warning them not to act upon the evidence of an accomplice unless it is corroborated. Such practice has found its place in the administration of criminal law, because Judges are aware from their experience that in order to ensure a fair trial for the accused and to prevent the operation of indirect but not the less serious prejudice to his interest, it is desirable in certain circumstances to relax the strict application of the law of evidence—per Lord Reading in 1914 A.C. 564.

Sub-section (1) (b).—The construction of written documents (except in the case of innuendoes in libel) is entirely for the Court which must determine what the legal effect of the instrument is, but where it contains words of technical art, or which have by any local usage a particular meaning, this is submitted to the Jury who have to pronounce what that meaning is; and then the Judge, having had the language thus as it were translated to

him, defines the legal consequences which follow from the document itself, *Forsyth His. Tr. by Jury*, p. 284-85.

Meaning and construction of documents.—Interpretation and application are two distinct things falling under different categories. Interpretation of a document is for the Judge and its application to a particular case is the function of the Jury. A Judge is entitled to draw attention to an alteration on the face of a document alleged to be false, 17 W.R. (Cr.) 58. It is for the Judge to point out to the Jury the legal effect of a document or a portion of it relied on by the prosecution or defence, 3 W.R. (Cr.) 69.

Sub-section (2).—This sub-section enables the Judge to express his opinion to the Jury as to the effect of certain portions of the evidence, but at the same time he must be careful to add that they are not bound by his opinion, but that it is for the Jury to form their opinion on the evidence on record, 10 C. 970; 34 C. 698; 13 C.W.N. 153; 7 C.L.J. 599; 4 C.W.N. 196 and 576; 26 M. 467; 14 A. 25; 23 B. 316; 28 Cr. L.J. 177=99 Ind. Cas. 849; 6 Bom. L.R. 31; 35 C. 531; 25 C. 230. A Judge while directing the Jury is clearly entitled to express his opinion on the facts of the case, provided he leaves the issues of fact to the Jury to determine, 12 Cr. App. Cas. 221; 26 A.L.J. 296 at 297; but he should not express his opinion on important matters of fact so positively as to leave to the Jury no loop-hole for taking any other view 1 W.R. (Cr.) 2 and 23; Ratanlal 743 and 728. If a Judge attempts to take a case out of the Jury's province by something in the nature of imposing his own view upon the Jury, it is a case of *misdirection*; but if he simply states his opinion which the law allows him to state in such a manner that intelligent Jurymen should see for themselves that it is only his opinion and nothing else. It is not necessary for him to add as a safeguard a remark that it is only his opinion and they are perfectly at liberty to form their own. If such presumption were made the Jury system would stand condemned. If the Jury were not wanting in ordinary intelligence and are not servile, it is clear that a Judge who expresses his opinion on a point of fact as his own opinion does not require to add the qualification that the Jury need not accept that opinion unless they wish to do so. On questions of fact the Judge's opinion in no way binds the Jury but the Judge has a right to express his opinion so that the Jury may know what it is. The principle underlying the rule by which the Judge is permitted to give his opinion in his summing up and the manner in which that opinion should be given is stated thus by Sir James Fitz James Stephen "After the evidence is concluded the Judge sums up; his position from first to last is that of a *moderator* between two litigants. He permits or forbids certain things to be done, but he originates nothing. His summing up may and generally does indicate his opinion, but it is an opinion which is the result of the evidence laid before him and not of an independent inquiry." In the case of Judges in India who are permitted to call witnesses independently in cases where they think it necessary they do occasionally originate. To all intents and purposes the fact remains that the opinion of the Judge in summing up in India is almost invariably the opinion on the evidence laid before him, 29 Cr. L.J. 721 at 723=110 Ind. Cas. 577. When a Judge lays down that there is not sufficient evidence to establish the plea of the accused, he, in fact, trenches upon the peculiar province of the Jury, 20 B. 215. The Judge should not state his own view of important matters of fact so positively as to leave to the Jury no loop-hole for taking any other view, 1 W.R. (Cr.) 23; Ratanlal 743; 13 W.R. (Cr.) 34; 20 W.R. (Cr.) 41. Native Juries are in all cases too apt to follow what they imagine to be the opinion of the presiding officer and any expression of the Judge's own sentiments should be avoided. The most that a charge should contain is a statement of the evidence *pro* and *con* with a running commentary as to its agreement or disagreement with the other facts of the case, 1 W.R. (Cr.) 26. They are too apt to take what they think of the Judge's opinion as their guide without paying any attention to the facts of the case and so a Judge should go no further than a general commentary on the evidence and a statement of what is the legal offence proved should such evidence be credited, 1 W.R. (Cr.) 2 at 3. But in the matter of sifting evidence and of weighing of probabilities the Judge may probably have more experience than the Jury and there is no reason why the Jury should not have the benefit of that experience, 1864 W.R. (Cr.) 6. It is no objection that the Judge lets the Jury know the impression which the evidence has made on his

mind and at all events the party objecting to such a course should show that the impression entertained by the Judge was not justified by the evidence, 3 W.R. (Cr.) 83 (F.B.) at 87.

Any question of mixed law and fact.—For example (1) the question whether there is any evidence to go to the Jury, (2) the question as to the reasonable time for postponing a trial under S. 344, *infra*, (3) the question whether a child of tender years is competent to give evidence, (4) the question as to *bona fides*, negligence, reasonable cause, due diligence etc. In a trial by Jury, it is the function of the Jury to find the facts upon the evidence laid before them and for that purpose to be guided by the Judge as to the law which is applicable to the case and in all cases it is the duty of the Judge to point out to them the law. The law of evidence is a part of the general law. The question is what is or what is not evidence, that is to say, what amounts or does not amount in law to evidence is a question of law to be decided by the Judge, as is the question whether there is any evidence in law to go to the Jury. Similarly the question as to what is or not, what amounts or does not amount to corroborative evidence in law is a question of law to be decided by the Judge, 32 C.W.N. 945 at 949.

Duty of jury.

299. It is the duty of the jury—

(a) to decide which view of the facts is true, and then to return the verdict which under such view ought, according to the direction of the Judge, to be returned ;

(b) to determine the meaning of all technical terms (other than terms of law) and words used in an unusual sense which it may be necessary to determine, whether such words occur in documents or not ;

(c) to decide all questions which according to law are to be deemed questions of fact ;

(d) to decide whether general indefinite expressions do or do not apply to particular cases, unless such expressions refer to legal procedure or unless their meaning is ascertained by law, in either of which cases it is the duty of the Judge to decide their meaning.

Illustrations.

(a) A is tried for the murder of B.

It is the duty of the Judge to explain to the Jury the distinction between murder and culpable homicide, and to tell them under what views of the facts A ought to be convicted of murder, or of culpable homicide, or to be acquitted.

It is the duty of the Jury to decide which view of the facts is true, and to return a verdict in accordance with the direction of the Judge, whether that direction is right or wrong, and whether they do or do not agree with it.

(b) The question is whether a person entertained a reasonable belief on a particular point—whether work was done with reasonable skill or due diligence.

Each of these is a question for the Jury.

To decide which view of the facts is true—"The law does not demand that they (Jury) should act on certainties and upon certainties alone. In the passage of our lives, in our acts, in our thoughts, we do not deal with certainties—we act on just and reasonable convictions, founded upon justice and reasonable grounds"—per Lord Coleridge. The whole view of the facts alleged, is to be taken into consideration and then decide whether taken of the facts by the prosecution leads to the conclusion as to the guilt of person. See the illustrations to the section. For example, in a case

obvious disadvantage which might appertain to any other form of procedure by allowing them to disperse after delivery of the charge will open the door to all kinds of possible abuses such as the chance of an improper communication being made to the Jury by persons, or by the Jury to persons interested in the subject matter of the trial. Where, after Judge's charge to the Jury, the Jury were allowed to disperse for several hours and then permitted to return to consider and deliver their verdict the trial was held bad. 26 Cr. L.J. 861=86 Ind. Cas 717. See also 22 C.W.N. 730=27 C.L.J. 553=19 Cr. L.J. 737=46 Ind. Cas. 513. At the conclusion of the trial the Jury are not allowed to separate until they have considered and returned their verdict or have been discharged for failure to agree. The verdict is to be delivered by the foreman and the assent of the Jurors to a verdict pronounced by the foreman in the presence and hearing of the rest without their express dissent is to be conclusively presumed. *Arch. Cr. Pl. Ev. & Pr.*, p. 203 (25th Ed.) If a Juror after the summing up separates himself from his colleagues and not being under the control of the Court converses or is in a position to converse with other persons, it constitutes an irregularity which renders all the proceedings abortive, and the only course open to the Court is to discharge the Jury and commence the proceedings afresh. If the Jury are unable to agree upon their verdict without retiring from their box they may withdraw to a convenient place appointed for that purpose, an officer being sworn to keep them, and to suffer none to speak to them without leave of the Court or speak to them himself except only to ask them whether they are agreed. During the retirement of the Jury no officer of Court may enter into any discussion with the Jury as to the case or answer any question put to him by them. If any further assistance is required by them it must be given in open Court by the Judge in the presence of the accused. *Ibid.* 211. The Jury are not entitled to discuss the case which is being tried before them nor can they talk to any one connected with the accused, 55 C. 279 at 284.

301. When the jury have considered their verdict, the foreman shall inform the Judge what is their verdict, or what is the verdict of a majority.

Delivery of verdict.

The law does not prescribe any particular form in which the Jury ought to return their verdict, and they are at liberty to deliver it in any form which they think fit, 14 W.R. (Cr.) 59. The Jury may ignore the grave charges and return a verdict of guilty on a lesser charge, 3 W.R. (Cr.) 41. A Jury trying an offence has authority under S. 238, *supra*, to find as an incident in such trial, that certain facts only which constitute a minor offence have been proved and return a verdict of guilty of such offence, though such minor offence be not triable by Jury and the accused is not discharged with such minor offence, 26 M. 243. If the Jury wish to say something in addition to their verdict, they must be allowed to do so, *e.g.*, a recommendation for mercy, and a Judge ought not to stop them the moment the verdict of "guilty" or "not guilty" is delivered by the foreman. In this country it is undesirable to stop the Jury at such a stage of the proceedings, for it may so happen that before the verdict is recorded, the foreman of the Jury may make some observation in respect of that verdict which may show to the presiding Judge that the Jury have not properly understood the case and that it would be the duty of the Judge not to record the verdict but to re-charge the Jury so as to lay the case properly before them, and when the words which the foreman attempted to add were very material, the High Court ordered a retrial, as the accused was prejudiced 30 C. 435. The verdict of the Jury should be the collective opinion of the Jury as a body arrived at after mature consideration and ascertained and announced by the foreman. Individual opinion cannot be asked by the Judge even where they are sitting as Assessors on some of the charges, 36 M. 535 at 538. Where there are more than one accused and where there are several charges, it would be a convenient course if the officer of the Court were to take the verdict of the Jury upon each charge separately, 50 C. 658 at 663. The sworn statements of Jurors and the evidences of admission by them as to the mode in which their verdict has been arrived at are inadmissible but the evidence of other persons as to the same is admissible. 40 C. 693.

302. If the jury are not unanimous, the Judge may require them to retire for further consideration. After such a period as the Judge considers reasonable, the jury may deliver their verdict, although they are not unanimous.

Procedure where jury differ.

This section lays down the procedure to be followed when the Jury differ. It is only in cases where the Jury are not unanimous in their verdict that a Court may require them to retire for further consideration but after delivery of the verdict, the Judge cannot direct the Jury to retire for further consideration. Where it is unanimous, it must be received by Judge unless it is contrary to law, 5 C. 871 at 873; 13 Cr. L. J. 678=25 Ind. Cas. 1006; 3 Cr. L. J. 1. When the Jury are not unanimous in the verdict, the proper course for the Judge is to require them, under this section, to retire for further consideration giving them further direction on matters of law, 6 Bom. L.R. 258 at 261; 8 C. 739 at 754. In cases of disagreement among the Jury the individual opinions of the members are never intended to be disclosed, 36 M. 585. In cases of disagreement among the Jury, the individual opinion of the Jurors by name are not intended to be disclosed, and such a procedure is irregular, 26 Cr. L. J. 1316=89 Ind. Cas. 386 where 36 M. 585 is followed. When the Judge agrees with the verdict of the majority such a verdict in law, has the same effect, as a unanimous verdict, 19 C.W.N. 633 (F.B.)=16 Cr. L. J. 561=30 Ind. Cas. 113.

303. (1) Unless otherwise ordered by the Court, the jury shall return a verdict on all the charges on which the accused is tried, and the Judge may ask them such questions as are necessary to ascertain what their verdict is.

Verdict to be given on each charge.
Judge may question jury.

(2) Such questions and the answers to them shall be recorded.

Questions and answers to be recorded.

Scope of the section.—This section enacts the principle of English law laid down by *Blackburn, J.* in L.R. 1 Q.B. 289 at 319. "It is the duty of the Judges to take care that the verdict of the Jury is not imperfect and if the Jury have completely omitted to answer the questions left to them, they ought to point out the omission and to have it corrected. When, however, the Judge receives an imperfect verdict, it is clear that the Judge has made a mistake; and he ought not to have discharged the Jury. But one good verdict is given the case is *res judicata*. If the verdict of the Jury is not imperfect, the Judge has no right to question the Jury to find out the reason for their verdict." A clear and concise finding of the Jury on the main facts submitted to them should be accepted even though a verdict of not guilty has been delivered 7 Pat. 55. The verdict is to be received in the form in which it is given. The law does not prescribe any specific form in which the Jury are to give their verdict. They may give it in any form they think fit and if it is not exhaustive it is the duty of the Judge to question and elicit a complete finding, 3 Cr. L.J. 1 at 3 (F.B.)=3 L.B.R. 73, the Judge has no power to control it, 7 W.R. (Cr.) 22; 2 A.L.J. 475=2 Cr. L. J. 357. The Indian authorities preponderate against questioning the Jury where their verdict is general and has been delivered without ambiguity and without incompleteness and where there is no reason to suspect a misconception or disobedience of the doctrines of law, 9 C. 53; 8 C. 739 at 754; 5 C. 871; 7 W.R. (Cr.) 22; 19 B. 733; 6 Bom. L.R. 258; Ratanlal 244 and 442; 11 Cr. L.J. 557=8 Ind. Cas. 52; 21 Cr. L.J. 829=58 Ind. Cas. 829, but to ascertain the true verdict questions may be put to the Jury and such questions and answers are to be recorded, 8 C. 739 at 754; 50 C. 653 but where a clear verdict is given there is no power to question the Jury, 9 C. 53; 30 M. 469; 2 A.L.J. 475=2 Cr. L.J. 357.

Shall return a verdict on all the charges—If the Jury return a verdict on some counts but disagree on others, it would seem that the accused can be retried on counts on which the disagreement has taken place, even after judgment on the counts on which he has been convicted or acquitted as each Count is a separate indictment but where the counts are not distinct offences but a single transaction, the accused is entitled to plead *autre fois convict or acquit* on the second trial, *Arch. Cr. Pl. & Ev. Pr. p. 212* (25th Ed.) When the verdict given by the Jury was confused and unintelligible it was the duty of the Judge to obtain from them a proper and correct verdict before accepting the same. When an accused was charged under *Es. 304* and *352 I.P.O.* and the Jury returned a verdict of not guilty under *S. 304* and on being asked their verdict on the other charge returned a verdict of guilty under *S. 334, I.P.O.*, it was not proper for the Judge to have accepted that verdict, *43 C.L.J. 537*.

The verdict may be general or special. A general verdict is the ordinary verdict of "guilty" or "not guilty" but a special verdict is one where the Jury state their findings on all questions of facts which are necessary to decide the case and it remains for the Judge to apply the law to those findings under *S. 299 (a), supra*. Verdict means the collective opinion of the Jury as a body arrived at after mutual consultation ascertained and pronounced by their foreman, *26 Cr. L.J. 1346 (1)=89 Ind. Cas. 386*. The Jury are not bound to return the verdict in any particular form. See also *36 M. 585*. Unless otherwise ordered by the Court, the Jury are bound to return a verdict on all the charges on which the accused is tried, *41 C. 1072* at *1038*. The requirements of the law are satisfied if in returning the verdict the Jury returns a verdict of guilty on a minor offence forming part of one of the charges, *5 C. 871* at *873*.

Judge may ask such questions as are necessary—This section which permits questions to be put to the Jury in order to ascertain what their verdict is negatives by implication a power on the part of the presiding Judge to question them otherwise, *29 M. 91*. This section no doubt empowers the Judge to ask the Jury such questions as are necessary to ascertain what their verdict is, but it was never contemplated that on ascertaining that the Jury are not unanimous the Judge should make minute inquiries to learn the nature of the majority and its opinion as a verdict according as it coincides with his own opinion or not. Whatever may be the opinion of the Judge if he does go so far as to ask the Jury what is the exact majority, he ought to receive their verdict without hesitation and if he differs from it, he ought to proceed under *S. 307, supra*, *10 C. 140*; *15 B. 453*. It is only when it is necessary in order to ascertain what their verdict really is that Judge is justified in putting questions to the Jury. Unless a necessity of the kind truly exists the questions are not justified in law. No doubt the Legislature has thought that it would be very dangerous to give to the Judge the power of cross-examining the Jury after they had delivered their final verdict with a view to show that the conclusions which they had arrived at were not logical or were inconsistent or in order to provide materials, upon which the Judge be enabled to dispute the finality of the verdict, *21 W.R. (Cr.) 1* See also *7 Pat. 85*. There is no provision of law which empowers a Judge to question the Jury as to their reasons for an unambiguous verdict, *28 B. 412*; *15 B. 432*; *30 M. 453*; *13 Cr. L.J. 586=15 Ind. Cas. 1002*; *22 M.L.J. 338=13 Cr. L.J. 235=14 Ind. Cas. 669*. The Judge may question the Jury to ascertain what their verdict really is, e.g., where there is apparently some lurking uncertainty in their mind, but he must not cross-examine them for the purpose of showing that the verdict is unreasonable or with a view to afterwards dispute the finality of the verdict, *21 W.R. (Cr.) 1*. Where the verdict is ambiguous, it is the duty of the Judge to ascertain what they meant, and for this purpose he may question them, *7 C.W.N. 139*. Where three known and named persons were charged with dacoity with two other unknown persons and the Jury while acquitting one found the other two guilty of dacoity, it was held that it was open to the Jury while holding that one of the accused was not properly identified to find that the total number of persons who took part in the occurrence was five and when the Jury while acquitting one found the other two guilty of dacoity, the Judge should have asked the Jury definitely whether they considered the possible result of their acquittal and whether they still found the number of persons who took part was five, *33 M.L.J. 732=1927 M.W.N. 833=29 Cr. L.J. 5=103*

Ind. Cas. 341. This was followed by Madhavan Nair and Reilly, JJ. in another case holding that the principle laid down in the above decision was a salutary rule to be followed by the learned Sessions Judges. See also 1929 M.W.N. 778 which followed 53 M.L.J. 732. See also 28 Cr. L.J. 1007-105 Ind. Cas. 831. The Judge has no right to put questions to the Jury when they had returned a plain simple verdict of "not guilty", 27 C.W.N. 625. It may have been erroneous but it certainly was not ambiguous and the duty of the Judge was to receive it and record it without asking questions about it, 9 C. 53; 32 C. 739. Where the Jury returned a verdict "of guilty but not voluntarily" in a trial under S. 326 I.P.C., and the Judge without further questioning them accepted the verdict as one of guilty and convicted the accused under S. 338, I.P.C., it was held by the High Court that the verdict was in effect a verdict of "not guilty" and the Judge was wrong without further questioning the Jury in treating it as a verdict of "guilty," 12 C.W.N. 530. When the Jury returned a verdict on a general issue of "guilty" or "not guilty" and there is ambiguity as to the precise offence of which the accused are convicted or acquitted, this section does not authorise the Judge to question the Jury, as the only questions he is entitled to put to the Jury are such questions as are necessary to ascertain what their verdict is, 30 M. 459 applied in 13 Cr. L.J. 586=15 Ind. Cas. 1002: 43 M. 744; 27 C.W.N. 626; 2 A.L.J. 475. But where the verdict returned was not a simple verdict of guilty or not guilty but a special or qualified verdict to ascertain the exact scope and import of which it was the Judge's duty to ask the Jury such necessary questions, the Judge's omission to question will create a difficulty in the High Court deciding whether the verdict was proper or not, it being not in a position to know the materials on which the verdict is based or what it really means, 26 Cr. L.J. 532=85 Ind. Cas. 372. Where a Jury returned a unanimous verdict of guilty of culpable homicide not amounting to murder under S. 304, I.P.C., the Judge was entitled to question the Jury as to which part of S. 304 I.P.C. their verdict came under as that section embraces a more severe and a less severe portion, 4 Ran. 438 (F.B.) where a Jury returned a verdict of 'doubt'—a verdict unknown to law and the Judge asked them their further opinion as to a particular part of the case to which the foreman of the Jury after some hesitation replied that they had not considered that particular part of the case and the Judge therefore sent back the Jury to consider that part of the case and the Jury after consideration returned a verdict of guilty, it was held that the procedure adopted by the Judge was proper, 28 Cr. L.J. 950=105 Ind. Cas. 662 but when the Jury returned a unanimous verdict of guilty and the Judge thereupon questioned them and charged them again and the jury thereupon altered their verdict and unanimously found the accused *not guilty* and it appeared even that the Judge had written out a letter of reference to the High Court differing from the Jury on their first verdict it was held that the procedure adopted by the Judge was illegal and not warranted by the Code and 'a retrial of the case was ordered, 32 C.W.N. 144. This section does not give any power to Judge to call upon the Jury to give their reasons for their verdict to make a reference to the High Court under S. 307, *infra*, 42 M. 744. In 38 C.L.J. 153 at 158 it was held that whatever may be the proper practice as regards asking jury for their reasons in a case where they return a verdict of not guilty, it cannot be left out of sight, the fact that the Jury had reasons for their verdict which they had not mentioned, which the High Court may take into account before setting aside their unanimous verdict. Where a Judge directed the Jury to give a clear verdict in respect of offences under Ss. 147, 148, 304, 325, and 326 I.P.C., and they returned a verdict of guilty under S. 147 against some, and under S. 148 against the rest and added none of them guilty under S. 149 it was held that the verdict was incomplete and the Judge was justified under this section in putting them further questions to ascertain precisely their verdict as to other offences and the further verdict of the Jury that the accused were guilty under S. 326 read with S. 149, I.P.C., was legal, 50 C. 653. Where the unanimous verdict of the Jury was incomplete, the Jury was questioned by the Judge and the answers to the questions disclosed the fact that they did not understand the law applicable to the case, it is the duty of the Judge to send back the Jury for reconsideration and he is bound to accept the second verdict when it is unanimous and proper, 4 Ran. 433 (F.B.) but when the Jury returned a verdict 'guilty of stabbing' but without the intention of committing murder, it is certainly a verdict not contrary to law though ambiguous and the Judge in such a case is not entitled to send back

the Jury with instructions to return a verdict of 'guilty or not guilty of murder' and he acted improperly in accepting the verdict of guilty subsequently given and in sentencing the accused to death, 3 Cr. L.J. 1 at 3 (F.B.)=3 L.B.R. 75. This section limits the power of the Judge to question the Jury only in cases in which it is necessary to ascertain what the verdict is, that is where the verdict being delivered in ambiguous terms or with uncertain sound the meaning is not clear. There is no provision of law which empowers a Judge to question the Jury as to their reasons for a unanimous verdict, where there is nothing ambiguous in the verdict itself and no lurking uncertainty in the mind of the Jury themselves regarding it, 28 B. 412; 22 M.L.J. 355=13 Cr. L.J. 285=14 Ind. Cas. 669; 6 Bom. L.R. 238; 15 B. 452 20 B. 215; 30 M. 469; 36 M. 595; 13 Cr. L.J. 586=15 Ind. Cas. 1002. 7 Pat. 25 following 23 Cr. L.J. 421=67 Ind. Cas. 581, 21 W.R. (Cr.) 1. Sessions Judges often go beyond legitimate limits and put questions to the Jury which are quite unwarranted especially in cases where the verdict is not acceptable to them and this practice seems to be very much in vogue but it is not only inexpedient but illegal. The practice has been strongly condemned in 7 Pat. 55 and the view expressed therein may be said to be consistent with the recognized principle of law that the Jury are the sole judges of fact and the opinion of the Jury is their verdict and not the reasons upon which the verdict is based. It may be of very great assistance to a Judge to know the reasons for the verdict of the Jury to make up his mind whether it is necessary to differ from their verdict or not but the mischief likely to result if such a course is allowed is manifold and therefore in accordance with the fundamental principle and scheme of trial by Jury, the Legislature has made it illegal for a Judge to question the Jury, to find out the reasons for their verdict, 32 C.W.N. 1xiii. There is no justification to question the Jury after they have given a unanimous verdict, 15 C.W.N. 198=11 Cr. L.J. 557=8 Ind. Cas. 52. But after they have given a clear and unambiguous verdict even though not unanimous and the Judge differs from it he has no power to question them but the proper procedure is to make a reference under S. 307, *infra*, 15 Cr. L.J. 678=25 Ind. Cas. 1006.

Sub-section (2).—When it becomes necessary to question the Jury, the questions and the answers are to be recorded, (1911) 1 M.W.N. 190 at 191=9 M.L.T. 345=12 Cr. L.J. 140=9 Ind. Cas. 783; 8 C. 739; 14 W.R. (Cr.) 59. A statement that the verdict is one of guilty where there are several charges without eliciting from the Jury a separate verdict on various charges recording the questions put and the answers under this section is not a sufficient compliance with law, 26 Cr. L.J. 1090=83 Ind. Cas. 178.

304. When by accident or mistake a wrong verdict is delivered, the jury may, before or immediately after it is recorded, amend the verdict, and it shall stand as ultimately amended.

Amending verdict.

Object of the section.—In England if by mistake the Jury deliver a wrong verdict (as when it is delivered without concurrence of all) and it is recorded and a few minutes elapse before they correct the mistake, the record of verdict may be corrected. When a verdict of not guilty was entered by the clerk purely by mistake and the prisoner discharged, the mistake was immediately corrected and the prisoner brought back and sentenced, the Court of Crown Cases Reserved held the verdict was properly amended. *Ros. Cr. Ev. & Pr.*, p. 189 (13th Ed.). This section obviously contemplates cases where the verdict delivered is not in accordance with what was really intended by the Jury and does not apply to a case where the Jury owing to a misunderstanding of the law arrive at a wrong conclusion, but there is no accident or mistake in the delivery of the verdict. If the Jury returned a verdict owing to a misapprehension of the law it can be corrected by the Judge disagreeing with the Jury and referring the case under S. 307 *infra* to the High Court, 28 B. 412.

(2) When in any such case the jury are satisfied that they will not be unanimous, but six of them are of one opinion, the foreman shall so inform the Judge.

Discharge of Jury in other cases.

(3) If the Judge disagrees with the majority, he shall at once discharge the jury.

(4) If there are not so many as six who agree in opinion, the Judge shall, after the lapse of such time as he thinks reasonable, discharge the jury.

Under English Law the verdict must be unanimous and if the Jury are unable to agree the Court may discharge them and have the prisoner retried by another Jury. It is established law that a Jury sworn and charged with a prisoner, even in a capital case, may be discharged by the Judge at the trial, without giving a verdict, if the necessity *i.e.*, a high degree of need for such discharge is made evident in his mind. When the Jury after several hours being locked up stated when sent for into Court that it was impossible that they should ever agree, the Judge's discharging them was held good. It is for the Judge alone to decide whether there was a necessity. *Arch. Cr. Pl. Ev. & Pr. p. 214 (25th Ed.)* The unanimous verdict of a Jury in a case tried before the High Court Sessions the Judge is bound to accept. The question of option comes in only when they are not unanimous. Then the Judge may take one of the courses specified in this section, 16 Cr. L.J. 676=30 Ind. Cas. 724. A Judge is not entitled to discharge the Jury where he obtains a verdict from the Jury prematurely and with which he disagrees and then to try the accused by a fresh Jury, *Weir II, 497*. The fact that in a charge of dacoity the Jury returned a unanimous verdict of guilty of abetment of robbery does not necessarily invalidate the verdict. 16 Cr. L.J. 676=30 Ind. Cas. 724.

Discharge the Jury.—Before discharging a Jury who are divided in opinion the Judge is bound to ascertain their opinion. The discharge of the Jury is not equivalent to a verdict of acquittal and the prisoner can be remanded for a fresh trial, a former trial which had been abortive with a verdict, there has been neither a conviction nor an acquittal which alone can be pleaded in bar. *Arch Cr. Pl. Ev. & Pr. p. 216 (25th Ed.)*

306. (1) When in a case tried before the Court of Session the Judge does not think it necessary to express disagreement with the verdict of the jurors or of a majority of the jurors, he shall give judgment accordingly.

Verdict in Court of Session when to prevail.

(2) If the accused is acquitted, the Judge shall record judgment of acquittal. If the accused is convicted, the Judge shall, *unless he proceeds in accordance with the provisions of section 562*, pass sentence on him according to law.

The words in italics in sub-section (2) are new. This section must be read along with S. 307, *infra*, under which if the Judge in a case tried with a Jury disagrees with the verdict of the Jurors or a majority of the Jurors and is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court he shall do so recording the grounds of his opinion. Manifestly this section does not impose an obligation on the Judge to refer a case to the High Court except when the conditions set out in S. 307, *infra*, are satisfied. The disagreement referred to in this section is the same disagreement as impels the Judge to take action under S. 307, *infra*, & Pat. 344. See also S. 473. This section says that when the Judge does not think it necessary to express his disagreement with the verdict of the Jurors, he shall give a judgment accordingly. That shows, as indeed is obvious, that

It is not a necessary part of the function of the Judge to have an opinion of his own about mere questions of fact and to assert it. His power only arises when having an opinion contrary to that of the Jury he thinks it necessary for the ends of justice to submit the case to the High Court, 32 C.W.N. 673 at 676=47 C.L.J. 483 at 487. Once the verdict of the Jury is accepted by the Judge and the case is postponed for sentence only, it is not open to him to reconsider his order, any more than it would be for the Jury to reconsider their verdict once given and recorded, and refer the case to the High Court under S. 207, *infra*, 4 C.W.N. 683. Mere sex of the criminal is no ground for not passing a sentence appropriate in the case of a man, 16 Cr. L.J. 20=26 Ind. Cas. 324. The Judge is not entitled to pass a nominal sentence because he does not agree with the verdict of the Jury as to accused's guilt. By so doing he usurps the function of the Jury; he must pass an adequate sentence, Weir II, 37; 3 W.R. (Cr. L.J.) 16.

307. (1) If in any such case the Judge disagrees with the verdict of the jurors, or of a majority of the jurors, on all or any of the charges on which *any accused person* has been tried, and is clearly of opinion, that it is necessary for the ends of justice to submit the case *in respect of such accused person* to the High Court, he shall submit the case accordingly, recording the grounds of his opinion, and when the verdict is one of acquittal, stating the offence which he considers to have been committed, *and in such case, if the accused is further charged under the provisions of section 310, shall proceed to try him on such charge as if such verdict had been one of conviction.*

(2) Whenever the Judge submits a case under this section, he shall not record judgment of acquittal or of conviction on any of the charges on which *such* accused has been tried, but he may either remand *such* accused to custody or admit him to bail.

(3) In dealing with the case so submitted the High Court may exercise any of the powers which it may exercise on an appeal, and subject thereto it shall, after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the jury, acquit or convict *such* accused of any offence of which the jury could have convicted him upon the charge framed and placed before it; and, if it convicts him, may pass such sentence as might have been passed by the Court of Session.

Amendment.—By the new amendment it is made clear that when a Judge accepts the verdict of the Jury in respect of some of the accused but not of others, he needs only refer the case of the latter to the High Court. Power is also given to pass orders under S. 562, *infra*. If the Judge decides to make a reference to the High Court he is enabled, where there is a further charge, to complete the record by trying the further charge.

Scope and object of the section.—This section is intended to provide the way by which a mis-carriage of justice by a perverse verdict can be remedied by the High Court and the discretionary power should always be exercised when the Judge is of opinion that the verdict is not supported by the evidence inasmuch as a failure on his part to make the reference will result in the conviction of persons on evidence as to the sufficiency of which he is very doubtful, 13 M. 343. This section clearly gives to the Judge a discretion in referring a case to the High Court and it is only when he is clearly of opinion that it is necessary for the ends of justice to submit the case to the High Court that he shall so submit it. If he is not

the High Court should consider the evidence not so much with a view to form its own opinion on the facts but to see whether the verdict of the Jury was such as could not be come to by a reasonable man, 51 M. 956 (F.B.) *overruling* 45 M.L.J. 406=18 L.W. 432=1923 M.W.N. 695. See also 56 C. 132; 32 C.W.N. 783; 30 Cr. L.J. 570=116 Ind. Cas. 297. See also 50 A. 625 (F.B.). The High Court should not interfere with an unanimous verdict of the Jury unless it can say decidedly that the verdict is clearly wrong, 51 C. 347; 29 C.W.N. 842=26 Cr. L.J. 1298=89 Ind. Cas. 242 and with a verdict of acquittal, unless it is perverse and clearly and manifestly wrong, 46 A. 265. The functions of both Judge and Jury are cast upon the High Court and this differentiates its position from that of the Courts in England, 1 B. 10, *followed*, in 50 A. 625 (F.B.). The High Court on a reference under this section combines in itself the functions both of the Jury and of the Judge and is entitled to come to an independent finding of its own and is not bound to accept the verdict of the Jury. The whole case is open before the High Court for consideration, 30 Cr. L.J. 390=115 Ind. Cas. 229. It is more than doubtful whether the English authorities were present in the mind of the Indian Legislature when enacting the provisions in the Code specially adapted to India as to Jury trials, 15 B. 542. The High Court when acting under this section can exercise all the powers of an appellate Court, 23 C. 123; 23 C. 852; 50 A. 625; 30 Cr. L.J. 390=115 Ind. Cas. 229. The language used in this section is totally inappropriate and inconsistent with a limited power of the High Court in dealing with a reference under this section. Where there has been an unsatisfactory verdict by a Jury, it cannot be said that the High Court's power is restricted to a consideration of some question of law or some misapprehension of law, 26 A.L.J. 321 (F.B.) at 326; 50 A. 625 (F.B.), and the High Court found the verdict which is unsatisfactory to be wrong and set it aside, 84 C. 703 *following* 23 C.W.N. 876 & 38 C.L.J. 1=24 Cr. L.J. 897=75 Ind. Cas. 145. Considering the important changes introduced by the amendment in 1923 especially S. 449, *infra*, where it is laid down that notwithstanding the provisions of S. 418 or S. 423 (2), *infra*, or the Letters Patent of any of the High Courts an appeal may lie to the High Court on a matter of fact as well as a matter of law. Thus in a case tried under Chapter XXXIII of the Code the finding of the Jury on a question of fact is no longer final and it cannot therefore be safely said that the High Court will not interfere in a case referred under this section unless the verdict is shown to be perverse or unreasonable, 6 Lah. 93; 54 C. 708; 3 Luck. 456; 29 Cr. L.J. 432=108 Ind. Cas. 900; 29 Cr. L.J. 933=112 Ind. Cas. 103; 10 Bom. L.R. 632=8 Cr. L.J. 143; 2 C.L.J. 1; 20 W.R. (Cr.) 16; 19 W.R. (Cr.) 38. No trial can legally speaking be complete until the judgment and sentence are passed and the trial of a case referred by the Sessions Judge to the High Court remains open for the High Court to conclude and complete either by maintaining the verdict of the Jury and causing judgment in accordance with it or setting aside the verdict and entering a judgment in accordance therewith, 9 A. 420. There is no acquittal or conviction by the Sessions Judge in a case referred to under this section. It is for the High Court to acquit or convict the accused, 30 M. 134. In 1 B. 10; 1 C.L.R. 275; 15 C. 269; 29 C. 123; 54 C. 708; 20 W.R. (Cr.) 16; 19 W.R. (Cr.) 38; 3 Luck. 456; 10 Bom. L.R. 632=8 Cr. L.J. 143; 2 C.L.J. 1; 29 Cr. L.J. 432=103 Ind. Cas. 900; 29 Cr. L.J. 933=112 Ind. Cas. 103, the High Court interfered with the verdict of the Jury in most instances of acquittal by Jury on a reference under this section and found the accused guilty and passed sentence on them according to law. Where the Judges hearing a reference under this section differ in their opinion, the fact that the verdict of the Jury is assented to by one Judge is ordinarily sufficient to show that the case is not such a clear one as would justify an interference by a third Judge when the matter is placed before him under S. 429, *infra*, 32 C.W.N. 733.

Sub-section (1).—There are three things which appear clearly from the provisions of this section: (1) It is entirely within the discretion of the Judge as to whether he would make a reference or not, (2) a reference is called only when the Judge is clearly of opinion that it is necessary for the ends of justice to submit a case to the High Court, (3) the Judge must disagree with the verdict of the Jury or of a majority of Jurors, 6 Pat. 817; 8 Pat. 344. See also 50 C. 653 at 664; 32 C.W.N. 673=47 C.L.J. 433 at 437. If the Judge is not clearly of opinion that the conviction is wrong as to make it necessary to submit the case to the

clearly of that opinion his failure to submit a case is not a subject of interference by the High Court on appeal, 5 Pat. 817; 50 C. 658 at 663. It is not the function of the Sessions Judge to have an opinion of his own on questions of fact and to assert it by making a reference under this section differing from the verdict of the Jury. His power only arises when he thinks that the verdict is clearly unsustainable and the ends of justice do require a reference to the High Court. This power of reference should be exercised with due regard to the fact that the constitutional tribunal to decide questions of fact is the jury and not the Judge, 32 C.W.N. 673=47 Cr. L.J. 483 at 487; 29 Cr. L.J. 819=111 Ind. Cas. 323. The discretion should always be exercised where the Judge thinks that the verdict is not supported by the evidence. It is no longer the law that before making a reference the Judge must be satisfied that the verdict is perverse. It is sufficient if he is clearly of opinion that the ends of justice require a reference, 41 C.L.J. 329=25 Cr. L.J. 1006=87 Ind. Cas. 606; 27 Cr. L.J. 398=93 Ind. Cas. 46; 52 C. 937. It is open to a Judge to disagree with the Jury and it is his duty to do so if he is clearly of opinion that such a course is necessary for the ends of justice; but this does not require that he should make reflections upon their conduct which are not supported by evidence on record. Such reflections are unfair as they are made behind the back of the Jurors, without their knowledge and after they have finished their labours especially as they are labouring under a disadvantage of having no opportunity to state the grounds of their opinion. These reflections are unfair to the Judge himself as they detract from the value of his opinion. They are unfair to the accused who are entitled to have due weight attached by the High Court to the opinion of the Jury as expressed without any aspersions against them. They are unfair to the High Court, whereon the duty is imposed to consider the entire evidence and acquit or convict the accused after giving due weight to the opinions of the Judge and Jury. Such opinion of the Judge is his opinion on the merits of the case on the evidence placed before him, and does not include his speculation as to what might or might not have influenced the Jurors, 51 C. 418. The point of view from which references under this section should be considered has been the subject of numerous judicial decisions. They seemed to vary from the extreme view that the High Court should be very reluctant to interfere with the verdict of the Jury to the view that the High Court in dealing with these references is to be guided by the plain words of the Code. It is upon far firmer ground if the strict words of the Code are adhered to and not to try to interpret the Code in the light of the practice in other countries where the law and conditions are different. Here the Code is clearly explicit. The High Court shall after considering the entire evidence and after giving due weight to the opinion of the Judge and of the Jury acquit or convict the accused. The Code would not seem to put the opinion of the Jury on any higher plane than the opinion of the Judge. Both should be given due weight. There is no suggestion that more weight should be given to the opinions of the Jury than that of the Judge. As a general rule one would be inclined to attach more weight to the opinion of the Judge who equally with the Jury had heard the witnesses and seen their demeanour. He has been trained to weigh and appreciate evidence and further he must give reasons for his opinion. The Jury a body of laymen unaccustomed to weigh and appreciate evidence give no reasons for their opinion. Obviously an opinion supported by reasons is likely to carry more weight than an opinion expressed unsupported by reasons, 53 C. 877 at 885-886. In dealing with a case referred to the High Court under this section, the High Court is first called upon to consider the entire evidence and then give due weight to the opinion of the Sessions Judge and that of the Jury and then acquit or convict the accused. The opinion of the Jury is the verdict of the Jury. The measure of relative weight to be attached to these two factors, the opinion of the Judge and that of the Jury cannot be crystallised into an inflexible formula. The answer must depend upon the circumstances of each case. When the Judge is not unanimous the weight to be attached to it necessarily diminishes. Where the corresponding is the verdict as to some accused and not to others, his opinion is weakened in a reference under this measure, 51 C. 347; 43 M.L.J. 406=13 L.W. 492=(1923) M.W.N. 693. In a unreasonable case, this section it is necessary to show that on the evidence the verdict is plainly and heard the witnesses, until that is shown, it is not possible for the High Court which had not seen and heard the witnesses to set aside the verdict 32 C.W.N. 891. The High Court should not interfere with the verdict unless it is such that no reasonable man could have come to and

the High Court should consider the evidence not so much with a view to form its own opinion on the facts but to see whether the verdict of the Jury was such as could not be come to by a reasonable man, 51 M. 956 (F.B.) *overruling* 45 M.L.J. 406=18 L.W. 432=1923 M.W.N. 695. See also 56 C. 132; 32 C.W.N. 783; 30 Cr. L.J. 570=116 Ind. Cas. 297. See also 50 A. 625 (F.B.). The High Court should not interfere with an unanimous verdict of the Jury unless it can say decidedly that the verdict is clearly wrong, 51 C. 317; 29 C.W.N. 852=26 Cr. L.J. 1293=89 Ind. Cas. 242 and with a verdict of acquittal, unless it is perverse and clearly and manifestly wrong, 46 A. 285. The functions of both Judge and Jury are cast upon the High Court and this differentiates its position from that of the Courts in England, 1 B. 10, *followed*, in 50 A. 625 (F.B.). The High Court on a reference under this section combines in itself the functions both of the Jury and of the Judge and is entitled to come to an independent finding of its own and is not bound to accept the verdict of the Jury. The whole case is open before the High Court for consideration, 30 Cr. L.J. 390=115 Ind. Cas. 229. It is more than doubtful whether the English authorities were present in the mind of the Indian Legislature when enacting the provisions in the Code specially adapted to India as to Jury trials, 15 B. 542. The High Court when acting under this section can exercise all the powers of an appellate Court, 23 C. 128; 23 C. 852; 50 A. 625; 30 Cr. L.J. 390=115 Ind. Cas. 229. The language used in this section is totally inappropriate and inconsistent with a limited power of the High Court in dealing with a reference under this section. Where there has been an unsatisfactory verdict by a Jury, it cannot be said that the High Court's power is restricted to a consideration of some question of law or some misapprehension of law, 26 A.L.J. 321 (F.B.) at 326; 50 A. 625 (F.B.), and the High Court found the verdict which is unsatisfactory to be wrong and set it aside, 54 C. 703 *following* 29 C.W.N. 876 & 38 C.L.J. 1=24 Cr. L.J. 897=73 Ind. Cas. 133. Considering the important changes introduced by the amendment in 1923 especially S. 449, *infra*, where it is laid down that notwithstanding the provisions of S. 418 or S. 423 (2), *infra*, or the Letters Patent of any of the High Courts an appeal may lie to the High Court on a matter of fact as well as a matter of law. Thus in a case tried under Chapter XXXIII of the Code the finding of the Jury on a question of fact is no longer final and it cannot therefore be safely said that the High Court will not interfere in a case referred under this section unless the verdict is shown to be perverse or unreasonable, 6 Lah. 93; 54 C. 703; 3 Luck. 456; 29 Cr. L.J. 452=103 Ind. Cas. 900; 29 Cr. L.J. 933=112 Ind. Cas. 103; 10 Bom. L.R. 632=8 Cr. L.J. 143; 2 C.L.J. 1; 20 W.R. (Cr.) 16; 19 W.R. (Cr.) 39. No trial can legally speaking be complete until the judgment and sentence are passed and the trial of a case referred by the Sessions Judge to the High Court remains open for the High Court to conclude and complete either by maintaining the verdict of the Jury and causing judgment in accordance with it or setting aside the verdict and entering a judgment in accordance therewith, 9 A. 420. There is no acquittal or conviction by the Sessions Judge in a case referred to under this section. It is for the High Court to acquit or convict the accused, 30 M. 134. In 1 B. 10; 1 C.L.R. 275; 15 C. 259; 23 C. 123; 54 C. 703; 20 W.R. (Cr.) 16; 19 W.R. (Cr.) 39; 3 Luck. 456; 10 Bom. L.R. 632=8 Cr. L.J. 143; 2 C.L.J. 1; 29 Cr. L.J. 452=103 Ind. Cas. 900; 29 Cr. L.J. 933=112 Ind. Cas. 103, the High Court interfered with the verdict of the Jury in most instances of acquittal by Jury on a reference under this section and found the accused guilty and passed sentence on them according to law. Where the Judges hearing a reference under this section differ in their opinion, the fact that the verdict of the Jury is assented to by one Judge is ordinarily sufficient to show that the case is not such a clear one as would justify an interference by a third Judge when the matter is placed before him under S. 429, *infra*, 32 C.W.N. 733.

Sub section (1).—There are three things which appear clearly from the provisions of this section: (1) It is entirely within the discretion of the Judge as to whether or not he will make a reference or not, (2) a reference is called only when the Judge is clearly of opinion that it is necessary for the ends of justice to submit a case to the High Court. It is not necessary that the Judge must disagree with the verdict of the Jury or of a majority of Judges. See also 50 C. 653 at 664; 32 C.W.N. 673=47 C.L.J. 433 at 434. The Judge is not bound of opinion that the conviction is wrong as to make it necessary to refer the case.

High Court then the position is described in S. 306, *supra*. The words are 'If the Judge does not think it necessary,' to express disagreement. His opinion will be irrelevant and he will be well-advised to keep it for himself. Learned Judges do not seem to appreciate that they are given an overriding power not that they pose as critics but in order that miscarriage of justice may not take place. If the Judge really disagrees with the verdict i.e., he has a settled and considered opinion against the guilt of the accused it is his clear duty in the interests of justice to make a reference. If the Judge does not think it necessary, his disagreement cannot be a reality at all. To administer properly the provisions of this and S. 306, *supra*, practical good sense is required not only as regards what is to be done but also as regards what is to be said and as a matter of practical sense acquittals and convictions raise for the present purpose considerations which, while covered equally by the phrase 'the ends of justice' are never quite the same, 33 C.W.N. 71. It is not in every case of doubt nor in every case in which a view different from that of the Jury can be entertained on the evidence that a reference under this section is to be made to the High Court, but the verdict of the Jury should be manifestly wrong before such a reference is made, 8 B. 731; 9 M.L.T. 291; 9 M.L.T. 103=12 Cr. L.J. 48=9 Ind. Cas. 288. It is not sufficient to show that another Jury might have formed a different opinion but what has to be shown is that no reasonable body of men would have returned the verdict complained of, 27 Cr. L.J. 1031 at 1039=97 Ind. Cas. 17 following 25 Cr.L.J. 856=86 Ind. Cas. 712. See 51 M. 956 (F.B.); 56 C. 132; 50 A. 625 (F.B.) If the High Court is to interfere in every case of doubt, in every case in which it may with propriety be said that the evidence would have warranted a different verdict, then a real trial by Jury is absolutely at an end, and that the verdict of the Jury has no more weight than the opinion of Assessors, 41 C. 521 at 631; 50 C. 41; 28 Cr. L.J. 211=83 Ind. Cas. 995. Great weight undoubtedly attaches to the unanimous opinion of the Jury on question of fact, 27 Cr. L.J. 1341=98 Ind. Cas. 413; 32 C.W.N. 673=47 C.L.J. 483 at 487 and the High Court will not legally interfere with findings of fact arrived by the Jury, 19 W.R. (Cr.) 43 but only in exceptional cases, 13 B.L.R. (Appx.) 19. If the High Court is not entitled to interfere with the verdict of the Jury on a reference under this section unless the High Court was of opinion that it was not possible for the Jury to take the view that they did take, then the High Court as a Court of reference will cease to function, its duty being confined only to reject references. Where the evidence is of such a nature that a Jury as reasonable men can possibly take the view they have taken the High Court should not interfere. Human opinion honestly held may differ in all questions. But the test to be applied with regard to the honesty of such opinion is whether any reasonable man on the materials before him can hold it. The test therefore that has to be applied in estimating the verdict of the Jury is whether the opinion is such as could on the particular facts and evidence of the case have been held by reasonable men however much the Judge may differ from that view and in the particular case the High Court set aside the verdict of not guilty as wrong, 54 C. 708 following 28 C.W.N. 876=25 Cr. L.J. 1231=82 Ind. Cas. 336; 38 C.L.J. 1=24 Cr. L.J. 697=75 Ind. Cas. 133. See also 53 C. 879 at 885 86. The Madras High Court also in 51 M. 956 (F.B.) took the same view and overruling the earlier decision in 43 M.L.J. 496=18 L.W. 482=1913 M.W.N. 695 held that in a reference under this section the High Court was not bound to decide for itself whether the evidence on which the Jury based their verdict was sufficient and the High Court should not interfere with the verdict unless it was such that no reasonable men could have come to that decision. After the decision of the Full Bench the case came back to the Division Bench which held that the High Court should consider the evidence not so much as to form its own opinion on the facts but to see whether the verdict of the Jury was such as could not have been come to by a reasonable man. The Allahabad High Court in 50 A. 625 (F.B.) has taken a different view and considering the provisions of this, S. 423 S. 426 *infra* has held that the High Court can resort to all the powers of an appellate Court and may if it thinks fit shall proceed after considering the entire evidence and after giving due weight to the opinions of the Judge and Jury acquit or convict the accused. See also 32 C.W.N. 781 29 Cr. L.J. 432=108 Ind. Cas. 900; 29 Cr. L.J. 983=112 Ind. Cas. 103; 3 Luck 456; 29 Cr. L.J. 1035 at 1039=112 Ind. Cas. 353. The conditions laid down in this section are not merely that the Judge disagrees with the verdict of the Jury but must also clearly be of opinion that it is necessary for the

ends of justice to make reference. The Judge is either clearly of opinion or not and according as he acts in that matter, the consequences must be. It is quite impossible to direct the learned Judge to be clearly of a certain opinion and the language used by the statute shows that the Judge's view on that point is to be final for that purpose and the High Court cannot enquire into the question whether or not the learned Judge ought to have been of opinion that it was necessary for the ends of justice to submit the case and the High Court cannot direct the learned Judge to submit a case nor can it act as though he has, in fact, submitted the case, 47 C.L.J. 483=32 C.W.N. 673. In order to justify a reference, it is not necessary that the Judge should be able to describe the verdict of the Jury as perverse. The language of the section is reasonably plain and should be adhered to. No translation or substitution of other phrase is necessary. Where in the opinion of the Judge the verdict of the majority of the Jury is not unwarranted by the evidence he is quite within his rights in not making a reference, 27 Cr. L.J. 1402=98 Ind. Cas. 714. Where a Judge accepted a verdict of guilty remarking that if he had been a Jury then he would have been in favour of a verdict of not guilty and failed to make a reference under this section, it was held that the Judge did not act illegally and that the High Court had no power to interfere with the action of the Judge and direct him to make a reference, 23 Cr. L.J. 819=111 Ind. Cas. 323. A reference could only be made when the Judge is clearly of opinion that he should do so for the ends of justice, 25 C. 555; 50 C. 658. The discretionary power to refer the case to the High Court should always be exercised when the Judge thinks that the verdict is not supported by the evidence. It is the only way by which a miscarriage of justice owing to a perverse verdict can be remedied as there is no appeal on facts, 13 M. 343; 14 M. 36; 4 M.L.T. 493; 10 C. 1029. Where several accused were tried together before a Judge and Jury for the same offence and the evidence was the same against all and the Sessions Judge summed up in favour of the defence, but the Jury returned a verdict of "guilty" against five of the accused and "not guilty" against one and the Judge agreeing with the Jury acquitted the one and convicted the rest, held that the Judge should certainly have referred the verdict as flagrantly perverse, 23 L.W. 90. It is not always true that a Judge having accepted the Jury's verdict on graver charges cannot make a reference with a view to have some of the accused convicted on a minor charge, 37 C.L.J. 34; 42 C. 789. If the Jury has returned an erroneous verdict owing to misapprehension of law, the mistake can be corrected only by the Judge making a reference under this section, 23 B. 412. It is necessary when the charge to the Jury is meagre that the Judge should state in his reference the evidence for the prosecution and the defence. He should also state the facts which in his opinion are proved upon the evidence recorded and the conclusions to which those facts lead him. The High Court ought to have the opinion of the Judge upon the evidence, before it can deal with the case, 6 Bom. L.R. 599; 10 Bom. L.R. 173; 7 C.W.N. 345. Where the Judge in his reference merely stated that the verdict was against the weight of evidence and expressed no other opinion, it was held he ought to have set out portions of the evidence or of facts disclosed by the evidence on which in his opinion, the accused should have been convicted, 7 C.W.N. 345. The referring order should certainly be in the nature of a judgment which would give the High Court a proper summary of the evidence for the prosecution and the reasons of the Judge for holding it to be credible or incredible. The charge to the Jury obviously cannot supply the Court with the necessary information as to the evidence and the opinion of the Judge in regard thereto. In directing a Jury it is, of course open, to the Judge to state his opinion as to the value of that evidence but when he disagrees with the verdict of the Jury, it is obviously desirable that he should state his reasons much more fully 50 A. 625 (F.B.) By a reference the whole case is opened out and the functions of both Judge and Jury are cast upon the High Court and this differentiates the position very widely from that of the Courts in England, 1 B. 10 followed in 50 A. 625 (F.B.). A Judge in his letter of reference should state the exact offence of which in his opinion the accused should have been convicted, 3 C. 623; 20 W. R. (Cr) 16; under this section only the Judge who tried the case can refer and not his successor, 2 C. L. J. 43 but a reference is in order even if made by one who has vacated office at the date of the reference, 2 C. L. J. 43. The words 'recording the grounds of his opinion' mean that the Judge making the reference should, in effect, show reasons for

convicting or acquitting the accused in as clear a manner as he could have done if the case had not been a Jury case and he had to write a judgment convicting or acquitting the accused. The High Court has not got the witnesses before it and it is impossible in many cases for the High Court to convict or acquit on the evidence which it has not heard unless it is assisted in examining that evidence by a judgment written by the Judge who heard that evidence. In referring a case the Judge takes on himself the responsibility of requiring the High Court 'to consider the entire evidence' as stated in sub-section (3) and if the Judge fails to write, what is in effect a judgment, there is a risk that he may too lightly put the High Court to the trouble of considering the entire evidence, 50 A. 540 at 542. The letter of reference must clearly state what witnesses the Judge believes, as he had an opportunity to see and hear the witnesses, 10 Bom. L. R. 173. Where the verdict of the Jury is brief and the Judge disagrees with it, he should before making a reference put such questions as may bring out their meaning more precisely, 16 Cr. L.J. 587=30 Ind. Cas. 139. A Judge cannot examine witnesses after the Jury had left the Court and in the absence of the accused to determine whether he should make a reference, 7 Bom. L. R. 979.

Sub-section (2).—Pending a reference to the High Court, there is no conviction or acquittal in the Sessions Court and the law before the amendment was that it was only after a conviction by the High Court that the accused can be called upon to plead to a previous conviction, and the Sessions Judge ought not to call upon the accused to plead, pending reference to the High Court, 30 M. 134 but now S. 310, *infra*, enables a Judge when the Jury or a majority of Jury gives a verdict of not guilty, in his discretion to proceed to try the accused on the charge of the previous conviction and, if he does so, to submit his finding along with the reference, and thus avoid the round-about procedure. A reference under this section is not invalid if made by an officer who held the trial, but who at the date of the reference has ceased to be a Judge 2 C.L.J. 43. The Judge who may make a reference under this section must be one who held the trial and heard the evidence, and not the officer who succeeds him as Judge. That this is a reasonable construction of the section seems to be clear from the procedure laid down in sub-section (3) which provides that the High Court is to give weight to the opinion of the Sessions Judge and the Jury, 2 C.L.J. 43 at 49. The new amendment is in accordance with 42 C. 789, where it was held that this sub-section contemplates a reference in the case of those persons in respect of whom the Judge declines to accept the verdict.

Sub-section (3).—This sub-section finally prescribes the function to be exercised by the High Court in dealing with a reference under this section, and provides the procedure to be followed by the High Court. The language of the section will be entirely meaningless if it is not intended to give to the High Court not merely a power but a direction to re-consider the entire evidence and to arrive at an independent conclusion of its own on the question of fact as well as of law in the interests of justice, 50 A. 625 (F.B.) ; 55 C. 879 at 885-86 ; 29 C. 123 at 133 but see 51 M. 956 (F.B.) and 54 C. 403 ; 48 C.L.J. 541 at 543, which took the view that where the Jury as reasonable men have taken a view of the evidence and come to a conclusion, the High Court should not go into the evidence and interfere with the verdict on a consideration of the evidence in the case. The High Court can only consider the evidence to see whether the verdict of the Jury was such as could be arrived at by reasonable men but see 30 Cr. L. J. 310=114 Ind. Cas. 433 which following 55 C. 879 hold that the Code would not seem to put the opinion of the Jury on any higher plane than the opinion of the Judge, both should be given due weight by the High Court in deciding the reference. This section lays down that in dealing with a case submitted thereunder, the High Court may exercise any of the powers which it may exercise on an appeal and that, subject thereto, it shall after considering the entire evidence and after giving due weight to the opinions of the Sessions Judge and the Jury, acquit or convict the accused of any offence of which the Jury could have convicted him upon the charge framed and placed before it. The duty of the High Court accordingly is to consider the evidence on the record as it stands, to weigh the respective opinions of the Sessions Judge and the Jury and then to form its

own conclusion. The verdict of the Jury is first in the field and S. 299. *supra*, makes it primarily the function of the Jury to decide which view of the facts is true and then return a verdict and to decide all questions which according to law are to be deemed questions of fact. On general principle, therefore, it appears that, when the process which this section directs has been carried out and the opinions of the Judge and Jury have been measured, the verdict of the Jury should stand unless the evidence and opinion of the Judge shows clearly that it is wrong and that in the interests of justice it ought to be reversed. But neither the Sessions Judge, nor the High Court would interfere with the verdict of the Jury unless there are strong reasons for doing so, 51 C. 169; 38 C.L.J. 1=24 Cr. L.J. 897=75 Ind. Cas. 143=*referred* in 23 Cr. L.J. 903=105 Ind. Cas. 231. A verdict of a Jury has more weight than the opinion of the Assessors and should not be set aside unless no sensible man could have arrived at that verdict particularly in the case of a verdict of acquittal, 29 Cr. L.J. 1033 at 1039=112 Ind. Cas. 363. This section requires the High Court to give due weight to the opinions of the Sessions Judge and of the Jury, after considering the entire evidence and then to acquit or convict the accused. It does not require the High Court to attempt to reconstruct the verdict of the Jury. In giving due weight to the opinion of the Jury the High Court should always hesitate to reverse an unanimous verdict unless it holds it to be unreasonable. 40 C.L.J. 135 at 142; 25 Cr. L.J. 785=81 Ind. Cas. 305. Ordinarily the verdict of the Jury to whom the decision of the case was primarily entrusted by law is entitled to very great weight and their verdict is not liable to displacement upon the mere ground that on a consideration of all the evidence, a Judge would have arrived at a certain conclusion different from that arrived at by the Jury. But where the verdict is perverse and patently erroneous and if it is established that it amounts to a gross mis-carriage of justice the High Court is entitled to draw its conclusions from the evidence as to the guilt of the accused. Where the verdict did not proceed upon a consideration of the evidence for the prosecution which was all one way and absolutely free from taint, the verdict was clearly perverse and justifies a reference under this section by the Judge differing from the verdict, 27 A.L.J. 509 *following* 2 A.L.J. 475; From the mere fact that the Jury are unable to give reasons for returning a verdict of 'not guilty' beyond saying that they give the benefit of doubt to the accused, the High Court cannot hold that the Jury had no adequate reasons for bringing the verdict of "not guilty." Even trained intellects often find it difficult to formulate and put before the Courts reasons for the opinion which they hold or which they wish to propound, 41 C.L.J. 35=26 Cr. L.J. 805=86 Ind. Cas. 453. In dealing with a case referred under this section the High Court is first called on to consider the entire evidence and then give due weight to the opinions of the Sessions Judge and that of the Jury. The opinion of the Judge is his opinion on the merits of the case and does not include speculations as to what external considerations if any which might have affected the judgment of the Jury. The opinion of the Jury is the verdict of the Jury. The measure of relative weight to be attached to these two factors cannot be crystallised into an inflexible formula. When the verdict of the Jury is not unanimous the weight to be attached to it necessarily diminishes. When the Judge accepts the verdict as to some accused and not to others his opinion is weakened in a corresponding measure, 51 C. 547 and 418; 45 M.L.J. 406=18 L.W. 432=(1923) M.W.N. 695. The duty of the High Court under this section does not end by merely finding that the defence story is one that cannot be accepted. It has to find whether on the evidence such as appears on the record it was possible for the Jury to take the view which they have taken in the case with reference to the accused whose case has been referred to the High Court. That is to say whether the Jury were entitled to discount the evidence which has been given by the prosecution witnesses because of the fact that the witnesses were highly interested. 38 C.L.J. 1. The view taken in 43 M.L.J. 406 to the effect that on a reference to the High Court, the whole case was reopened by the reference and the High Court was entitled to decide for itself whether the evidence was sufficient to justify the verdict was doubted in Ref. No. 22 and 1924 of the Calcutta High Court also in 54 C. 708 and 51 C. 344. This necessitated a reference to the Full Bench. In 51 M. 956 (F.B.) it was held that the High Court should not interfere with the verdict of the Jury unless it was such, that no reasonable man could have come, to and the decision in 43 M.L.J. 406 was *overruled*. After the Full Bench decision in 51 M. 956

(F.B.) the case came before the division Bench which held that the High Court should consider the evidence not so much with a view to influencing its own opinion on the facts but to see whether the verdict was such as could not be come to by a reasonable man. So far as Madras is concerned the point is settled now. The Allahabad High Court in 50 A. 625 (F.B.) has taken a different view. See also 56 C. 132. In dealing with a case under this section the High Court which had not the opportunity of seeing the witnesses must act with great caution and will not be justified in interfering with the verdict of the Jury because in its opinion the evidence would have warranted a different verdict. "The most careful note must often fail to convey the evidence fully in some of its most important elements. It cannot give the look or manner of the witness, his hesitation, his doubts, his variation of language, his confidence or precipitancy, his calmness or consideration. It cannot give the manner of the prisoner, where that has an important bearing upon the statement of anything at a particular moment. It is in short, or it may be the dead body of the evidence without its spirit which is supplied when given openly and orally by the ear and eye of those who receive it," 51 C. 271 at 278. In a reference under this section it is not for the High Court to Judge of the case on the merits. Although the case is one of great suspicion, the High Court has to consider whether the verdict of the Jury should be set aside, 38 C.L.J. 135. The High Court should not interfere with a unanimous verdict of the Jury unless the verdict of guilty is clearly and manifestly wrong, 51 C 347; 27 Cr. L.J. 773=95 Ind. Cas 309; 29 Cr. L.J. 1035=112 Ind. Cas. 363. The High Court should not take upon itself the responsibility of deciding differently from those to whom the decision was primarily entrusted by the law, 10 B. 437; 20 B 215; 15 B. 452 (F.B.); 11 C. 85; 2 C.L.R. 518; 13 B.L.R. (App.) 19; 14 B.L.R. (App.) 1 and 13; 19 W.R. (Cr.) 43; 25 W.R. (Cr) 25; 3 C. 189; 48 C.L.J. 541; 51 M. 956 (F.B.) and any undue interference by the High Court may tend to diminish the sense of responsibility which is desirable that a Jury should cherish, 1 B 10, see also 13 B.L.R.(Ap.) 19=20 W.R. (Cr) 73; but it was held in 50 A. 625 (F.B.) that it was open to the High Court to revise the verdict of the Jury even though there had been no misdirection to the Jury or a misunderstanding by them of the law as laid by the Judge, relying on, 21 C. 935; 29 C. 128; 1 B. 10; 29 M. 91; 6 Pat. L.J. 264 and 46 A. 265. See also 55 C 877 and 54 C 708. But a verdict of acquittal should be perverse and clearly and manifestly wrong for the High Court to interfere, 41 C 632; 23 Cr. L.J. 758=31 Ind. Cas. 216; 46 A. 283; 16 Cr. L.J. 442=29 Ind. Cas 72. When the High Court is of opinion that the Jury's verdict is perverse it is entitled to substitute its own opinion on the evidence for the opinion of the Jury, 26 Cr. L.J. 211=83 Ind. Cas 935. The High Court on a reference under this section is reluctant to interfere with a unanimous verdict of Jury and if that verdict is not unreasonable and can on the evidence, be supported it should accept it even though it may not wholly agree with it, 30 C.L.J. 503. The High Court can interfere in cases of acquittal by Jury where the acquittal is patently bad and perverse, 29 Cr. L.J. 452=108 Ind. Cas. 900 29 Cr. L.J. 983=112 Ind. Cas. 103; 3 Luck 456; 54 C. 708 following 28 C.W.N. 876; 38 C.L.J. 1. The High Court before it can refuse to accept the verdict of the Jury in a case under this section has got to find that the verdict is unreasonable. 52 C. 987=48 C.L.J. 541 at 545. The effect of reference under this section is to open up the whole case and to render it the duty of the High Court to consider whether the evidence against the accused is sufficient to justify a conviction for all or any of the offences charged inclusive of the offences of which the Jury have acquitted the accused, 36 M 585 at 587, 50 A. 625 (F.B.) The High Court is not confined to the grounds of difference between the Judge and the Jury, but the whole case is thrown open to the Court and it must be decided after giving due weight to the opinion of the Judge and Jury, 10 Bom. L.R. 632=8 Cr. L.J. 143; 38 C. 629; 29 C. 128; 9 C.L.J. 432; 29 M. 91. By the expression "*opinion of the Jury*" in this section is meant the conclusion of the Jury, (i.e., the verdict and not the reasons on which that conclusion is based, 18 C.W.N. 613=18 C.L.J. 522=16 Cr. L.J. 31=22 Ind. Cas. 175; (1922) Pat. 218=23 Cr. L.J. 421=67 Ind. Cas. 581. There is nothing in this section warranting the interpretation that the term "*opinion*" in it means anything other than the respective conclusions of the Judge and Jury. In dealing with a reference, the High Court must consider the entire evidence and give due weight to the opinions of the Judge and Jury including the opinion of the minority of the Jury when the verdict is divided, 38 C. 629; 17 C.W.N. 1077=14 Cr. L.J. 558=21 Ind. Cas.

155; 16 Cr. L.J. 440=29 Ind. Cas. 72; 37 C.L.J. 30 at 32; 23 Cr. L.J. 244=66 Ind. Cas. 180 15 C. 269; Ratanlal 440. Without considering the entire evidence the High Court on a reference under this section could not be in a position to give due weight 'to the opinion of the Sessions Judge and of the Jury, 29 C. 128 at 133; 50 A. 625 (F.B.). Before the High Court can substitute its opinion to that arrived at by the majority of the Jury, it must be able to say in the legal sense of the expression that the Jury's verdict is against the weight of evidence, that is to say, it is not such a verdict as reasonable men properly instructed could have arrived at, 43 C.L.J. 541 at 545; 54 C. 708; 55 C. 879; 51 M. 956 (F.B.). There is no provision to ascertain the opinion of the Jury, and a reference to the High Court when a Judge differs from the Jury will not be vitiated on account of its not containing the opinion of the Jurors, 18 C.W.N. 615. Apart from their verdict, the opinion of the Jury in this subsection is the conclusion of the Jury, and not the reasons on which that conclusion is based. In a reference under this section although it may be expedient to have before the Court the reasons of the Jury for the view taken by them when they have been given, but the circumstance that no such reasons have been ascertained does not warrant the High Court to decline to go into the evidence and arrive at its own judgment after giving due weight to the views taken by the Judge and Jury as to the guilt or innocence of the accused, 29 M. 91 (F.B.); 25 Cr. L.J. 145=76 Ind. Cas. 289; 41 C. 662; 20 Cr. L.J. 20=43 Ind. Cas. 500; 55 Ind. Cas. 282 and 29. The Court is also bound to consider the entire evidence and give weight to the opinion of the Sessions Judge and Jury. Failure on the part of the Judge to record the reasons of the Jury for their verdict enhances the responsibility of the High Court and requires it to go into the evidence more carefully, 6 Pat. L.J. 264 at 267. See 26 Cr. L.J. 856=85 Ind. Cas. 712, where it was held following 21 Cr. L.J. 829=58 Ind. Cas. 629, that it was not competent to the Sessions Judge after a clear verdict was returned by the Jury to ask them for their reasons, and the view expressed in 6 Pat. L.J. 264 and 23 Cr. L.J. 421=67 Ind. Cas. 581, to the contrary are disapproved. It is open to a Judge when he disagrees with a verdict and intends to make a reference to the High Court to ask the Jury the reasons for their verdict and he should record the same for the information and guidance of the High Court, 27 Cr. L.J. 773=95 Ind. Cas. 309 where 36 C. 629, Welr II, 389 are followed. See also 29 Cr. L.J. 963=112 Ind. Cas. 51. With regard to the opinion of the Jury most of the reasons given by the foreman may not commend themselves to the High Court or may not be very convincing and such reasons need not necessarily be taken as constituting all the grounds which the Jury may have had for their verdict. It is well-known that even trained minds find it difficult when asked off-hand to formulate all the grounds in support of the opinion they have formed. What the High Court has got to find, before it can refuse to accept the verdict, is that it is unreasonable, 52 C. 987. When a reference is made of the whole case under this section, where some of the offences are tried by the Jury and the others tried with the aid of Assessors, by the Judge differing from the verdict of the Jury and the opinion expressed by the Jurors as Assessors on the Assessor charges, the High Court while accepting the reference as to the verdict of the Jury returned the case to the Sessions Judge so far as the Assessor offences were concerned remarking that the Judge ought not to have joined them in the reference, 8 Bom. L.R. 599=4 Cr. L.J. 192; 9 Bom. L.R. 1057. See also 42 C. 789 but see 21 C.W.N. 435, which suggests a different procedure. When a reference is made to the High Court under this section, it has all the powers of an appellate Court and should form its own opinion, after considering the entire evidence, giving due weight to the opinion of the Judge and the Jury, 15 Cr. L.J. 513=24 Ind. Cas. 601; 29 C. 128; 9 C.L.J. 432=10 Cr. L.J. 57=2 Ind. Cas. 593. When a reference is made to the High Court the language of the Code does not justify any undue preference being given to the opinion of the Jury over that of the Judge. The High Court has to weigh both the opinions and consider the entire evidence on record just as it would do in any Criminal matter coming before it for decision, 23 Cr. L.J. 785=81 Ind. Cas. 305. The High Court is empowered on a reference under this section to convict the accused of an offence not triable by Jury but only by Assessors, on a consideration of the evidence and giving due weight to the opinions of the Judge and Jury, 37 M. 236, where 22 M. 15; 24 M. 641, and the view of *Bhashyam Ayyangar, J.*, in 26 M. 243 are followed. The power of the High Court under this section is not limited to interference on

(F.B.) the case came before the division Bench which held that the High Court should consider the evidence not so much with a view to influencing its own opinion on the facts but to see whether the verdict was such as could not be come to by a reasonable man. So far as Madras is concerned the point is settled now. The Allahabad High Court in 50 A. 625 (F.B.) has taken a different view. See also 56 C. 132. In dealing with a case under this section the High Court which had not the opportunity of seeing the witnesses must act with great caution and will not be justified in interfering with the verdict of the Jury because in its opinion the evidence would have warranted a different verdict. "The most careful note must often fail to convey the evidence fully in some of its most important elements. It cannot give the look or manner of the witness, his hesitation, his doubts, his variation of language, his confidence or precipitancy, his calmness or consideration. It cannot give the manner of the prisoner, where that has an important bearing upon the statement of anything at a particular moment. It is in short, or it may be the dead body of the evidence without its spirit which is supplied when given openly and orally by the ear and eye of those who receive it," 51 C. 271 at 278. In a reference under this section it is not for the High Court to Judge of the case on the merits. Although the case is one of great suspicion, the High Court has to consider whether the verdict of the Jury should be set aside, 33 C.L.J. 155. The High Court should not interfere with a unanimous verdict of the Jury unless the verdict of guilty is clearly and manifestly wrong, 51 C. 347; 27 Cr. L.J. 773=95 Ind. Cas. 309; 29 Cr. L.J. 1035=112 Ind. Cas. 363. The High Court should not take upon itself the responsibility of deciding differently from those to whom the decision was primarily entrusted by the law, 10 B. 437; 20 B. 215; 15 B. 452 (F.B.), 11 C. 85; 2 C.L.R. 518; 13 B.L.R. (App.) 19; 14 B.L.R. (App.) 1 and 13; 19 W.R. (Cr.) 45; 25 W.R. (Cr.) 25; 3 C. 189; 48 C.L.J. 541; 51 M. 956 (F.B.) and any undue interference by the High Court may tend to diminish the sense of responsibility which is desirable that a Jury should cherish, 1 B. 10, see also 13 B.L.R. (Ap.) 19=20 W.R. (Cr.) 73; but it was held in 50 A. 625 (F.B.) that it was open to the High Court to revise the verdict of the Jury even though there had been no misdirection to the Jury or a misunderstanding by them of the law as laid by the Judge, relying on, 21 C. 955; 29 C. 128; 1 B. 10; 29 M. 91; 6 Pat. L.J. 264 and 46 A. 265. See also 55 C. 877 and 54 C. 708. But a verdict of acquittal should be perverse and clearly and manifestly wrong for the High Court to interfere, 41 C. 652; 23 Cr. L.J. 752=31 Ind. Cas. 216; 46 A. 263; 16 Cr. L.J. 443=29 Ind. Cas. 72. When the High Court is of opinion that the Jury's verdict is perverse it is entitled to substitute its own opinion on the evidence for the opinion of the Jury, 26 Cr. L.J. 211=83 Ind. Cas. 955. The High Court on a reference under this section is reluctant to interfere with a unanimous verdict of Jury and if that verdict is not unreasonable and can on the evidence, be supported it should accept it even though it may not wholly agree with it, 30 C.L.J. 503. The High Court can interfere in cases of acquittal by Jury where the acquittal is patently bad and perverse, 29 Cr. L.J. 432=108 Ind. Cas. 900; 29 Cr. L.J. 983=112 Ind. Cas. 103; 3 Luck 436; 54 C. 708 following 28 C.W.N. 876; 38 C.L.J. 1. The High Court before it can refuse to accept the verdict of the Jury in a case under this section has got to find that the verdict is unreasonable. 52 C. 937=48 C.L.J. 541 at 545. The effect of reference under this section is to open up the whole case and to render it the duty of the High Court to consider whether the evidence against the accused is sufficient to justify a conviction for all or any of the offences charged inclusive of the offences of which the Jury have acquitted the accused, 36 M. 585 at 587, 50 A. 623 (F.B.) The High Court is not confined to the grounds of difference between the Judge and the Jury, but the whole case is thrown open to the Court and it must be decided after giving due weight to the opinion of the Judge and Jury, 10 Bom. L.R. 632=8 Cr. L.J. 143; 26 C. 629; 29 C. 128; 9 C.L.J. 432; 29 M. 91. By the expression "*opinion of the Jury*" in this section is meant the conclusion of the Jury, i.e., the verdict and not the reasons on which that conclusion is based, 18 C.W.N. 619=18 C.L.J. 522=16 Cr. L.J. 31=22 Ind. Cas. 175; (1922) Pat. 218=23 Cr. L.J. 421=67 Ind. Cas. 531. There is nothing in this section warranting the interpretation that the term "*opinion*" in it means anything other than the respective conclusions of the Judge and Jury. In dealing with a reference, the High Court must consider the entire evidence and give due weight to the opinions of the Judge and Jury including the opinion of the minority of the Jury when the verdict is divided, 38 C. 629; 17 C.W.N. 1077=14 Cr. L.J. 558=21 Ind. Cas.

156; 16 Cr. L.J. 440=29 Ind. Cas. 72; 37 C.L.J. 30 at 32; 23 Cr. L.J. 244=66 Ind. Cas. 180 15 C. 269; Ratanlal 440. Without considering the entire evidence the High Court on a reference under this section could not be in a position to give due weight to the opinion of the Sessions Judge and of the Jury, 29 C. 128 at 133; 50 A. 625 (F.B.). Before the High Court can substitute its opinion to that arrived at by the majority of the Jury, it must be able to say in the legal sense of the expression that the Jury's verdict is against the weight of evidence, that is to say, it is not such a verdict as reasonable men properly instructed could have arrived at, 48 C.L.J. 541 at 545; 54 C. 708; 53 C. 879; 51 M. 956 (F.B.). There is no provision to ascertain the opinion of the Jury, and a reference to the High Court when a Judge differs from the Jury will not be vitiated on account of its not containing the opinion of the Jurors, 18 C.W.N. 615. Apart from their verdict, the opinion of the Jury in this subsection is the conclusion of the Jury, and not the reasons on which that conclusion is based. In a reference under this section although it may be expedient to have before the Court the reasons of the Jury for the view taken by them when they have been given, but the circumstance that no such reasons have been ascertained does not warrant the High Court to decline to go into the evidence and arrive at its own judgment after giving due weight to the views taken by the Judge and Jury as to the guilt or innocence of the accused, 29 M. 91 (F.B.); 23 Cr. L.J. 145=76 Ind. Cas. 289; 41 C. 662; 20 Cr. L.J. 20=43 Ind. Cas. 500; 53 Ind. Cas. 282 and 29. The Court is also bound to consider the entire evidence and give weight to the opinion of the Sessions Judge and Jury. Failure on the part of the Judge to record the reasons of the Jury for their verdict enhances the responsibility of the High Court and requires it to go into the evidence more carefully, 6 Pat. L.J. 264 at 267. See 26 Cr. L.J. 856=86 Ind. Cas. 712, where it was held following 21 Cr. L.J. 829=58 Ind. Cas. 529, that it was not competent to the Sessions Judge after a clear verdict was returned by the Jury to ask them for their reasons, and the view expressed in 6 Pat. L.J. 264 and 23 Cr. L.J. 421=67 Ind. Cas. 581, to the contrary are disapproved. It is open to a Judge when he disagrees with a verdict and intends to make a reference to the High Court to ask the Jury the reasons for their verdict and he should record the same for the information and guidance of the High Court, 27 Cr. L.J. 773=95 Ind. Cas. 309 where 36 C. 629, Weir II, 388 are followed. See also 29 Cr. L.J. 963=112 Ind. Cas. 51. With regard to the opinion of the Jury most of the reasons given by the foreman may not commend themselves to the High Court or may not be very convincing and such reasons need not necessarily be taken as constituting all the grounds which the Jury may have had for their verdict. It is well-known that even trained minds find it difficult when asked off hand to formulate all the grounds in support of the opinion they have formed. What the High Court has got to find, before it can refuse to accept the verdict, is that it is unreasonable, 52 C. 987. When a reference is made of the whole case under this section, where some of the offences are tried by the Jury and the others tried with the aid of Assessors, by the Judge differing from the verdict of the Jury and the opinion expressed by the Jurors as Assessors on the Assessor charges, the High Court while accepting the reference as to the verdict of the Jury returned the case to the Sessions Judge so far as the Assessor offences were concerned remarking that the Judge ought not to have joined them in the reference, 8 Bom. L.R. 599=4 Cr. L.J. 192; 9 Bom. L.R. 1057. See also 42 C. 789 but see 21 C.W.N. 435, which suggests a different procedure. When a reference is made to the High Court under this section, it has all the powers of an appellate Court and should form its own opinion, after considering the entire evidence, giving due weight to the opinion of the Judge and the Jury, 15 Cr. L.J. 513=24 Ind. Cas. 601; 29 C. 128; 9 C.L.J. 432=10 Cr. L.J. 57=2 Ind. Cas. 593. When a reference is made to the High Court the language of the Code does not justify any undue preference being given to the opinion of the Jury over that of the Judge. The High Court has to weigh both the opinions and consider the entire evidence on record just as it would do in any Criminal matter coming before it for decision, 25 Cr. L.J. 785=81 Ind. Cas. 305. The High Court is empowered on a reference under this section to convict the accused of an offence not triable by Jury but only by Assessors, on a consideration of the evidence and giving due weight to the opinions of the Judge and Jury, 37 M. 236, where 22 M. 15; 24 M. 641, and the view of *Bhashyam Ayyangar, J.*, in 26 are followed. The power of the High Court under this section is not limited to

questions of law, i.e., misdirection by the Judge or misapprehension of the law by the Jury as laid down by the Judge. The clear provisions of this section are not in any way curtailed or cut down by the provisions of S. 418, *infra* and it is open to the High Court to go into the facts in a case referred under this section, 9 A. 420; 44 C.L.J. 233=28 Cr. L.J. 19=99 Ind. Cas. 51. When a Jury has given their verdict on the facts of a particular case, it is open to the High Court on a reference under this section to revise that verdict even though it was not alleged that there had been a misdirection by the Judge or a misunderstanding by the Jury of the law as laid down by the Judge, 50 A. 623 (F.B.) referring to 21 C. 155; 2 C. 128; 1 B. 10; 29 M. 51; 6 Pat. L.J. 24 and 45 A 265, but the High Court will not interfere unless it was established in the clearest possible manner that the Jury were wholly miscarried in their conclusions upon the case, 20 W.R. (Cr.) 33 and 73; 11 C. 83; Weir II, 338, and the High Court will not interfere merely because it is of a different opinion from that arrived at by a unanimous verdict of the Jury, 2 A.L.J. 475; 9 C. 53. Where in a case there is evidence, if believed, sufficient to establish the guilt of the accused but on the other hand there were many circumstances which throw a doubt upon his guilty, it cannot be said that the Jury took a perverse view in returning a verdict of not guilty and the High Court will not be justified in interfering with the verdict even though the verdict may or may not be correct but not unreasonable, 21 Cr. L.J. 895=104 Ind. Cas. 411, but the High Court may, in view of the suspicious circumstances tending to show the falsity of the prosecution case acquit the accused refusing to accept the unanimous verdict of the Jury, 44 C.L.J. 233=28 Cr. L.J. 19=99 Ind. Cas. 51. Where one of two inferences is possible on the evidence, the Court of reference will not interfere with the finding of the Jury even though the High Court is of opinion that it would have drawn the other inference if it had been a Court of appeal. But where the inference drawn by the Jury is manifestly inconsistent with the documentary evidence and with the conduct of the parties it is obligatory on the Court to interfere, 27 Cr. L.J. 1041 at 1053=97 Ind. Cas. 17. The High Court is to accept the opinion of the Judge and Jury when they agree and it is not open to believe evidence disbelieved by both Judge and Jury, 41 C. 662. In a reference under this section the Judge should set forth in his letter of reference in some detail his own opinion regarding the evidence and should clearly state the material portions of the evidence he believes to be true and his reasons for arriving at his conclusions, to enable the High Court in the interests of justice, to convict the accused on the charges framed. A bare statement that the reasons are indicated in the heads of charge to the Jury is wholly insufficient, 30 Cr. L.J. 210=113 Ind. Cas. 694. When the Judges hearing a reference under this section differ in their opinion, the procedure to be followed is that laid down in S. 429 *infra* viz., the case shall be laid before a third Judge, 2 C.L.J. 77 (n); 15 B. 452.

Appeal.—No appeal lies from the judgment of the High Court passed on a reference under this section, Ratanlal 691.

G.—Re-trial of Accused after Discharge of Jury.

308. Whenever the Jury is discharged, the accused shall be detained in custody or on bail (as the case may be), and shall be tried by another Jury, unless, the Judge considers that he should not be re-tried, in which case the Judge shall make an entry to that effect on the charge, and such entry shall operate as an acquittal.

Practice.—It is well established law that a Jury even in a capital case may be discharged by the Judge at the trial without giving a verdict if a 'necessity' that, is a high degree of need for such discharge is made evident in his mind. It is for the Judge alone to decide whether a necessity exists and his decision is final. Where a Jury at a trial for murder after being locked up for several hours on their being sent for into Court stated that it was impossible that they should ever agree and it was the first day of business at the next Assizes town, the Judge discharging the Jury was held to be warranted by law. So also

where misconduct on the part of a Juror was discovered before the verdict or in the course of the trial, one of the Jurors left the Jury box or where it was discovered that a person on the Jury was not on the Jury panel *Arch. Cr. Pl. Ev. & Pra. p. 213-214 (25th Ed.)*.

Whenever the Jury is discharged.—This section will apply when a Jury is discharged for misconduct not provided for specifically, in the Code and it seems clear that the Judge must have such powers, 50 C. 872 at 873, if one of the Jury dies before the delivery of verdict the remaining eleven will be discharged and a new Jury may be sworn or a new Juror added to the eleven. So also if one of the Jurors is taken so ill that he is not able to proceed with the trial. Where misconduct on the part of one of the Jurors is discovered before verdict the Court may discharge the Jury. Where in the course of a trial one of the Jurors without leave left the Jury box and also the Court, the Jury had to be discharged. So also where in the course of a trial it was discovered that a person was in the Jury who was not on the Jury panel and who had by mistake been summoned as a Jurymen and when it is accidentally elicited during the course of the case for the Crown that the defendant had been previously convicted, the Jury is frequently discharged in the interests of defendant, *Arch. Cr. Pl. Ev. and Pr., p. 214 (25th Ed.)*.

A Sessions Judge has inherent power to discharge the Jury and to empanel another for misconduct on the part of the Jury, 25 C.W.N. 210—33 C.L.J. 122; 51 C. 418; 26 Cr.L.J. 1009=87 Ind. Cas. 833. But such power to discharge should not be exercised lightly or until the Judge has satisfied himself from inquiry that reasonable grounds for exercising such a right exist. The matter is one for the Judge's own discretion, 37 C.L.J. 595; 7 C.W.N. 83. But the Advocate General may exercise his powers under S. 833 *infra* and, enter a *nolle prosequi*. The trial before a fresh Jury is a continuation of the first trial on the original plea, 41 C. 1072. The power of discharge while discretionary ought not to be exercised without strong reasons; yet it may be exercised without any absolute necessity *e.g.*, a material witness for the prosecution persistently refused to answer questions put, and the Judge thereupon adjudged him guilty of contempt and fined and imprisoned him, the Jury was discharged against the will of the accused, *Arch. Cr. Pl. Ev. & Pr. p. 214 (25th Ed.)*

H.—Conclusion of Trial in Cases tried with Assessors.

309. (1) When, in a case tried with the aid of assessors, the case for the defence and the prosecutor's reply (if any) are concluded, the Court may sum up the evidence for the prosecution and defence, and shall then require each of the assessors to state his opinion orally *on all the charges on which the accused has been tried*, and shall record such opinion, *and for that purpose may ask the assessors such questions as are necessary to ascertain what their opinions are. All such questions and the answers to them shall be recorded.*

Delivery of opinions of assessors.

(2) The Judge shall then give judgment, but in doing so shall not be bound to conform to the opinions of the assessors.

Judgment.

(3) If the accused is convicted, the Judge shall, *unless he proceeds in accordance with the provisions of section 502, pass sentence on him according to law.*

Amendment.—The words in italics are new.

Scope of the Section.—The assessors are no doubt to assist the Judge, but nowhere in the Code of Criminal Procedure has the Legislature invested the Assessors with the power

of appreciating the evidence so as to bind the Judge. The theory of trial with the help of Assessors is that the system of Assessors forms as it were a stage towards the ultimate introduction of trial by Jury. That was the object with which the Assessors' system was introduced in the earlier years of the introduction of Criminal Law by the British Indian Legislature in this country. The opinion of the Assessors must have no doubt, regard paid to it, but after all, it is the Judge who is to decide the case on the facts as well as law. His is the final responsibility, 14 Bom. L.R. 710 at 711=13 Cr. L.J. 677=16 Ind. Cas. 325 There is nothing in the Code authorising or forbidding the Judge to allow consultation between the Assessors and there is nothing prohibiting the Judge in his discretion to allow it. The opinion of Bashyam Ayyangar, J., in 24 M. 523 went to the extent of holding that the Judge is entitled to have before him each Assessor's individual and independent opinion, 16 Cr. L.J. 717=30 Ind. Cas. 1005.

May sum up.—A summing up of the evidence is not required in a case tried with the aid of Assessors, 11 W.R. (Cr) 39. The law gives the Judge a discretion to sum up the evidence for the benefit of the assessors if he thinks necessary, but it gives him no power to question them until they have delivered their opinions orally and he has recorded such opinions. If there is anything obscure in their opinion, there is no objection to the Judge asking questions to clear up such obscurity but he is bound to allow the assessors to express their opinion independently in their own words on the whole case before interfering with them in any way or asking them any questions whatever except "what is your opinion," 40 C. 163 at 163. The provision as to summing up should be availed of by Judges where facts are complicated and it may therefore be expedient to explain the same, 24 M. 523 at 537. The effect of summing up the evidence in a case tried with the aid of Assessors is to enable the Sessions Judge to place the evidence in a long and intricate case in an intelligible form, to assist the Assessors in arriving at a reasonable conclusion, 9 C. 875.

Require each Assessor to state his opinion orally.—If a Judge should decide a case without inviting the opinions of Assessors, he virtually holds the trial without the aid of Assessors, and his finding and sentence cannot be regarded as one passed by a Court of competent jurisdiction, 24 M. 523 at 535. See also Weir II, 301; 25 M 598; 21 M L J. 520; 10 A. 414; 9 C. 875; 22 W R. (Cr.) 35. The opinion of each Assessor shall be given orally and shall be recorded in writing. Such record shall contain not only the conclusion arrived at by each Assessor but also the grounds of his opinion, 9 C 875. In cases tried with the aid of Assessors, each of the Assessors should be asked to give his opinion clearly as to what happened and he should then, if necessary, give a further opinion on such matters as to intention, knowledge, etc., 30 Cr. L.J. 378=115 Ind. Cas 66. To state his opinion means, that the Assessor is required to give a definite opinion whether the prisoner is guilty of either, and if so which of the charges preferred against him and it is not sufficient if he should merely express his opinion that the accused did certain acts. It is imperative for a Judge to take the opinion of the Assessors on the charge, it is proposed to convict the accused on. It is not open to the Judge to put merely the charge of murder to the Assessors and when they give their opinion on that charge and that charge only, then on his own motion and without asking any further opinion of the Assessors find the accused guilty of some other offence quite distinct. When an accused is charged with a major offence and in the alternative with a minor offence being in effect an accessory to the crime the case will be different. 26 Cr. L J 394=84 Ind Cas. 933 where 25 Bom. L R. 231=25 Cr L J. 1343=82 Ind. Cas. 709 is distinguished. The Assessors ought not to be allowed to put in written opinions like judgments. They are to state their opinions orally and the Judge is to record them. To allow Assessors to put in written opinions defeats the intention of the section, 39 C. 119 at 122. But see the opinion expressed by the Privy Council, 6 Lah. 226 (P.C.) at 231, where their Lordships held if the Assessors gave their opinion in writing it has not been shown that it led to any miscarriage of justice at all. In order to comply with the provisions of this section the Judge should record the opinion expressed by the Assessors in writing when given in his own words by each Assessor. Where the accused is tried in one trial of two offences, one of which is a Jury case and the other an Assessors case and the Judge after recording the verdict of the Jury only took the

opinion of two of the assessors on the other charge without taking the opinion of all the Jurors as Assessors as required by S. 269, *supra*, it was held that the conviction was bad and S. 537, *infra*, could not cure such a defect, 26 M. 593; 21 M.L.J. 520. Assessors are appointed to assist the Court in the trial and are to give their opinion, and when that opinion differs from that formed by the Judge, he should always ascertain the grounds of their opinion, 3 W.R. (Cr.) 21, and Assessors should be invited and encouraged by the Judge to state briefly the grounds of their opinion as well as the result, 2 Bom. L.R. 322. The addition in subsection (1) of the words "*and for the purpose of ascertaining such opinion*" shall ask each Assessor such questions, as he thinks necessary, such questions and answers thereto shall be recorded" assimilates the procedure by which the Assessors give their opinion to that adopted for ascertaining the verdict of the Jury, namely, by question and answer, to be recorded. See S. 303, *supra*.

On all charges on which the accused had been tried.—This section makes it obligatory on the Judge to require each of the Assessors to state his opinion orally on all the charges on which the accused had been tried and to record such opinion. The words "on all the charges" have been interpreted to mean that distinct opinion on each charge must be taken. A conviction for abetment of the offence charged without taking the opinion of the assessors on the point is not therefore permissible, 29 Cr. L.J. 561=109 Ind. Cas. 497.

The Judge may ask such questions.—Cross-examination of the Assessors is entirely contrary to law. This section gives the Judge no power to question the assessors until they have delivered their opinion orally and the Judge has recorded such opinion. If there is any obscurity in the opinion then there is no objection to ask questions to clear up the obscurity, 13 Cr. L.J. 497=15 Ind. Cas. 641; 41 C. 350. Grounds should be elicited by putting specific and pointed questions to the Assessors on the important and salient points on which the decision of the case really depends and in inviting their opinion thereon; the recording of the opinion of the assessors should be appended to the judgment *Rule 245 Mad. Cr. Rules of Pr.*

Shall record such opinion.—If a Judge should decide a case without inviting the opinion of the Assessors and recording the same, he virtually holds the trial without the aid of the Assessors and his finding and sentence cannot be regarded as one passed by a Court of competent jurisdiction, 23 M. 523; 26 M. 593; 21 M.L.J. 520; *Weir II*, 331; 10 A. 414; 22 W.R. (Cr.) 34; 9 C. 873. By the new amendment the power is given to the Judge to put such questions to the Assessors as are necessary to ascertain what their opinion is and to record such opinion. The grounds on which the Assessors have their opinion are also to be recorded especially when the Judge differs from their opinion. It is too much the custom to neglect the opinion of the Assessors and put them in such a shape that the High Court can make nothing of them. There is all the difference between the verdict of the Jury and the opinion of the Assessors. The former is the simple and conclusive verdict of guilty or not guilty. The other is not a verdict but an opinion and not having any legal validity the weight seems to depend solely on the reason and sense by which it is supported. In recording in writing the opinion of each Assessor as required by this section the Judge should not merely put in his judgment, that he concurs with or differs from the Assessors, but should separately record the opinion of each assessor and should invite and encourage each assessor to make that opinion more than a mere expression for or against the prisoner, but an opinion on the case stating the view that the Assessor takes of the facts and the consideration (in brief) on which his opinion is founded, 3 W.R. (Cr.) 6. The reasons for their opinion should also be briefly stated and not merely the result of their opinion which cannot in any way assist the Judge or the High Court on appeal, 2 Bom L.R. 322 at 323. See also 2 Bom L.R. 323 at 324. "State his opinion" means that the assessor is required to give a definite opinion whether the prisoner is guilty of either and if so which of the charges preferred against him and it is not sufficient if he should merely express an opinion that the accused did certain acts, 22 W.R. (Cr.) 34. Where the Assessors are not asked and apparently not allowed to give an independent opinion in their own words on the whole case, the trial is altogether bad, 13 Cr L.J. 497=5 Ind. Cas. 641. Once a trial has been held and the opinion of the Assessors recorded the Judge is not entitled to cancel the trial and order a new

trial on the ground that a charge has been improperly joined. He has no option after recording the Assessors' opinion but to give judgment in accordance with this section, 17 Bom. L.R. 1074, when once a Sessions Judge differs from the opinion of the Assessors he should always record carefully the grounds on which the Assessors base their opinion and should make some reference to the matters in the judgment, 1903 P.L.R. (Cr. J.) 192 p. 637, where a Judge differs from the opinion of the assessors or any of them it is desirable to have a record not merely of the opinion of each Assessor but also as far as possible, of the grounds on which the opinion is based as such record will be of use to the appellate Court and to Government in dealing with mercy petitions, *Rule 213 Mad. Crl. Rules, of Pr.*

The Judge shall then give judgment.—Under this section the Judge is bound to give judgment after recording the opinion of the Assessors. After taking the opinion, he is not entitled to take evidence and if he does so the trial is bad, 22 Cr. L.J. 127=39 Ind. Cas. 559; nor can he hold a local inspection after recording the opinion of Assessors, 1 C.L.R. 143; 9 L.B.R. 88, once the opinion is taken and the Assessors discharged they cannot be recalled by the Judge and then the charge against the accused be amended and he be convicted on the amended charge, 1 W.R. (Cr.) 40. The fact that the accused is charged in the same trial with another offence triable by Jury and the Judge disagrees with the Jury and makes up his mind to make a reference to the High Court will not absolve the Judge from his duty to give judgment on the charge tried with the aid of Assessors and when the Judge without doing so made a reference to the High Court, it was held that the reference was premature and the case sent back to rectify the error and then act according to law, 36 M.L.J. 452=9 L.W. 376 =26 M.L.T. 45=20 Cr. L.J. 352=59 Ind. Cas. 832. A Sessions Judge is not entitled to incorporate in his judgment the opinion of a surgeon obtained privately after he had taken the opinion of the Assessors and reserved his judgment. If he wants that evidence he ought to have the surgeon summoned, adjourn the case and examine him in the presence of the accused and the Assessors, 1889 A.W.N. 181; See also 15 A. 136; 1889 P.R. (Cr.) 29.

Shall not be bound to conform to opinion of assessors.—The opinion of an Assessor is certainly not a judicial opinion in any sense though one may not be so hypercritical as to object to its being characterized or referred to as quasi-judicial. Assessors are analogous to expert witnesses and in principle the opinion of an Assessor is substantially on the same footing as the opinion evidence of an expert witness, 24 M. 523 at 543. The Assessors like a Jury are not Judges of all questions of fact. The opinion of the Assessors must have no doubt, regard paid to it, but after all it is the Judge who is to decide the case on the facts, as well as law. The function no doubt is to assist the Judge but they are not invested with the power of appreciating the evidence so as to bind the Judge who must pay regard to their opinion but after all, he is to decide the case on the facts as well as the law. His is the final responsibility, 14 Bom. L.R. 710=13 Cr. L.J. 677=16 Ind. Cas. 325. Under the law the Jury is required to deliver its verdict, but Assessors are appointed to aid the Judge in the trial and are to give their opinion and when that opinion differs from that formed by the Judge the latter should always ascertain the grounds of the Assessor's opinion. The decision does not rest with them but they are to assist the Judge at the trial and in no better mode can they assist him than by stating the reason for their opinion when the case is one in which there may be a difference of opinion, 3 W.R. (Cr.) 21.

Under sub section (3) a Judge is now empowered expressly by the addition newly made to pass an order under S. 562, *infra*, releasing the accused on probation of good conduct or release him on admonition.

1.—*Procedure in case of Previous Conviction.*

310. In the case of a trial by a jury or with the aid of assessors
 Procedure in case of previous conviction. When the accused is charged with an offence and further charged that he is by reason of a previous conviction liable to enhanced punishment or to punishment of a different kind for such subsequent offence, the

procedure prescribed by the foregoing provisions of this Chapter shall be modified as follows, namely:—

(a) *Such further charge shall not be read out in Court and the accused shall not be asked to plead thereto, nor shall the same be referred to by the prosecution, or any evidence adduced thereon unless and until,*

(i) *he has been convicted of the subsequent offence, or*

(ii) *the jury have delivered their verdict, or the opinions of the assessors have been recorded, on the charge of the subsequent offence.*

(b) *In the case of a trial held with the aid of assessors, the Court may, in its discretion, proceed or refrain from proceeding with the trial of the accused on the charge of the previous conviction.*

Amendment.—This section which deals with the procedure in the case of a trial by a Jury or with the aid of Assessors when a previous conviction has to be proved, has been recast in order to avoid the inconvenience which may at present arise in cases tried by Assessors (whose opinion is not binding on the Judge) and in cases in which a Judge decides to make a reference to the High Court under S. 307. Under the amendment, if a Jury delivers a verdict of not guilty on the charge of the subsequent offence for which the accused is primarily being tried, or in any trial held with aid of Assessors the Court is given a discretion to proceed or refrain from proceeding with the trial of the accused on the charge of the previous conviction.—*Statement of Objects and Reasons*

Scope of the section.—This section lays down a special form of trial of the issue of liability to enhanced punishment in consequence of previous conviction, and it is expressly made applicable to trials before the Courts of Session only, and does not apply to trials before Magistrates 50 C. 367 at 369. The provisions of this section are imperative and must be complied with. A charge of previous conviction should not be read out in Court, and the accused should not be questioned about it until he has been convicted or the opinion of the Assessors recorded on the subsequent charge and, when such a charge is allowed to be read in the presence of the Assessors in the very beginning of the trial and the accused's admission as to his previous conviction recorded in the presence of the Assessors, the trial and conviction were wholly bad and therefore set aside 28 Cr. L.J. 667 = 103 Ind. Cas. 203. It is not easy for Magistrates to keep their mind entirely free from prejudice, when the records show that the accused has been previously convicted. But this section insists that in Sessions trials the fact of a previous conviction is rightly to be withheld from the Jurors and Assessors until the accused has pleaded to the charge or has been found guilty. This shows the importance of complete exclusion of such knowledge in weighing the evidence as to the truth or otherwise of the charge against the accused S. 54 of the Indian Evidence Act also lays down that a previous conviction is inadmissible in evidence except where evidence of bad character is relevant, 1 Ran. 520.

Form of charge.—Care should be taken to clearly and accurately state the previous conviction and something like the following form may conveniently be adopted "I—further charge you—" "with having on the—day of—19 at—before the—Judge or Magistrate" " (as the case may be) been convicted of an offence under section—of the Indian Penal Code and sentenced to rigorous imprisonment or transportation for—years" 1831 A.W.N. 144. The charge need not show the extent of the former punishment, & M.H.C.R. Appx. 11. Bare statement of the accused that the accused is an old offender is not sufficient, Welr II, 266.

Previous conviction.—Formerly it was merely an act of grace to suppress evidence of a previous conviction but now 24 & 25 Vict. c. 96, S. 16 enacts that an offender shall in the first instance be arraigned upon so much only of the indictment as charges the subsequent

offence and at the conclusion of the subsequent offence he shall be asked and not before whether he has been previously convicted. See *Roscoe, Cr. Pr. & Ev.* p. 190. The question of previous conviction is one of fact which ought to be determined by the Jury, 21 W.R. (Cr.) 40. When the verdict of Jurors or majority of Jurors has been delivered, or the opinion of the Assessors has been recorded on the charge of the subsequent offence, the accused may be called upon to plead to the charge of previous conviction and evidence on that charge may be adduced now. Previous conviction may be proved if the accused denies the charges by the evidence of the Jailor or some other jail authority who identifies the accused as the person who underwent imprisonment in a particular jail, Ratanlal 52; 1903 A.W.N. 51 mere production of record is not sufficient. Identification of the prisoner with the person previously convicted as evidence by the records is quite necessary, 6 B L.R. (Appx) 151; 1881 A.W.N. 144 Also a discretion is given to the Judge to proceed or refrain from proceeding with the trial after the Jury or majority of Jury have returned a verdict of not guilty on the charge on the subsequent offence. Before making reference under S. 307, *supra*, the Judge may now ask the accused to plead to the previous conviction and take evidence and the procedure suggested in, 30 M. 134, is not of much importance now. The High Court instead of remanding the case as it did in, 2 Bom. L.R. 336, to record the plea and to pass sentence, may now itself do so as the Judge has now to record the plea of the accused as to the previous conviction and take evidence in support of the same in the exercise of the discretion given to him. In cases tried with the aid of Assessors a discretion is given to the Court to proceed or not, with the charge of previous conviction.

Previous conviction by a Court outside British India cannot be charged, 7 Cen. Pro. L. R. 24; nor can a conviction under a special or local law be charged 1 Cr. L.J. 1031.

311. Notwithstanding anything in the last foregoing section,

When evidence of previous conviction may be given.

evidence of the previous conviction may be given at the trial for the subsequent offence, if the fact of the previous conviction is relevant under the provisions of the Indian Evidence Act, 1872.

See S. 511, *infra*, which provides for special means of proving previous conviction.

J.—List of Jurors for High Court, and summoning Jurors for that Court.

Number of special Jurors.

312. The High Court may prescribe the number of persons whose names shall be entered at any one time in the special jurors' list :

Provided that no definite number of Europeans or of Americans or of Indians shall be prescribed.

This section has been newly substituted by Act XII of 1923. The proviso restricts the power of the High Court prescribing a definite number of Europeans or Americans or Indians. The High Court is empowered only to prescribe the number of persons whose names shall be entered in the special Jurors' list.

313. (1) The Clerk of the Crown shall, before the first day of April in each year, and subject to such rules as the High Court from time to time prescribes, prepare—

Lists of common and special Jurors.

- (a) a list of all persons liable to serve as common jurors ; and
- (b) a list of persons liable to serve as special jurors only.

(2) Regard shall be had, in the preparation of the latter list, to the property, character, and education of the persons whose names are entered therein.

(3) No person shall be entitled to have his name entered in the special jurors' list merely because he may have been entered in the special jurors' list for a previous year.

(4) The Governor General in Council *or the Local Government* in the case of the High Court at Fort William in Bengal, and, in the case of other High Courts, the Local Government, may exempt any salaried officer of Government from serving as a juror.

(5) The Clerk of the Crown shall, subject to such rules as aforesaid, have full discretion to prepare the said list as seems to him to be proper, and there shall be no appeal from, or review of his decision.

Discretion of officer preparing lists.

314. (1) Preliminary lists of persons liable to serve as common jurors and as special jurors, respectively, signed by the Clerk of the Crown, shall be published once in the local official Gazette before the fifteenth day of April next after their preparation.

Publication of lists, preliminary and revised.

(2) Revised lists of persons liable to serve as common jurors and special jurors, respectively, signed as aforesaid, shall be published once in the local official Gazette before the first day of May next after their preparation.

(3) Copies of the said lists shall be affixed to some conspicuous part of the Court-house.

315. (1) Out of the persons named in the revised lists aforesaid, there shall be summoned for each sessions *in the town which is the usual place of sitting of each High Court as many of those who are liable to serve on special or common juries respectively as the Clerk of the Crown considers necessary.*

Number of Jurors to be summoned.

(2) No person shall be so summoned more than once in six months unless the number cannot be made up without him.

(3) If, during the continuance of any sessions, it appears that the number of persons so summoned is not sufficient, such number as may be necessary of other persons liable to serve as aforesaid shall be summoned for such sessions.

Supplementary summons.

This section provides for summoning Jurors for the High Court Sessions in the Presidency Towns.

316. Whenever a High Court has given notice of its intention to hold sittings at any place outside the town which is the usual place of sitting of such High Court for the exercise of its original criminal jurisdiction, the Court of Session at such place shall, subject to any direction which may be given by the High Court, summon a sufficient number of jurors from its own list, in the manner hereinafter prescribed for summoning jurors to the Courts of Session.

Summoning Jurors outside the place of sitting of High Courts.
This section provides for summoning of Jurors when a High Court intends to hold its Sessions in any place outside the Presidency Town. The Court of Sessions at such a place of sitting is to summon a sufficient number of Jurors from its own list subject to any direction which the High Court may give.

High Court has given notice.—See Es. 335 and 336, *infra*.

In the manner hereinafter prescribed.—See S. 326, *infra*.

317. (1) In addition to the person so summoned as jurors, the said Court of Session shall, if it thinks needful, after communication with the Commanding Officer, cause to be summoned such number of commissioned and non-commissioned officers in Her Majesty's Army or Air Force * resident within ten miles of its place of sitting as the Court considers to be necessary to make up the juries required for the trial of persons charged with offences before the High Court as aforesaid.

Military Jurors.

(2) All officers so summoned shall be liable to serve on such juries notwithstanding anything contained in this Code; but no such officer shall be summoned whom his Commanding Officer desires to have excused on the ground of urgent official * duty or for any other special * official reason.

318. Any person summoned under section 315, section 316 or section 317, who, without lawful excuse, fails to attend as required by the summons, or who, having attended, departs without having obtained the permission of the Judge, or fails to attend after an adjournment of the Court after being ordered to attend, shall be deemed guilty of a contempt, and be liable, by order of the Judge, to such fine as he thinks fit; and, in default of payment of such fine, to imprisonment for a term not exceeding six months in the civil jail until the fine is paid;

Provided that the Court may in its discretion remit any fine or imprisonment so imposed.

S. 205, *supra* enacts that if a trial is adjourned, the Jurors shall attend at the adjourned sitting and at every subsequent sitting, until the conclusion of the trial. See in this con-

* Added by Act X of 1927.

section 8. 332, *infra* which deals with similar cases before the High Court Sessions. See also 8 W.R. (Cr.) 83; 1897 A.W.N. 167; 1899 A.W.N. 13; 6 C.W.N. 107 as to the power of High Court to revise orders passed under this section fixing Jurors.

Amendment.—"For a term not exceeding six months", these words were added in the Code of 1893.

The proviso to the section was added in the Code of 1893 and gives a wide discretion to the presiding Judge to remit the fine or imprisonment imposed by him on a Juror who fails to attend in accordance with the summons.

K.—List of Jurors and Assessors for Court of Session and summoning Jurors and Assessors for that Court.

319. All male persons between the ages of twenty-one and sixty shall, except as next hereinafter mentioned, be liable to serve as jurors or assessors at any trial held within the district in which they reside.

Liability to serve as Jurors or Assessors.

or, if the Local Government, on consideration of local circumstances, has fixed any smaller area in this behalf, within the area so fixed.

Jurors must be persons of independent condition in life, men of judgment and experience, 23 W.R. (Cr.) 35.

If Local Government has fixed any area.—In the Madras Presidency the area fixed is within a radius of twenty miles from the place where trials before the Sessions Court are held in Districts in which there is no railway communication and in Districts where there is railway communication, all persons residing within the District are liable to serve as Jurors or Assessors if the journey to the town where the Sessions Court is situated from the town or village in which they reside, does not exceed a distance of fifty miles by rail and ten miles by road or water. But in the Districts of Malabar, Godavari and Kistna where exceptional facilities of water communication exist, the radius will be forty miles in the case of such towns or villages as are in direct communication by water with the Sessions station, G. O., No. 1781 dated 10—12—1909.

320. The following persons are exempt from liability to serve as jurors or assessors, namely:—

(a) officers in civil employ superior in rank to a District Magistrate;

(aa) members of either Chamber of the Indian Legislature and members of a Legislative Council constituted under the Government of India Act.*

(b) salaried Judges;

(c) Commissioners and Collectors of Revenue or Customs;

(d) police-officers and persons engaged in the Preventive Service in the Customs Department;

(e) persons engaged in the collection of the revenue whom the Collector thinks fit to exempt on the ground of official duty;

(f) persons actually officiating as priests or ministers of their respective religions;

(g) persons in Her Majesty's Army or Air Force † except when,

* Amended by Act XXIII of 1925, B. 2.

† Added by Act X of 1917.

by any law in force for the time being, they are specially made liable to serve as jurors or assessors ;

(h) surgeons and others who openly and constantly practise the medical profession ;

(i) legal practitioners (as defined by the Legal Practitioners' Act, 1879), in actual practice ;

(j) persons employed in the Post-Office and Telegraph Departments ;

(k) persons exempted from personal appearance in Court under the provisions of the Code of Civil Procedure, sections 640 and 641 [Sections 132 and 133 of Act V of 1908] ;

(l) other persons exempted by the Local Government from liability to serve as jurors or assessors.

Scope of the section.—This section provides exemptions from liability to serve as Jurors or Assessors. There is a clear distinction between *exemption* and *disqualification*. The persons specified in this section are no doubt fully qualified and capable of serving on the Jury. But they are exempted. See S. 278, *supra*, which deals with disqualification to serve on the Jury.

Cl. (b) : Salaried Judges.—The word "salaried" was newly added in the Code of 1898. to make "Honorary Magistrates" who are "Judges" but not "salaried Judges" liable to serve as Jurors or Assessors.

Cl. (d) : Police-officers.—This was newly added in the Code of 1898.

Cl. (g).—Persons employed in the Army are generally exempted but when necessity arises, the Court is empowered to summon them as Jurors. See Ss. 316, 317 and 326 (4), *infra*.

Cl. (j).—This clause was newly added in the Code of 1898. Advocates, Vakils and Attorneys of the High Court are specially exempted in the Presidency of Madras—*Fort St. George Gazette*, 1876, Sep. p. 1 and *Ibid.*, 1874, p. 105.

Cl. (k).—See Ss. 132 and 133, Civil Procedure Code, Act V of 1908.

Cl. (l).—*G. O. No. 1734 Jud.*, dated, 10-12-1909. exempts the following persons from serving as Jurors or Assessors in Courts other than the High Court under Cl. (l) of this section :—(1) The Agent, the Chief Accountant and Cash-keeper of every branch of the Bank of Madras (Imperial Bank of India). (2) All officers and Subordinates of P.W.D. while actually in charge of P.W. ranges. (3) All members of the executive establishments of P.W.D. (4) Managers of offices of Superintending Engineer, P.W.D. and Head Clerks and Accountants of division offices. (5) All railway Engineers in charge of sections of Railway open to public traffic. (6) The Agent, the Chief Engineer, Dy. Chief Engineer, Loco, and Carriage Superintendent, General Traffic Manager, District Traffic Superintendents, Dy. Traffic Managers, Permanent Way Inspectors, Locomotive Foreman, Station Masters, Engine Drivers, Telegraph Inspectors, Signallers and Guards of M.S.M. & S.I.R. Railways. (7) Managers of the office of Engineers-in-chief and Head Clerks and Accountants of Divisional Offices of State Railways (8) All Treasury Deputy Collectors, Huzur Sheristadars and Cash-keepers. (9) Assistant and Sub-Assistant Inspectors of Schools, and Supervisors of Primary schools. (10) Assistant or Deputy Director of Survey, (11) All Superintendents of Jails and their subordinates (12) All Stamp Vendors, and Registration and Post Officers. (13) All persons who live at a distance further than 20 miles by road from the place where the trials before the Sessions Courts are held, provided where the means of communication by rail or water are available the distance may be proportionately increased, 2 miles by water and 5 miles by rail being taken as equivalent to 1 mile by road, *Rule 45, Mad. Cr. Rules of Pr.*

321. (1) The Sessions Judge, and the Collector of the district or such other officer as the Local Government appoints in this behalf, shall prepare and make out in alphabetical order a list of persons liable to serve as jurors or assessors and qualified in the judgment of the Sessions Judge and Collector or other officer as aforesaid to serve as such, and not likely to be successfully objected to under section 278, clauses (b) to (h), both inclusive.

(2) The list shall contain the name, place of abode and quality or business of every such person, and, if the person is an European or an American, the list shall mention the race to which he belongs.

This section provides for making a list of Jurors or Assessors qualified to serve as such. Due consideration ought to be given to the provisions of S. 278, cls. (a) and (b), *supra*, viz., presumed or actual partiality and personal disqualification, such as alienage, etc. In selecting persons, a Sessions Judge should choose persons of independent condition in life and men of judgment and experience, 23 W.R. (Cr.) 35 and persons of very high social position should not be placed in the list of Assessors as native sentiment is rightly or wrongly not in favour of such nomination, 1897 A.W.N. 167. The question will be in regard to property, character, and education and in case of superior qualification in any of these, such person will be included in the list of special Jurors.

322. Copies of such list shall be stuck up in the office of the Collector or other officer as aforesaid, and in the Court-houses of the District Magistrate and the District Court and extracts therefrom in some conspicuous place in the town or towns in or near which the persons named in the extract reside.

323. To every such copy or extract shall be subjoined a notice stating that objections to the list will be heard and determined by the Sessions Judge and Collector or other officer as aforesaid, at the sessions court-house, and at a time to be mentioned in the notice.

The section only says that to every such copy or extract shall be subjoined a 'notice' and does not contemplate personal service of notice stating that objections will be heard.

324. (1) For the hearing of such objections the Sessions Judge shall sit with the Collector or other officer as aforesaid, and shall, at the time and place mentioned in the notice, revise the list and hear the objections (if any) of persons interested in the amendment thereof, and shall strike out the name of any person not suitable in their judgment to serve as a juror or as an assessor, or who may establish his right to any exemption from service given by section 320, and insert the name of any person omitted, from the list whom they deem qualified for such service.

(2) In the event of a difference of opinion between the Sessions Judge and the Collector or other officer as aforesaid, the name of the proposed juror or assessor shall be omitted from the list.

(3) A copy of the revised list shall be signed by the Sessions Judge and Collector or other officer as aforesaid, and sent to the Court of Session.

(4) Any order of the Sessions Judge and Collector or other officer as aforesaid in perparing and revising the list shall be final.

(5) Any exemption not claimed under this section shall be deemed to be waived until the list is next revised.

(6) The list so prepared and revised shall be again revised once in every year.

(7) The list so revised shall be deemed a new list, and shall be subject to all the rules hereinbefore contained as to the list originally prepared.

Hearing objection at the time and place mentioned in the notice.—Where the name of an exempted person appears in the list of Jurors and Assessors prepared under s. 321 *supra* and such person does not object at the time of revision of the list under this section, sub-section (5) lays down that he shall be deemed to have waived his objection until the list is next revised and sub-section (4) says that the revised list shall be final.

Strike out the name of any person not suitable in their Judgment.—A person whose name is included in the first list may be capable and fully qualified yet the revising authorities may if they think fit, strike out his name from the list.

325. In the case of any district for which the Local Government has declared that the trial of certain offences shall, if the Judge so direct, be by special jury, the Sessions Judge and the Collector of such district or other officer as aforesaid shall prepare, in addition to the revised list hereinbefore prescribed, a special list containing the names of such jurors as are borne on the revised list and are in the opinion of such Sessions Judge and Collector or other officer as aforesaid, by reason of their possessing superior qualifications in respect of property, character or education, fit persons to serve as special jurors:

Preparation of list of special Jurors.

Provided always that the inclusion of the name of any person in such special list shall not involve the removal of his name from the revised list nor relieve him of his liability to serve as an ordinary juror in cases not tried by special jury.

This section enables the preparation of special Jury-list out of ordinary Jury-list, and empowers the Local Government to direct that the trials for certain offences in particular districts shall, if the Sessions Judge so directs, be by special Jury.

326. (1) The Sessions Judge shall ordinarily, seven days at least

District Magistrate
to summon Jurors and
Assessors.

before the day which he may from time to time fix for holding the sessions, send a letter to the District Magistrate requesting him to summon as many persons named in the said revised list or the said special list as seem to the Sessions Judge to be needed for trials by jury and trials with the aid of assessors at the said sessions, the number to be summoned not being less than double the number required for any such trial and including where any accused person is an European or an American, as many Europeans or Americans as may be required for the purpose of choosing jurors or assessors for the trial.

(2) The names of the persons to be summoned shall be drawn by lot in open Court, excluding those who have served within six months unless the number cannot be made up without them; and the names so drawn shall be specified in the said letter.

(3) Where the accused requires, and is entitled to be tried under the provisions of section 275, there shall be chosen by lot, in the manner prescribed by or under section 276, from the whole number of persons returned the jurors who are to constitute the jury until a jury containing the proper number of Europeans or Europeans and Americans or of Indians, as the case may be, has been obtained :

Provided that, in any case in which the proper number of Europeans or Americans cannot otherwise be obtained, the Court may, in its discretion for the purpose of constituting the jury, summon any person excluded from the list on the ground of his being exempted under section 320.

(4) Where, under the proviso to sub-section (3), the Court proposes to summon as a juror any person in His Majesty's Army, the provisions of section 317 shall apply in like manner as they apply for the purpose of the summoning of military jurors for a trial under section 316.

Amendment.—The italicised words in sub-section (1), sub-sections (2) and (4) were added by Act XII of 1923, Racial Distinctions Act. "Seven days" has been substituted for "three days" in the Code of 1898.

Scope and object of the section.—S. 327 *infra* would seem to show that this section has in contemplation, viz., the summoning of a sufficient number of persons for attendance throughout the sessions and not to summon separate sets of persons for each particular trial and to fix dates accordingly, much in the same way as persons summoned under s. 316 *supra* to give their attendance at the High Court sessions. It is to be noticed that the phrase used in this section is "the number to be summoned not being less than double the number required for any such trial," S. C. 371. The object of this and the other provisions is to secure an impartial trial by rendering impossible any intentional manipulation of the jury for a particular case, and an accused has a right to claim to be tried by a jury of 12 in all cases.

strict regard to all the safeguards provided by law to secure perfect impartiality, 7 C.W.N. 188. If a Judge is unable to comply with the provisions of this section, he will do well to postpone the trial. The duty of issuing a precept under this section cannot be performed by a Subordinate Judge doing current duties in the absence of the Sessions Judge, Ratanlal 148.

District Magistrate to summon.—The provisions of Chapter VI relating to service of summons apply to summoning Jurors and see Sch. V, Form No. 32 *infra*, as to the form of precept to District Magistrate, to summon Jurors and Assessors. Where a summons to a Juror was not served personally but a copy was affixed to the outer door of his house in his absence and he had no knowledge of such service of summons, it was held he could not be fined for non-attendance, 6 C.W.N. 887; 1899 A.W.N. 13. An Assessor cannot be held to have lawfully summoned to act as such on a particular day unless the summons issued to him was for his attendance on that day and no other. What the Legislature has contemplated as the ordinary or normal procedure is that all Assessors should be summoned on the first day on which the Sessions commence, however many trials it may propose to hold in the course of that Sessions. This procedure has been found to be unnecessarily burdensome for the persons summoned, in view of the length to which the Sessions are apt to run in many districts. The practice commonly followed, *viz.*, to summon four Assessors for each date is not objectionable in law, but is far from being obligatory and is not even the normal procedure, 7 Cr. L. Rev. 267=17 Cr. L.J. 17=32 Ind. Cas. 145. Where a Judge had requested the District Magistrate to summon five Assessors to attend the Court on a particular day and when the case was taken up he found only one of those persons present and thereafter directed a search in the Court precincts of any person acquainted with English who could be required to act as an Assessor and a *Nazir* of the Court was produced, and he without any objection by the accused acted as an Assessor it was held that as the *Nazir* was not summoned to act as an Assessor and as there was nothing to show that he was on the list of Assessors and could be summoned, the trial was illegal and S. 537 *infra* cannot cure a defect as to the constitution of the Court even though the accused did not object to the course adopted, 11 Cr. L.J. 724=8 Ind. Cas. 874 where 15 B. 514; 25 B. 694 at 696; 3 Bom. L. R. 274 are referred to.

Not being less than double the number.—Where any accused is charged with an offence punishable with death, an offence triable by Jury in Calcutta (under the Jury notification), the District Magistrate shall summon a number of persons not being less than double the number of persons required for the trial under this section. The Jury in such a case is to consist of not less than seven and if practically of nine persons. It is contrary to the intention of the Code and the standard set by the Legislature if an unreasonable number of Jurors were summoned with the result that it was not possible to have a Jury properly and the whole proceedings should therefore have to be set aside and retrial was ordered, 55 C. 794 following 31 C.W.N. 1102=56 C.L.J. 160=28 Cr. L.J. 889=104 Ind. Cas. 905.

Sub-section (3).—This sub-section is new. Before the amendment, S. 462, now repealed, dealt with summoning Jurors when a mixed Jury was claimed. Now under S. 275 *supra* Indian British Subjects can also claim like European British Subjects a trial by a Jury the majority of which is to be Indians in trials before the High Court. This provision is extended to trials in Sessions Court as well, by the amendment.

Sub-section (4).—This sub-section is also new. The power of the Court of Session to try European British Subjects is now extended and therefore the power is given to summon Military Jurors, a power which the High Court alone possessed before the amendment. S. 320 (g) exempts generally persons employed in the Army or in the Air Force but they can be summoned when necessity arises.

For Form of Precept to the District Magistrate to summon Jurors and Assessors, See Sch. V, Form No. 82.

327. The Court of Session may direct jurors or assessors to be summoned at other periods than the period specified in section 326, when the number of trials before the Court renders the attendance of one set of jurors or assessors for a whole session oppressive, or whenever, for other reasons, such direction is found to be necessary.

Power to summon another set of Jurors or Assessors.

328. Every summons to a juror or assessor shall be in writing, and shall require his attendance as a juror or assessor, as the case may be, at a time and place to be therein specified.

Form and contents of summons.

S. 68 *supra* is the only provision in the Code for service of summons and any other mode adopted for such service is illegal. The issue of a summons to an Assessor to attend the Sessions Court by registered letter is illegal and not authorised by law and the person summoned cannot be held guilty under S. 332, I.P.C., for non-attendance, 1 C.W.N. cxvi. See forms 32 and 33 of Sch. V for summons to Juror or Assessor.

329. When any person summoned to serve as a juror or assessor is in the service of Government or of a Railway Company, the Court to serve in which he is so summoned may excuse his attendance if it appears on the representation of the head of the office in which he is employed, that he cannot serve as a juror or assessor, as the case may be, without inconvenience to the public.

When Government or Railway servant may be excused.

Court may excuse attendance of Juror or Assessor.

Court may relieve special Jurors from liability to serve again as Jurors for twelve months.

330. (1) The Court of Session may, for reasonable cause excuse, any juror or assessor from attendance at any particular session.

(2) The Court of Session may, if it shall think fit, at the conclusion of any trial by special jury, direct that the jurors who have served on such jury shall not be summoned to serve again as jurors for a period of twelve months.

331. (1) At each session the said Court shall cause to be made a list of the names of those who have attended as jurors and assessors at such session.

(2) Such list shall be kept with the list of the jurors and assessors as revised under section 324.

(3) A reference shall be made in the margin of the said revised list to each of the names which are mentioned in the list prepared under this section.

List of Jurors and Assessors attending.

332. (1) Any person summoned to attend as a juror or as an

Penalty for non-attendance of Juror or Assessor.

assessor who, without lawful excuse, fails to attend as required by the summons, or who, having attended, departs without having obtained the permission of the Court, or fails to attend after an adjournment of the Court, after being ordered to attend, shall be liable by order of the Court of Session to a fine not exceeding one hundred rupees.

(2) Such fine shall be levied by the District Magistrate by attachment and sale of any moveable property belonging to such juror or assessor within the local limits of the jurisdiction of the Court making the order.

(3) For good cause shown, the Court may remit or reduce any fine so imposed.

(4) In default of recovery of the fine by attachment and sale, such juror or assessor may, by order of the Court of Session, be imprisoned in the civil jail for the term of fifteen days, unless such fine is paid before the end of the said term.

In preparing a list of Assessors, persons of high rank should not be included until it is known that they are willing to act as such, as native sentiment upon this point is rightly or wrongly against such nomination, 1887 A.W.N. 167.

An order under this section passed by a Sessions Judge fining an Assessor is not appealable, and the High Court cannot interfere in Revision where there was nothing illegal in the order passed, 8 W.R. (Cr.) 83, but if the Juror or Assessor fined by the Judge subsequently appears and gives good ground for his absence when his name was called on, such as illness etc., the Judge should reconsider the matter. See S. 318 *supra* which relates to failure to attend at the Sessions. See also 1899 A.W.N. 13; 1897 A.W.N. 167; 6 C.W.N. 887 as to powers of the High Court to revise orders fining Juror or Assessor.

Sub-section (3).—An Assessor on account of illness failed to attend Court, and a medical certificate as to his illness was produced, an hour or two after the order of the Judge fining him for non-attendance. In such a case there is no reason why it should not have been received and favourably considered by the Judge, to remit or reduce the fine imposed, 8 W.R. (Cr.) 83.

L.—Special Provisions for High Courts.

333. At any stage of any trial before a High Court under this

Power of Advocate-General to stay prosecution.

Code, before the return of the verdict, the Advocate-General may, if he thinks fit, inform the Court on behalf of Her Majesty that he will not further prosecute the defendant upon the charge; and thereupon all proceedings on such charge against the defendant shall be stayed, and he shall be discharged of and from the same. But such discharge shall not amount to an acquittal unless the presiding Judge otherwise directs.

Scope of the section.—This section deals with the power of the Advocate-General to stay prosecution by entering what is called a *nolle prosequi*. *Nolle Prosequi* (not willing to prosecute) is an entry, on the record, of a statement that the prosecutor will not proceed further. This course is occasionally adopted (1) when it is desired to call the accused as

king's evidence i.e., as an approver against another concerned in the crime (2) when a Civil suit is pending on the same facts (3) where the charge is clearly defective or of doubtful validity and cannot be sustained. The entry when made has not the effect of a judgment on the merits, but puts an end to the indictment on which the prisoner is brought before the Court and prevents the issue of further process therein. It is not equivalent to a pardon or an acquittal, for raising a plea of *autrefois acquit*. 'The prisoner cannot be proceeded against on the same charge, but the rule does not affect the legality or otherwise of any proceedings taken hereafter by the Crown against him, 52 C. 590. A *nolle prosequi* does not operate as a bar or discharge or acquittal on the merits, but the party remains liable to be re-indicted. The power of the Attorney-General in England is not subject to any control by the Courts; but that power does not interfere with the right of the Judge to allow a case to be withdrawn on the application of a private party. *Arch. Cr. Pl. Ev. and Pr.*, p. 121. (25th Ed.). Similarly the power of the Advocate-General in India is not subject to the control of the Court. The words 'if he thinks fit' indicate that the power is solely vested in him.

Advocate-General may inform Court he will not further prosecute.—For definition of the term "Advocate-General," see S. 4 (1) (a) *supra*. At the Criminal Sessions of the Calcutta High Court, the trial had commenced before Rampini, J., and evidence was partly recorded, when the presiding Judge retired from the case under S. 556 *infra* on account of personal interest, as being a share-holder in the prosecuting bank, but he did not discharge the Jury. The Chief Justice purporting to act under clause 13 of the Charter Act appointed Stevenson, J., to try the case and in answer to a question by the Judge the Standing Counsel intimated that he intended to proceed with the trial from where it had been left. An objection was raised on behalf of the accused, that Stevenson, J., could not proceed with the trial, as Rampini, J., and the Jury empanelled before him had still the

held that where a presiding Judge, after swearing in of the Jury and the reading of the charge, and the counsel for the Crown had started opening his case by reading the sections of the I.P.C., fell suddenly ill, and another Judge was appointed by the Chief Justice to preside at the Sessions, the trial can validly proceed before the successor and no objection can validly be taken that it was necessary to discharge the Jury sworn in and a *de novo* proceedings should be commenced as the *seisin* of the case was with the Court as constituted when the Jury was formed, and until the Jury was discharged there cannot be another duly constituted Court to try the case. For similar instances where the Advocate General exercised his power under this section, see 7 C.W.N. xxxi; 8 C.W.N. xlviii. A *nolle prosequi* puts an end to the prosecution, but does not bar a second trial, see 41 C. 1072. Where the Judge disagreed with the verdict of the Jury who by a majority of seven to two returned a verdict of "not guilty" the Advocate General under this section entered *nolle prosequi* and the accused was discharged. A discharge under this section will not amount to an acquittal unless the presiding Judge otherwise directs, 41 C. 1072. See also 40 C. 71; 29 C. 725. This is important, as a discharge does not debar a second trial, see S. 403, *infra*. An order of discharge does not operate as any bar to fresh proceedings being taken before a competent Magistrate upon a complaint or police report or under S. 190 (1) (c) *supra*, whether such a discharge was by a Presidency Magistrate or a Provincial Magistrate or by a Court of Session or by the High Court. Where the Advocate General entered *nolle prosequi* in a case tried in the Calcutta High Court Sessions on objection being raised that the offence was committed outside the original jurisdiction of the High Court and the accused was discharged, it was held that the order of discharge did not prevent a Provincial Magistrate from starting fresh proceedings, 1 Cr. L. Rev. 164.

334. For the exercise of its original criminal jurisdiction, every High Court shall hold sittings on such days and at such convenient intervals as the Chief Justice of such Court from time to time appoints.

Time of holding sittings.

335. (1) The High Court shall hold its sittings at the place at which it now holds them, or at such other place (if any) as the Governor-General in Council in the case of the High Court at Fort William, or the Local Government in the case of the other High Courts, may direct.

(2) But it may, from time to time, in the case of the High Court at Fort William with the consent of the Governor-General in Council, and in all other cases with the consent of the Local Government, hold sittings at such other places within the local limits of its appellate jurisdiction as the High Court appoints.

(3) Such officer as the Chief Justice directs shall give notice before hand in the local official Gazette of all sittings intended to be held for the exercise of the original criminal jurisdiction of the High Court.

Sub-section (2).—This sub-section empowers the High Court with the consent of the Local Government to hold its sittings outside the Presidency town at any place within the local limits of its appellate jurisdiction in exceptional cases, such as prevalence of epidemics in the Presidency Town or in the case of an offence committed in a prison and to avoid excessive expense in summoning a large number of witnesses from distant places or in cases to ensure public safety, or to ensure a fair trial to the accused when the public mind is prejudiced by the publication of wild stories against the accused in the local dailies in the Presidency Town before the commencement of the inquiry etc., See S 316 *supra* which provides for Jurors being summoned in cases contemplated by this section. The Court of Session of the place where the sitting is to be held is to summon the Jurors from its own list.

336. *Omitted by Act XII of 1923, S. 20.*

CHAPTER XXIV.

GENERAL PROVISIONS AS TO INQUIRIES AND TRIALS.

This Chapter is headed general provisions as to inquiries and trials. "Some of the sections of this Chapter are not in accordance with the strict interpretation of the heading inasmuch as they do not deal with matters which either must or may arise in the course of an inquiry or trial (cf. Ss. 340, 350, 350A). Others deal with questions which are in nature general (*e.g.*, tender of pardon to an accomplice (Ss. 337, 339A), compounding of offences (S. 345). Others, however, appear to be quite general and to be so expressed (exemptions or exceptions being made as necessary). The right to be defended by a pleader (S. 340), the rights of accused who cannot be made to understand the proceedings (S. 341), the right to be free from undue influence, threat or promise (S. 343), the power to remand (S. 344), detention of offenders attending Court (S. 351), Courts to be held in public (S. 352), these are all general provisions, as to inquiries and trials in the fullest sense of the phrase. The language in several of the sections is of studied generality (*e.g.*, any person accused of an offence before a Criminal Court S. 340 compare S. 351 and 352) and is appropriate to the subject matter. They are intended to be general provisions and not merely as miscellaneous provisions, 55 C. 297 at 298.

337. (1) In the case of any offence triable exclusively by the High Court or Court of Session, or any offence punishable with imprisonment which may extend to ten years, or any offence punishable under section 211 of the Indian Penal Code with imprisonment which may extend to seven years, or any offence under any of the following sections of the Indian Penal Code namely, sections 216A, 369, 401, 435 and 477A, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate or any Magistrate of the first class may, at any stage of the investigation or inquiry into, or the trial of the offence, with a view to obtaining the evidence of any person supposed to have been directly or indirectly concerned in or privy to the offence, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and to every other person concerned, whether as principal or abettor, in the commission thereof :

Provided that, where the offence is under inquiry or trial, no Magistrate of the first class other than the District Magistrate shall exercise the power hereby conferred unless he is the Magistrate making the inquiry or holding the trial, and, where the offence is under investigation, no such Magistrate shall exercise the said power unless he is a Magistrate having jurisdiction in a place where the offence might be inquired into or tried and the sanction of the District Magistrate has been obtained to the exercise thereof.

(1A) Every Magistrate who tenders a pardon under sub-section (1) shall record his reasons for so doing, and shall, on application made by the accused, furnish him with a copy of such record :

Provided that the accused shall pay for the same unless the Magistrate for some special reason thinks fit to furnish it free of cost.

(2) Every person accepting a tender under this section shall be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any.

(2A) In every case where a person has accepted a tender of pardon and has been examined under sub-section (2), the Magistrate before whom the proceedings are pending shall, if he is satisfied that there are reasonable grounds for believing that the accused is guilty of an offence, commit him for trial to the Court of Session or High Court, as the case may be.

(3) Such person, unless he is already on bail, shall be detained in custody until the termination of the trial.

Amendment—Old sub-section (4) has been split up, first part of it coming in more appropriately at the end of sub-section (1) and the latter part is rendered unnecessary by the addition of the new sub-section (2A). It is now made clear that sub-section (2) applies to the Court of the Magistrate holding the original inquiry. Sub-section (1) has been redrafted with many additions to make the meaning of the section more clear.

Scope and object of the section.—This section does not suggest the idea that the only method of obtaining the evidence of a co-accused against another is by tendering him a pardon with all the safeguards mentioned in this section. This section does not govern S. 494 *infra* and it does not in any way abridge the wide language of that section. This section and S. 494 *infra* should be read together. This section deals with the granting of pardon to an under-trial prisoner in some serious cases. If he satisfies the conditions upon which the pardon is granted, he gets acquitted; if not he may be tried for the offence, 33 C.W.N. 458. The object of the section is, in cases involving offences of great magnitude liable to be punished with heavy punishments, to prevent the escape of the offenders from punishment. For attaining this object, conditional pardon is tendered to the accomplice for the purpose of obtaining evidence in grave crimes by holding out the hope to him that if he should disclose the truth as a witness at the trial and thus bring the offenders to justice, he will himself go unpunished. Such conditional pardon protects from prosecution the approver who makes a full and true disclosure of the whole of the circumstances within his knowledge relative to the offence and the offenders. If it should ever be laid down as a practical rule in the administration of justice that the testimony of an accomplice should be rejected as incredible, the most mischievous consequences must necessarily ensue because it must not only happen that many heinous crimes and offences will pass unpunished but great encouragement will be given to bad men, by withdrawing from their minds the fear of detection and punishment through the instrumentality of their partners in guilt and thereby universal confidence will be substituted for that distrust of each other which naturally possesses men engaged in wicked purposes and which operates as one of the most effectual restraints against the commission of those crimes to which the concurrence of several persons is required"—*per Abbot, L.C.J., in his charge to Grand Jury in 1820*. There is no law that every offender ought to be prosecuted and it is well known that offenders manage to conceal their misdeeds or that evidence to prosecute has often been found to be insufficient. There is nothing to prevent the prosecuting authority from refraining to prosecute any individual and that discretion is inherent in the authority to whom the law has entrusted the power of instituting prosecution. The competency of a person to whom an assurance of not prosecuting is given, to be a witness is in no way affected though it may affect his credibility, 26 Cr. L.J. 1487—89 Ind. Cas. 1035. The procedure laid down in this section is an exception to the general rule that the statement of an accused person is not to be used as evidence against a co-accused unless he implicates himself to the same extent and runs the same risk as those jointly accused with him. The tendering of conditional pardon under this section is different from the withdrawal of a charge under S. 494, *infra*. In the latter case, there is a discharge or acquittal of the accused unconditionally, while under this section the tender of pardon is made on condition of his making a full and true disclosure of the whole of the circumstances connected with the offence and, if he fails to do so, the pardon may be forfeited and he can be tried for the same offence. The pardon can be granted only by any of the Magistrates mentioned in this section and for offences triable exclusively by High Court or Court of Session and punishable under certain sections herein mentioned, 1 Lah 102; 33 C. 1353. The pardon can be tendered even when the offence is under police inquiry, 3 Lah 431; 1904 P.R. (Cr.) 21 but where there is no inquiry into an offence no pardon can legally be tendered, 45 B. 61. The pardon tendered is of no avail unless the Magistrate is competent to tender the same, 20 A. 49. The fact that a case before a Magistrate was temporarily postponed under S. 526 (8) *infra* will not thereby render the Magistrate *functus officio* to tender pardon. This section does not say that the inquiry or trial should be in progress when pardon is tendered. The Magistrate is the only Magistrate having jurisdiction to inquire into the case and although the inquiry is postponed he did not cease to be the Magistrate inquiring into the offence said to have been committed, 49 A. 181

at 183. Under this section as amended certain modifications have been introduced and pardon granted by a Magistrate inquiring into a case exclusively triable by a Court of Session with regard to some offences and others not so triable will not invalidate a pardon granted with regard to offences so exclusively triable and once a pardon is granted it extends to all charges and to all the accused, 26 Cr. L.J. 1045=87 Ind. Cas. 953. The Local Government has no power to offer a conditional pardon and the evidence of the accused taken on such a conditional pardon is wholly inadmissible, 10 C.W.N. 847. A pardon tendered by Government does not come within the purview of this section, 1905 P.R. (Cr.) 9=4 Cr. L.J. 282 S. 529 (g) *infra* enacts that if a pardon is tendered by a Magistrate not empowered but who acts erroneously but in good faith his proceedings will not be set aside. The words "*a full and true disclosure . . . under inquiry*" refer to the importance, when a pardon is tendered, for encouraging the approver to give the fullest details so that points may be found in his evidence which may be capable of corroboration, 11 A. 79. When a pardon is tendered and accepted, the fullest faith must be kept on both sides, 12 C.L.R. 226. An accused who has been discharged is a competent witness against the other accused and there is no illegality in the procedure of withdrawing the case against the discharged accused though the more reasonable and proper procedure would be to tender a pardon to him and make him an approver. When an accused is discharged there is no fear of any action under S. 339, *infra*, hanging over his head. For normally he could not be proceeded with in connection with the original offence under the ordinary law applicable, 27 Cr. L.J. 807=93 Ind. Cas. 471. The Code makes no provision for any inquiry by the District Magistrate or by any other Magistrate in connection with a tender of pardon to an accomplice. The Magistrate may make such formal inquiry as he thinks best for his own guidance and it is entirely a matter for him. Any such inquiry as he makes would not be an inquiry conducted under S. 4 (1) (k) *supra*, 46 B. 61.

Sub-section (1).—Before the amendment this section applied to cases exclusively triable by Court of Session or the High Court. But now other offences not so exclusively triable are within the scope of this section, 26 Cr. L.J. 1115=88 Ind. Cas. 283. This sub-section provides that certain Magistrates may tender a pardon on condition that the person concerned shall make a true and full disclosure of all the circumstances within his knowledge. It is nowhere laid down that such disclosures shall be in writing. If made orally the Magistrate may depose to it. As a rule of caution, however, the approver's statement is always formally reduced to writing. The disclosure may be made anterior to the inquiry before the Committing Magistrate as also be made at the time of the inquiry or trial. It is the disclosure inducing the pardon that is contemplated by S. 339. (2) To such disclosure S. 164 *supra*, has no application, 29 Cr. L.J. 413=108 Ind. Cas. 514. Conditions other than those mentioned in this sub-section are of no avail, *e.g.*, it cannot be stipulated that the accomplice should testify to his having been present at the scene of murder when the offence was committed. The condition can only be of his making a full and true disclosure of the whole of the circumstances within his knowledge and of the person or persons concerned in the commission of the offence, Ratanlal 612. The words "suppose to have been directly or indirectly concerned or privy to the offence" are in accordance with the decision in, 6 W.R. (Cr.) 94. See in this connection, 16 Cr. L.J. 632=30 Ind. Cas. 456.

Sub-section (1A).—This sub-section was originally the first part of sub-section (4), now repealed. The recording of reasons by the Magistrate is not a condition precedent to the tender of pardon and its acceptance by the approver, 13 Cr. L.J. 589=15 Ind. Cas. 1004. The Magistrate is to record his reasons for doing so and he is also bound to furnish a copy of the same to the accused on his application. In 36 C. 629; 5 Cr. L.J. 142 and 5 C.L.J. 224, it was held that omission to record reasons was only an irregularity. It would not be sufficient to show that the Magistrate had omitted to record reasons but it should further be shown that the omission to record reasons had in effect occasioned a failure of justice, otherwise the alleged defect would be cured by S. 537 *infra*, 27 A.L.J. 227 at 228.

Sub-section (2).—Under this sub-section as now amended it is essential that the approver must be examined as a witness in the Court of the Magistrate taking cognizance of the offence and in the subsequent trial, if any. It is not a sufficient compliance with the

section if the approver is examined in the Court of the Committing Magistrate. The amendment appears to have been made to make it clear that the approver must be examined before the committing Magistrate and in the subsequent trial. Whether the non-compliance with the provisions of the sub-section vitiates the trial of a person, against whom the approver's evidence is sought to be tendered, need not be decided but the fact that the approver was not examined at the trial of the persons whom he sought to implicate is no breach on the part of the crown of the conditions upon which the disclosures are made, and pardon tendered, and the pardon so granted cannot be pleaded as a bar to his trial. He must be considered to have failed to comply with the conditions of his pardon as soon as it is proved that he has not made a full and true disclosure and this becomes apparent the moment he makes a statement entirely inconsistent with his previous statement on the strength of which pardon was tendered to him, 9 Lah. 608. The validity of a pardon tendered cannot be affected by the fact that a co-accused against whom the approver's evidence was used was ultimately convicted of a minor offence and even if the pardon was invalid it would not prevent the approver being examined in the Sessions Court when he is not committed with the other accused, 27 Cr. L.J. 1103=97 Ind. Cas. 367. In a case where a pardon was tendered and accepted by the accused in the Committing Magistrate's Court but by some oversight, his name was not removed from the list of accused and at the commencement of the Sessions trial, his plea was also taken and the Sessions Judge finding out the mistake, immediately corrected the same by removing him from the dock, it was held that the evidence given by the accused at the Sessions trial was not rendered inadmissible and there was no prejudice of any description caused to the accused by the procedure adopted, 53 C. 839. This sub-section provides that a person accepting the pardon is to be examined as a witness in the Court of the Magistrate taking cognizance of the offence. That condition is fulfilled when the approver is examined as a witness before the Magistrate. This sub-section does not mean that it is compulsory to examine the approver in the Sessions Court if he has shown by his evidence in the Magistrate's Court that he is an untrustworthy witness. It is contrary to all principles that the Crown should be obliged to examine as a prosecution witness one who has shown himself by his evidence in a previous stage of the case to be untrustworthy, 42 C. 886 at 870; 24 M. 321; 29 A. 24; 33 M. 514, 25 B. 675, 13 Cr. L.J. 33=13 Ind. Cas. 273. An accused person who after accepting the conditional pardon shows an intention not to give the evidence which he has led the prosecution to expect, ought not to be put back in the dock without being examined as a witness under this sub-section and then dealt with under S. 339, *infra*. Such a person should, if tried, be tried separately and after the trial of the other accused, 31 M. 272. See also the new proviso to S. 337 (1) which enacts that the trial is to be separate and not with the other accused.

Sub-section (2A).—The word "him" occurring in this sub-section does not refer to the person who has accepted a tender of pardon but refers to the accused. What the provision of law means is, that whenever an approver is examined, the Magistrate has no jurisdiction to proceed with the trial, but must commit the accused to the Court of Session. It does not mean that the approver should be committed for trial along with the accused person. It is the common rule of interpretation that the pronoun refers to the person immediately preceding, which herein is the accused and not the approver. The direction is that the approver unless he is already on bail shall be detained in custody until the termination of the trial, a direction for which there is no necessity if he is to be committed along with the accused to the Court of Session, 26 Cr. L.J. 4216=88 Ind. Cas. 736, followed in 30 Cr. L.J. 567=116 Ind. Cas. 193. In a case where two persons were charged with murder and all the evidence for the prosecution was recorded in the presence of the accused who had full opportunity of cross-examining the witnesses the Magistrate for reasons recorded by him tendered pardon to one of the accused on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge but immediately accepting the pardon, he when examined a witness, refused to make a statement saying he knew nothing; the Magistrate therefore revoking the pardon proceeded with the inquiry and ultimately committed the accused to the Court of Session, it was held that there was no illegality in the procedure and the commitment was valid, 3 A.L.J. 613=4 Cr. L.J. 142. A Magistrate

especially empowered was trying a case against persons including an approver, and meanwhile the Amended Act came into force and the Magistrate had closed the evidence. The Magistrate was therefore bound under S. 347, *infra*, to commit the case to the Court of Session and he should not try the same, 26 Cr. L.J. 549=85 Ind. Cas. 645. This sub-section enacts that if after examination of the approver under sub-section (2) the Magistrate is satisfied that there are grounds for believing that the accused is guilty, he may commit him for trial, but a District Magistrate empowered under S. 30, *supra*, who has not tendered the pardon may himself try the case instead of committing the accused. The prohibition contained in the proviso is in accordance with the ruling in 10 C.W.N. 847. It would not be sufficient to show that the Magistrate has omitted to record his reason under this sub-section. It would also be shown that such omission to record his reasons has in effect occasioned a failure of justice; otherwise the alleged defect would be cured by S. 537 *infra*, 27 A.L.J. 227 at 228. When a Magistrate empowered under S. 30 *supra*, tenders a pardon to one of the accused he must not try the case himself but should commit the accused to the Sessions Court, as this sub-section governs S. 30 *supra*, also, 25 Cr. L.J. 1341=82 Ind. Cas. 573. So also in a case of robbery where a Magistrate tendered pardon to an approver and is satisfied a *prima facie* case is made out, he must commit the case to the Court of Session under this sub-section, 26 Cr. L.J. 829=85 Ind. Cas. 477. There is no provision of Indian Statute Law nor is there any principle of natural justice which makes an accomplice as such, an incompetent witness at the trial of another person in respect of an offence. A refusal to admit his evidence merely because the case is outside the purview of this section would be a clear error of law, 21 A.L.J. 42; 25 Cr. L.J. 174=76 Ind. Cas. 393.

Sub-section (3).—This sub-section contemplates only a case where there has been a commitment made by a Magistrate to the Court of Session or the High Court. It omits to consider the case where the Magistrate himself on his own responsibility discharges the accused person. It seems manifest that the meaning of this sub-section is merely that the approver shall not be set at large until the judicial proceedings pending against the accused are finished. It is for the purpose of this section immaterial, whether the proceedings are finished by the magisterial order of discharge before trial or by a Judge's order of acquittal after trial. In the case of the magisterial discharge the sub-section would be satisfied if the approver was detained in custody or on bail until the order of discharge was made. When the magisterial order of discharge was made, the provisions of this sub-section were spent and are inapplicable to any proceedings held thereafter, 37 B. 146 at 150. It was held in 30 B. 611 that at the termination of the trial either in the Sessions Court or in the High Court, the approver must be discharged immediately by the Court. It is not for the Court to exercise a discretion in the matter and to say that it will detain him in order that further proceedings be instituted against him. See also 37 C. 845; 46 B. 120. It is indisputable that unconditional release of an accomplice before the termination of a trial is attended with serious risks and is such as is likely to frustrate the very object of his being pardoned. Not only is he likely to abscond and not appear when he is wanted but there is every fear of his being tampered with and of his tampering with the prosecution evidence. Unless, therefore special circumstances exist for his being released on bail or his continuing to remain on bail if he has already been released, it is but just and proper that he should remain in custody. It is with that object in view and not with the express purpose of overriding the provisions of granting bail contained in Chapter XXXIX that sub-section (3) has been enacted. It is a corollary to sub-sections (1) and (2) and purports to enable the Magistrate granting pardon to detain the accomplice in custody notwithstanding his pardon. It however expressly provides that the fact that the accomplice has turned an approver, shall not *ipso facto* mean the cancellation of his bail bond if he is on bail. Whether such bail should be subsequently cancelled or not has been left untouched. The sub-section does not go further and does not deal either with the question whether the accomplice may not be released on bail by a superior Court subsequent to the grant of pardon under S. 498, *infra* or that if he is on bail that he may not be detained by order of the superior Court under S. 497 (5) *infra*. Sub-section (3) is an affirmative clause and though the use of the word 'shall' is primarily obligatory it is less significantly imperative than the expression 'must.'

There is nothing in the sub-section to suggest that the Legislature wished to favour accomplices who were on bail before their pardon or to place them on a better footing than those who had not got such pardon. If the admission of guilt puts an end to the privilege of being permitted to remain on bail it equally applies to both and if special circumstances exist which make it highly improbable that an accomplice will not abscond or be tampered with and entitle one who is released on bail before his pardon to continue on bail, there is no reason why the same circumstances should not enure to the benefit of another who has unfortunately been remanded to custody up to the time of his pardon. It is therefore more consistent that sub-section (3) should be interpreted as obligatory only on the Magistrate granting the pardon, requiring him to detain the accomplice in custody and as in no way affecting the powers of the superior Court. This interpretation is in conformity with the rule that the jurisdiction of the superior Court is not to be ousted except by express language, 28 Cr. L.J. 439=101 Ind. Cas. 471.

338. At any time after commitment, but before judgment is passed, the Court to which the commitment is made may, with the view of obtaining on the trial the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, any such offence, tender, or order the committing Magistrate or the District Magistrate to tender, a pardon on the same condition to such person.

Power to direct tender of pardon.

Any time after commitment.—The words "after commitment" denote that a pardon could be tendered not only during the trial but before the trial actually begins.

Of any person.—These words will include an accused person before the Sessions Judge, S. 343, *infra*, supports this view and it is difficult to see any other case to which the section would apply, 7 Cr. L. Rev. 64=16 Cr. L. J. 632=30 Ind. Cas. 456.

Any such offence.—These words restrict the scope of this section to the offences referred to in the preceding section and a pardon cannot be tendered with regard to offences not specified in S. 337, *supra*. See 10 M.L.J. 147 (F.B.). A pardon may be tendered at any time after commitment and before judgment is passed. There is nothing to preclude a Sessions Judge tendering pardon to a person who has pleaded guilty to the charge and his being examined subsequently as a witness against his co-accused, 7 A. 160. The words "supposed to have been directly or indirectly concerned" occurring in this and S. 337, *supra* must be taken merely as intended to exclude the case of a person who has been actually convicted, 7 A. 160; Ratanlal 750.

339. (1) Where a pardon has been tendered under section 337 or section 338, and the *Public Prosecutor certifies that, in his opinion* any person who has accepted such tender has, either by wilfully concealing anything essential or by giving false evidence, not complied with the condition on which the tender was made, *such person* may be tried for the offence in respect of which the pardon was so tendered, or for any other offence of which he appears to have been guilty in connection with the same matter :

Commitment of person to whom pardon has been tendered.

Provided that such person shall not be tried jointly with any of the other accused, and that he shall be entitled to plead at such trial that he has complied with the conditions upon which such tender was

made ; in which case it shall be for the prosecution to prove that such conditions have not been complied with.

(2) The statement made by a person who has accepted a tender of pardon may be given in evidence against him *at such trial*.

(3) No prosecution for the offence of giving false evidence in respect of such statement shall be entertained without the sanction of the High Court.

Amendment.—(1) The Public Prosecutor is now to certify that in his opinion the conditions have not been fulfilled by the approver. (2) The approver is to be tried separately from the other accused. (3) The approver may plead that he has complied with the conditions of the tender. (4) It is for the prosecution to prove affirmatively that the conditions of the tender have been broken.

Scope of the section.—This section is an empowering section addressed to certain Courts of Justice and has nothing to do with the powers of discretion of an Executive such as a Local Government instituting or refraining from instituting any prosecution, 21 A.L.J. 42=25 Cr. L.J. 597=77 Ind. Cas. 961. This section contemplates a pardon being forfeited under it, but neither in it nor in any other part of the Code is it enacted that the forfeiture of pardon depends on the opinion of the Judge or Magistrate, 30 B. 611, followed in 12 Cr. L.J. 326=10 Ind. Cas. 622. No formal withdrawal and no formal declaration of forfeiture is necessary, 42 C. 756; 14 Cr. L.J. 401=20 Ind. Cas. 225. But now the Public Prosecutor is to certify that in his opinion the approver has not complied with the conditions on which the tender of pardon was made. It is a matter of great importance which cannot be too emphatically insisted upon, that the strictest faith should be kept with the accomplice, even though his statement may reveal him to be one of the vilest of criminals and the mere failure of his evidence to procure conviction of his alleged associates in crime is clearly insufficient for withdrawing the pardon tendered and for putting him on his trial, 12 C.L.R. 226; 24 M. 321; 32 M. 173; 7 M.L.T. 121. It is open to an accused person who has accepted pardon in the first instance, to resile from that pardon and say that he does not want the pardon and that he is not willing to give evidence but wishes to be tried so that his character may be cleared. The acceptance of a pardon continues till the person pardoned actually gives evidence and it is only then, any question will arise whether he has forfeited his pardon by not giving true evidence. A pardon which though accepted for a time, is rejected by himself before he gave evidence cannot be treated as falling under this section and therefore there is no objection to such an accused being tried jointly with the other accused, 45 M.L.J. 613=18 L.W. 606=(1923) M.W.N. 697. It is for the prosecution to prove that the pardon has been forfeited, 32 M. 173 and the accused can plead the pardon in bar of his trial, 24 M. 323; 32 M. 173; 14 A. 336; 25 B. 675; 30 B. 611; 27 C. 137.

Sub-section (1).—It should be for the prosecution to decide whether the approver should be prosecuted. The Public Prosecutor is to certify that in his opinion the approver is to be prosecuted. The certificate of the Public Prosecutor is a condition precedent to the validity of the trial of the approver; and the absence of such a certificate, vitiates the trial of the approver, 5 Lah. 379; followed in 27 Cr. L.J. 940 (2)=96 Ind. Cas. 396 (2); 26 Bom. L.R. 1240=26 Cr. L.J. 469=85 Ind. Cas. 149, but the production of a certificate after commitment before the Sessions Court validates the trial even though the commitment was irregular, 3 Ran. 55. Where a Sessions Judge in a Sessions trial found out the absence of a certificate of the Public Prosecutor for prosecuting an approver as required by this section and adjourned the trial and on the adjourned day the certificate was produced and the accused was tried and convicted, it was held that the proceedings before the Magistrate was merely an inquiry and not a trial within this section and it was open to the Sessions Judge to accept the commitment even though it was irregular

and the defect was cured by the production of the certificate in the Sessions Court before the trial, 3 Ran. 55. But in a case where a pardon has been declared forfeited by a Magistrate, this section cannot apply, 23 Cr. L.J. 1355=82 Ind. Cas. 715. The provision of law contained in this section aims at obtaining true evidence of offences by the grant of pardon to accomplices. It is nowhere laid down that if a witness first makes a full and true disclosure, he is at liberty to contradict his statement, deny its truth, without fear of forfeiting his pardon. The transaction is one of utmost good faith on both sides, and the approver commits a breach of the condition if he fails to make a full and true disclosure throughout. It is not enough for him to make such a disclosure before the committing Magistrate if he withdraws it in the Sessions Court, or to make it when examined-in-chief if he withdraws it in cross-examination, 33 M. 514 at 517. Whether the conditions of the pardon have or have not been complied with is a question of fact, 20 A. 529. There must be clear finding as to whether the accused had or had not complied with the conditions of the pardon. When the approver is a person of low intellect who would make what is familiarly known as a "bad witness" and made a very bad statement on the whole he cannot be held to have deliberately broken the conditions upon which he had been granted pardon, 27 Cr. L.J. 768=95 Ind. Cas. 288. The refusal of an approver to give evidence after accepting the conditional pardon amounts to a breach of the condition and his pardon may legally be withdrawn, 29 A. 24. If an approver denied all knowledge of the offence when examined as a witness the proper course is to try him for the offence which he is alleged to have committed with the certificate of the Public Prosecutor to the effect that he has not complied with the conditions of his pardon, 3 Ran. 244. The pardon is offered on two conditions (1) that the approver shall make a full and (2) true disclosure of all he knew about the crime. Pardon is forfeited if he fails to comply with these two conditions in two corresponding ways, first by concealing some material evidence, i.e., by not making a full disclosure, or secondly giving false evidence, i.e., by not making a true disclosure. The words "false evidence" must be read subject to the limitation of their contents as defining one of the modes of non-compliance with the conditions of the pardon and not in their literal sense, 30 B. 611 at 620; 32 M. 173. When a pardon was granted by the Magistrate in Calcutta which was never withdrawn, the accused was entitled to be protected from a trial at Benares on charges which related and closely mixed up with those tried at Calcutta. It must be borne in mind in countenancing these pardons to accomplices, the law does not invite a cramped and constrained statement by the approver; on the contrary, it requires a thorough and complete disclosure of all the facts within his knowledge bearing upon the offence or offences, as to which he gives evidence and he has given evidence. The question how far it is to protect him and what portions of it should protect him ought not to be treated in a narrow spirit, 11 A. 79 at 86. When at the conclusion of the trial a Sessions Judge directed certain approvers to whom pardons were tendered by the District Magistrate be committed for trial on the original charge it was held that the Sessions Judge had jurisdiction to pass the order and the accomplices could plead their pardon and it was for the trial Court to decide whether the pardon had been forfeited, 1 Lah. 218. Where an accused person had been tendered a pardon for a dacoity committed in E. District and he made a confession admitting his complicity in the dacoity in question and also of another dacoity in another District one month previously it was held, there was nothing in this section which forbade the confession of the accused made before the Committing Magistrate being put in evidence and no pardon could legally be pleaded in bar of his trial in respect of the offence committed in the district other than the E. District, 45 A. 236 (F.B.) where 11 A. 79 is distinguished.

Proviso.—This new proviso expressly enacts that the approver is entitled to plead that he has complied with the conditions of the tender made to him. The Court has to try this issue first, 32 M. 173; 42 C. 856; 16 Cr. L.J. 234=27 Ind. Cas. 806, and he should be tried separately and not jointly with the other accused, and it is for the prosecution to prove that the approver had forfeited the pardon by a breach of the conditions, 32 M. 173. No action is to be taken until the conclusion of the trial and the proper course is to detain the approver in custody until the conclusion of the trial of the co-accused and then proceed against him if necessary, 10 Cr. L.J. 418=3 Ind. Cas. 922; 24 M. 321 at 324; 27 C. 137; 23 B. 443.

Sub-section (2).—Under the Code no formal withdrawal of a pardon and no formal declaration that the pardon has been forfeited are required, 42 C. 756 at 758. The words "or the statement made by person who has accepted the tender of pardon" are wide enough to cover a statement made before the pardoning Magistrate, 25 Cr. L.J. 1355=82 Ind. Cas. 715. The question whether a pardon is forfeited, which must be tried and found is one of fact, 26 B. 673. The statement made by the person who accepted the conditional pardon is not governed by S. 24 of the Ind. Ev. Act and can be used as evidence against him, 5 A.L.J. 691. "The full and true disclosure" contemplated by S. 337 (1) *supra* may be anterior to the inquiry before the Magistrate and may also be at the inquiry or trial. It is the disclosure inducing the pardon which is the statement referred to in this sub-section. The pardon may be offered before any inquiry has commenced before the committing Magistrate or it may be offered when he is under trial. It is not made under S. 164 *supra* and that section in no way governs such a statement and such a statement is not necessarily excluded from evidence by S. 24, of the Ind. Ev. Act. The sub-section makes by necessary implication a statement of the nature of an exception to the rule enacted in S. 24 the Ind. Ev. Act, so far as that section excludes confessions made as a result of inducement, or promise, 29 Cr. L.J. 413=108 Ind. Cas. 514, *following*, 1908 A.W.N. 259=5 A.L.J. 691=8 Cr. L.J. 433.

Sub-section (3)—The object of this sub-section is to safeguard persons whose pardons have been withdrawn, against a prosecution for false evidence unless and until the propriety of such prosecution has been sanctioned by the highest criminal tribunal of the Province. If an approver can be punished sufficiently by being charged for the original crime it is not necessary that he should be punished for perjury. Sanction therefore ought to be refused unless a conviction for the original crime is unlikely or a prosecution for it is undesirable for any other reason or on a conviction for the original offence, the sentence which would be passed will be too light to cover both offences. Before sanction is granted it must be clear that there was no intention to prosecute the approver for the original offence or that he has already been tried for it or has been acquitted or received only a very light sentence not sufficient to cover the offence of perjury. When the original offence is one of murder, he ought to be tried for it and without doing so, sanction application for perjury would be rather premature, 23 Nag. L.R. 35. Sanction of the High Court is necessary for the prosecution of the approver for perjury. The prosecution for perjury is an exceptional measure and sanction under this section ought not to be granted where material for contradiction has been provided by an unnecessary examination of an approver on oath which should not be encouraged. To grant sanction under such circumstances would be practically to approve the practice of making a special and separate examination of an approver on oath before examining him as a witness in order that in the event of his making contradictory statement in two examinations the materials furnished by his unnecessary examination can be used as a basis for prosecution for perjury, 3 Ran. 224. Sanction ought not to be given merely because there is a contradiction. Such person should be given every possible, *locus penitentiae*, 11 A.L.J. 963=15 Cr. L.J. 76=22 Ind. Cas. 428. But the granting of *locus penitentiae* is a matter for judicial discretion and the High Court refused to grant *locus penitentiae* 27 A.L.J. 227 at 229. The sanction is to be obtained before the commencement of the prosecution, 10 B. 190. The want of sanction of the High Court cannot be considered as a mere irregularity, but it is an illegality and S. 537, *infra*, cannot apply to this section, 27 C. 137. An application to the High Court for sanction must be made in open Court on motion on behalf of the Crown, 32 M. 47; 24 C. 492; and not by a letter of reference, 13 Cr. L.J. 451=15 Ind. Cas. 83 1893 A.W.N. 13.

Procedure in trial of
person under S. 337.

339A. (1) *The Court trying under section 339 a person who has accepted a tender of pardon shall—*

(a) if the Court is a High Court or Court of Session, before the charge is read out and explained to the accused under section 271, sub-section (1), and

(b) if the Court is the Court of a Magistrate, before the evidence of the witnesses for the prosecution is taken,

ask the accused whether he pleads that he has complied with the conditions on which the tender of the pardon was made.

(2) If the accused does so plead, the Court shall record the plea and proceed with the trial, and the jury, or the Court with the aid of the assessors, or the Magistrate, as the case may be, shall, before judgment is passed in the case, find whether or not the accused has complied with the conditions of the pardon, and if it is found that he has so complied, the Court shall, notwithstanding anything contained in this Code, pass judgment of acquittal.

This section is new and prescribes the procedure to be adopted in the trial of an approver on forfeiture of his pardon. The Court is bound to ask the accused whether he pleads his pardon in bar of trial, having complied with the conditions on which the tender of pardon was made and if he so pleads the Court shall record the plea and proceed with the trial. The Court is also bound to record a finding whether or not the accused has complied with the conditions of his pardon and if he has so complied, he ought to be acquitted. The section lays down that the Court trying a person who has accepted a tender of pardon, shall, if the Court is a Court of Session before the Charge is read out and explained to the accused, ask him whether he pleads that he has complied with the condition on which the tender of pardon was made. The terms of the section should be strictly complied with by making it clear to the accused that he could plead the pardon as a bar to his trial and the conviction had without strictly complying with the provisions of this section is illegal and cannot stand. 3 Lah. 379 followed in, 30 Cr. L.J. 559=116 Ind. Cas. 64.

Right of person against whom proceedings are instituted to be defended and his competency to be a witness.

340. (1) *Any person accused of an offence before a Criminal Court, or against whom proceedings are instituted under this Code in any such Court, may of right be defended by a pleader.*

(2) Any person against whom proceedings are instituted in any such Court under section 107, or under Chapter X, Chapter XI, Chapter XII or Chapter XXXVI, or under section 552, may offer himself as a witness in such proceedings.

Amendment.—This section is re-drafted. The expression "person accused" may be read as referring only to persons accused of any offence. Now any person against whom proceedings under the Code are instituted is entitled to be defended by a pleader. It is also enacted that persons against whom proceedings under S. 107 and under Chapters X to XII, XXXVI or under S. 552 of the Code are pending do not labour under the ordinary disability of an accused person to be sworn, and they may be examined as witnesses in such proceedings.

Scope of the section.—The section as amended extends to the case not only of a person accused of an offence but applies to the case of any one against whom proceedings are instituted under the Code. The section not only contemplates that the accused should be defended by a pleader at the time of the proceedings actually going on but also implies that he should have a reasonable opportunity, if in custody, of getting into communication with his pleader for preparing his defence. The same policy is shown in S. 40 of the Prisons Act, X of 1874. No undue obstacle should be placed in the way of the accused in custody, preparing his defence by preventing his pleader having access to him. 50 B. 741 at 746. Prisoners

in Police custody before being produced before a Magistrate are at liberty, at any time of the day, to see a pleader—due regard being taken against their escape. Access to prisoners in Jails by pleaders is for the officer-in-charge of the Jail to decide, *Mad. Pol. Ord. Vol. I, p. 111*. Sub-section (2) says as to who may be examined on oath by a criminal court.

May of right be defended by a pleader.—The word "pleader" used with reference to any proceeding in any Court means a pleader or a *mukhtar* authorized under any law for the time being in force to practise in such Court, and includes: (1) An Advocate, a Vakil and Attorney of the High Court. (2) Any other person appointed with the permission of the Court to act in such proceedings. The privilege under this section is not a question of indulgence but is a matter of a right. The object of the Legislature in allowing parties to be represented at trial by a Counsel is that Counsel must be heard before a final opinion is formed by the Court and it is not necessary for the Counsel to ask the Court for an opportunity to be heard. *It is not an indulgence but of right*. It is not necessary that the accused's Counsel should ask the Magistrate for the usual opportunity to be heard on the case, 6 Bom. L. R. 665. An accused person should be given an opportunity to be defended by a pleader and when he asks for time the proper course is to examine the prosecution witnesses in-chief and adjourn the case to enable him to engage and instruct a pleader to defend him, 47 A. 147. The defence of an accused should not be shut out on the ground he is represented by a *Mukhtar* 33 C. 488. A Counsel for the accused who adduced no evidence has a right of being last heard in the case; this means he is entitled to have an opportunity of being heard, 53 B. 119; the accused has a right to be defended by a pleader and he has also a right to be heard through his pleader; where at the conclusion of the evidence in a trial the pleader for the accused wished to argue the case for his client and the Court refused to hear the pleader, it was held that such a denial to hear the pleader was not a mere irregularity and the conviction and sentence must be set-aside, 55 M. L. J. 625-23 L.W. 636; the oral address of Counsel is a valuable right which every party accused of a Crime who engages to defend him is entitled to regard as such. By means of an address Counsel can be of great assistance to his client. Many points might escape his attention if he only wrote out a written argument. The advantage of an oral address is that Counsel is in direct touch with the Magistrate and can more effectively direct his remarks to such points, as from the demeanour of the Court might seem to him to require elucidation. ... In 5 Bom. L.R. 665, it was laid down as an elementary principle of law that no order should be made to a man's prejudice without hearing him and the very object of the Legislature in allowing parties to be represented at the trial by Counsel is that Counsel must be heard before final opinion is formed by the Court. It is not a question of indulgence but of right. It is not necessary that the Magistrate should be asked by Counsel to be heard. It is his duty to give to the Counsel the usual opportunity to be heard on the case. The right of Counsel is not not only that he should be heard but he shall be given an opportunity of being effectively heard, 53 B. 119 at 122-124; the High Court has condemned in more cases than one the practice of allowing Counsel to file a memo of written arguments. This is all the more to be condemned when the Court receives a written argument on behalf of the prosecution without the knowledge of the accused. The practice prevails in several places and the only way to put an end to such a practice is by setting aside all the proceedings as being highly irregular. It cannot be too strongly expressed the highly objectionable practice of allowing written arguments to be filed in Court, 23 L. W. 511 = 1927 M.W.N. 783 = 29 Cr. L. J. 923 = 111 Ind. Cas. 849 "If Judges would only appreciate that what an invaluable assistance it is for their minds to listen to those who have prepared their arguments and are perfectly familiar with facts, they would recognise that initial listening, at all events is most desirable"—per Lord Halsbury. The Court is bound to exercise a discretion in each case as to permitting or not permitting the appearance of an unauthorised pleader, Weir II, 400. A general rule excluding any particular class from appearing as a pleader is illegal. An order excluding any particular individual in any particular case on grounds stated is within the discretion of a Court, Weir II, 401. Under S. 4 (1) (r) *supra* and this section an accused person may appoint a private vakil with the permission of the Court to act for the accused, and if the Magistrate refuses permission, the person has himself no real grievance and the proceedings of the

Magistrate could not be revised at his instance. The discretion vested in the Magistrate to accord permission is a judicial discretion to be exercised without being fettered by any general order issued by the District Magistrate prohibiting such permission to an individual generally, 3 Cr. L. Rev. 131. It is the duty of the Court to afford to an accused person every opportunity of making his defence and a Magistrate should not interpose between the accused and his pleader engaged to defend him, 1 Bom. L.R. 856, followed in 50 B. 741 and all facilities should be afforded to an accused person to engage a pleader, 1 B.H.C.R. (Cr.) 16. Where an accused charged with murder engaged a senior and a junior pleader to represent him before the committing Magistrate and at the Sessions trial the junior pleader in the absence of his senior applied for an adjournment which was refused and the junior pleader intimated to the Court his inability to proceed with the defence in the absence of his senior, the District Magistrate at the request of the Judge appointed a competent pleader to defend the accused and he took up the defence the senior pleader then appeared before the Judge and claimed to conduct the defence himself and refused to act as junior to the pleader engaged by the Crown, it was held that the refusal of the Judge to allow the pleader originally engaged by the accused to conduct the defence did not vitiate the trial when the defence had already been assigned to another pleader appointed by the Court, 43 Cr. L.J. 307. The Court is bound to hear the pleader if one is engaged by the accused, 23 C. 493. The Court has no power to tell the accused to engage another pleader on the ground that the pleader he has chosen did not know how to behave in Court, Ratanlal 861. It is an elementary principle of law that no order should be made to a man's prejudice especially in a criminal case without hearing him, 6 Bom. L.R. 665, followed in 30 Bom. L.R. 1530. If a pleader representing a party does not file a vakalat he shall be required to file a memo of appearance stating that he has been duly instructed to appear for the party and even that is not necessary where the party is present in person along with his pleader in Court, 5 M.L.T. 290=9 Cr. L.J. 303=1 Ind. Cas. 546. The right to be defended by a pleader applies to appeals also. A petition of appeal in a criminal case may be presented to the appellate Court by any person authorised by the appellant to present it, and the Code affords no authority for a contrary view, 1 M. 304. The Criminal Procedure Code unlike the Code of Civil Procedure nowhere prescribes the mode of appointment of pleaders and there is no authority for the proposition that in criminal cases a pleader must file an authority from his client in order to enable him to present an application or appeal on behalf of his client and to act for him in criminal cases Art. 10 of Sch. II of the Court Fees Act prescribes a fee for vakalatnamas when presented to a criminal Court including a High Court. This merely means that when an authority is filed such authority should be stamped. It does not make it necessary that a vakalatnamah must be filed in Criminal cases. [1926] Pat. 125=27 Cr. L.J. 666=94 Ind. Cas. 714.

Sub-section (2).—This sub-section makes special reference to the Chapter X. Public Nuisances; XI Temporary orders in urgent cases of nuisances or apprehended danger; XII. Disputes to immovable property; XXXVI. Of maintenance of wives and children. S. 552 deals with power to compel restoration of abducted females. Chapter VIII dealing with security for keeping the peace and for good behaviour comes within sub-section (1) "or against whom proceedings are instituted under this Code" In 23 C. 493; 21 A. 107; 27 C. 656; 23 A. 375; a person ordered to give security for good behaviour was held to be an accused person. The amendment is in accordance with 2 C.L.J. 143 where the decisions cited above were distinguished. See 50 C. 983. But in this sub-section S. 107 is specially mentioned and so persons proceeded against under good behaviour sections may not be examined on oath although they are not accused of an offence.

Duty of advocate appearing for defence.—The duty of an Advocate charged with the defence of an accused person indicted for a serious crime will be found dwelt upon by Lord Brougham in his celebrated defence of Queen Caroline where the topic of fidelity to the client is exhaustively discussed "An advocate in the discharge of his duty knows, but one person and that person is his client. To save that client all means and expedients at all hazards and costs to other person and among them to himself is his first duty and only duty and in performing his duty he must not regard the alarm, the torment, the deduction he may bring upon others." Entire devotion to the interest of the client, warm zeal in the maintenance

and defence of his rights and the exercise of utmost learning and ability these are the points which can only satisfy the truly conscientious Advocate. Every man accused of an offence has a constitutional right to be tried according to law and the duty of his Counsel requires him to scan with legal knowledge the forms of proceedings against the accused, 38 C.L.J. 307 at 318. As to the duty of an Advocate to his client, a Counsel will not be acting properly if he embarks on a perilous adventure, as to inform the trial Judge in advance that he was satisfied that the prisoner had no defence to the charge. "A man's rights are to be determined by the Court, not by his Attorney or Counsel. A client is entitled to say to his Counsel, '*I want your advocacy, not your judgment. I prefer that of the Court;*'" if an Advocate is to reject a story because it seemed improbable to him he would be usurping the office of the Judge, 38 C.L.J. 411 (F.B.) at 515-28 C.W.N. 170-25 Cr. L.J. 817-81 Ind. Cas. 353. It is the duty of an Advocate appearing for a party to call witnesses for the defence if his client insists on submitting their evidence to the Court, 3 Bom. L.R. 562. "Sir, you do not know a cause to be good or bad till the Judge determines it. An argument which does not convince you may convince the Judge to whom you urge it. It is the business of the Judge to Judge and you are not to be confident in your opinion that a cause is bad but to say all you can for your client, and then hear the Judge's opinion." A Lawyer's motto ought to be "to direct the doubtful, to instruct the ignorant, to prevent wrong and to terminate contention." It is his duty to show the same courtesy to the Judge and the Counsel appearing for the opposite party which he desires or expects to be shown, to himself and a pleader's neglect or default should not be visited on his client. "An Advocate should be fearless in carrying out the interests of his client but the arms which he wields are to be the arms of a warrior and not of the assassin. It is his duty to strive to accomplish the interests of his client *per fas* but not *per nefas*. It is his duty to the utmost of his power, to seek to reconcile the interests he is wanted to maintain and the duty, it is incumbent on him to discharge, is to be discharged with the eternal and immutable interests of truth and justice." As to the limits within which an Advocate for an accused may attack the prosecution evidence, no clear rule can be laid down than this, that he is entitled to test the evidence given by each individual witness, and to argue that the evidence taken as a whole is insufficient to amount to proof that the accused is guilty of the offence charged, 38 C.L.J. 411 (F.B.) at 515-28 C.W.N. 170. "It is only as an Advocate that one is entitled to address the Jury. As a man he has no right to trouble them." Sound arguments beget sound decisions. Many of the best judgments are but seasoned and authoritative summary of the cogent arguments addressed by Counsel to the Court.

341. If the accused, though not insane, cannot be made to

Procedure where
accused does not
understand proceed-
ings.

understand the proceedings, the Court may proceed with the inquiry or trial; and, in the case of a Court other than a High Court, if such inquiry results in a commitment, or if such trial results in a conviction,

the proceedings shall be forwarded to the High Court with a report of the circumstances of the case, and the High Court shall pass thereon such order as it thinks fit.

Scope of the section.—This section deals with the procedure to be followed in cases where the accused does not understand the proceedings against him i.e., to cases where the accused is deaf and dumb or is unable to understand or making himself understood from ignorance of the language of the place and does not apply to a person of unsound mind, 5 B. 262. "The law in England appears to be that though a great caution and diligence are necessary in the trial of a deaf and dumb person yet if it be shown that if such person had sufficient intelligence to understand the character of his criminal act he is liable to punishment. The decisions in 22 W.R. (Cr.) 33 and Ratanlal 696 are authorities to show that the same is the law and practice in India," 40 B. 393 at 599; 25 Bom. L.R. 43=25 Cr. L.J. 660=81 Ind. Cas. 143. A perusal of this section makes it absolutely clear that a reference can only be made if the accused, though not insane, cannot be made to understand the proceedings

the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined and before he is called on for his defence.

(2) The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

(3) The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

(4) No oath shall be administered to the accused.

Scope and object of the section.—This section has been enacted to safeguard the interests of accused persons. The Legislature contemplates that they should always get an opportunity of explaining any circumstances that may appear against them. So a duty has been cast upon criminal courts to examine the accused. At the same time it must be remembered that the accused is not bound to make a statement, 28 Cr. L.J. 226=99 Ind. Cas. 1026. The section is a part of a system for leading the Court to discover the truth and it constantly happens, that the accused's explanation or his failure to explain is the most incriminating circumstance against him. The result of the examination may be beneficial but it may equally be injurious to him. The principle involved in the maxim '*Audi alteram partem*' and that of this section is that the accused should be heard on every circumstance appearing in evidence against him, 4 Nag. L.R. 163; the Legislature intended by this section to protect the accused from the ordeal of examination as a witness and rendering him capable of being punished for making false statements on oath, 19 A. 200; 12 M. 451. See also 54 C. 236 (F.B.). The object of the section is not to fill up gaps in the prosecution evidence but is to enable the accused to explain each and every circumstance appearing in evidence against him, 26 C. 49; 27 M. 238; 14 A. 242; 13 A. 345; 39 M. 770. A Judge or Magistrate should note every point which he thinks he will have to put into the scale against the accused and then question him on each point. Otherwise it is impossible for the accused to know what is in the Court's mind. Several points may be made by the prosecution, some of these the Court considers good, others are regarded as practically worthless, but the accused is not afforded any reasonable opportunity of clearing up the case by such a question as, "what have you to say, regarding the statement of the complainant's witnesses?" The specific point or points which weigh against him must be mentioned; for, if this is not done he cannot reasonably be expected to be able to explain it or them, 1 Ran. 689; 23 Cr. L.J. 12=48 Ind. Cas. 487. The real object of the power given by this section is to ascertain from time to time from the prisoner particularly if he is undefended, what explanation he may offer regarding any fact stated by a witness or after the close of the case how he can meet what the Judge may consider to be damaging evidence against him, 6 C. 98 at 102. The provisions of this section are based on the well known principle that no man should be condemned unheard, 29 Cr. L.J. 932=111 Ind. Cas. 852. The obvious reason for the provisions of this section is that an accused person cannot give evidence on oath in support of his case, 52 B 763. There is no provision in the Indian Law by which an accused person may give his sworn testimony in support of his case. Indeed the section prohibits the swearing of an accused person. The purpose and use of the examination of the accused is laid down in the Code and no one has a right to travel outside it. The accused under this section may be questioned from time to time, by the Court, during the progress of the inquiry or trial for the purpose of enabling him to explain the circumstances appearing in evidence against him. It further says that, for the same purpose the Court shall examine him generally after the prosecution evidence has been closed. It is clear that the examination is not

meant to supply any deficiency that may exist in the prosecution evidence, 51 A. 313 at 321. See also 30 Bom. L R. 957; 54 C. 286 (F.B.) The main object being thus to ensure that the Court having heard one side, i. e., the prosecution should proceed to hear the other side also. For this purpose the Court must interrogate the prisoner and call upon him to explain if he can, the circumstances appearing in evidence against him. The right of interrogation is restricted, and there must be nothing in the nature of cross examination. The prisoner is thus protected against inquisitorial questions and to make this protection absolute it is laid down that he cannot be compelled to answer or to give true answers and failure to answer or give true answers will not render him liable. There is no possible connection between S. 73, of the Indian Evidence Act and this section since the taking of finger impressions is an entirely different matter from putting such questions. This section does not prohibit a direction to him to make finger impression any more than it prohibits a direction to him to face a witness in order that he may be identified, 1 Ran. 759 (F.B.) followed in 6 Pat. 623; 50 C. 985 at 991. Taking of a thumb impression is merely observing a characteristic feature of a man's body. When a thumb impression is taken, it is an observation made and recorded and in principle the position is the same as if the Magistrate had photographed the accused or noticed a deformity or scar, matters which might certainly be proved if they were relevant. The analogy between taking a thumb impression and asking a question to the accused and recording an answer within S. 132 Ind. Ev. Act does not exist. The right of a Magistrate to take the thumb impression of an accused whether he consented or not to the giving of the thumb impression were left undecided, 39 C. 343, but in 6 Pat. 623 it was held that the Court has the power to take a thumb impression whether the accused consented or not to have the impression for comparison and the Court may draw an inference adverse to the accused if he refused to do so. In 50 M. 462 also it was held that if the Judge thinks fit, he is entitled to take a thumb impression and use it to compare with an admitted impression of the accused and also to base a conviction on such comparison. The question of identity of thumb impression is a question of fact to be decided like any other fact on evidence, 1 Pat. 232 is not followed in the above cases. See also 46 M. 715, 28 Cr. L. J. 850-104 Ind. Cas. 626 following 30 C.W.N. 373-43 C.L.J. 403-27 Cr. L.J. 409-93 Ind. Cas. 73 where it was held that in view of S. 5 of Act XXXVII of 1920 (Identification of Prisoners Act) it is not wrong to take finger prints of accused in a case and have the same compared by an expert with the suspected print the subject of the charge against the accused and arriving at a conclusion on such expert opinion. The object of the Legislature in enacting this section is quite clear and the provision of the statute must be strictly enforced and the question of prejudice ought not to come in S. 537, *infra*, was certainly not inserted in the code for being invoked on any and every occasion as a shield against irregularity perpetrated by a subordinate criminal Court; the only way to secure proper observance of the law by subordinate Courts is for the High Court to interfere whenever any departure comes to its notice. So far as this section is concerned the matter is one of paramount importance and non-compliance with it cannot be passed over on the ground of technicality, 29 C.W.N. cxviii; 52 C. 522. What is necessary under this section is that accused should be brought face to face, solemnly with an opportunity given to him to make a statement from his place in the dock so that the Court may have the advantage of hearing his defence, if he is willing to make one with his own lips, but not to cross-examine the accused, 23 Cr. L. J. 1510-93 Ind. Cas. 294, 10 C. 140, 5 C.W.N. 864; 27 M. 238. The object of the section is to give opportunity to the accused if he so desires to tender any explanation he likes of his part in the case that is presented against him. There is no provision in the Code for the accused being warned of the consequence of the statement he makes. The main consequence of course would be that the statement he makes must be given in evidence against him. It would be a salutary amendment of the Indian Law, if it were not compulsory to put in evidence such a statement. If there were any danger of prosecutors unfairly keeping back a statement that helps the accused, the Judge is there to insist on its being put in. It is extremely desirable that some such form of caution as is prescribed in 11 and 12 Vict. Ch. 42, S. 18 should be introduced into the Code, 23 L.W. 384-27 Cr. L. J. 311-92 Ind. Cas. 693. The examination contemplated by this section is only after the commencement of any inquiry or trial. There is no justification for an examination of the accused before commencing an inquiry or trial and such examina-

opportunity of making a statement direct to the Court, 29 C.W.N. 939=26 Cr. L.J. 1032=87 Ind. Cas. 920, but see 4 Ran. 506. A promise by the accused to file a written statement, made at the time of the plea, in no way absolves the Court from the duty of examining the accused at a later stage as required by this section. The intention of the law is that at a certain stage of the case the Court itself shall call upon the accused to state in his own way anything he desires to say, 50 C. 518, but see 1925 Pat. 112, where it was held that the filing of a written statement by an accused, relieved the Magistrate from the necessity of examining the accused orally with reference to the matters elicited in cross-examination and re-examination. Where the personal attendance of the accused is dispensed with under S. 205 *supra*, then there will be no objection in allowing the accused's pleader to make a statement under this section on behalf of the accused and his personal attendance to make the statement will not be insisted upon, 4 Ran. 506. In every case there is an imperative duty upon the Magistrate to put into operation the provisions of this section, the moment when the complainant and all the witnesses for the prosecution have been examined in the full sense in which the word is used, 30 Cr. L.J. 530 at 535=115 Ind. Cas. 872. The word "examined" in this section includes cross-examination and re-examination and the omission to examine the accused after cross-examination and re-examination of all the prosecution witnesses vitiates the trial and conviction; 51 C. 924; 49 C. 1075; 27 Cr. L.J. 336=92 Ind. Cas. 752; 50 C. 939; 51 C. 933; 50 B. 42; 4 Ran. 361, see 4 Pat. 488; 4 Pat. 231; 6 Pat. L.J. 147 and 644; 50 C. 518; 27 Cr. L.J. 719=94 Ind. Cas. 811; 27 Cr. L.J. 727=95 Ind. Cas. 55; 50 C. 985; 52 C. 522; 29 C.W.N. cxviii; 38 C.L.J. 175; 39 C.L.J. 31; 14 L.W. 418; 1924 Pat. 193; 5 Pat. L.J. 430; 26 Bom. L.R. 149; 51 C. 924; 52 C. 403; 26 Cr. L.J. 760=86 Ind. Cas. 345; 26 Cr. L.J. 927=86 Ind. Cas. 991; 26 Cr. L.J. 1510=90 Ind. Cas. 294; 3 Ran. 139; 30 Cr. L.J. 18=112 Ind. Cas. 850. The provisions of this section are mandatory and their non-compliance vitiates the trial, 7 Lah. 64, *followed* in, 43 C.L.J. 591=29 Cr. L.J. 382=108 Ind. Cas. 381; 26 Cr. L.J. 716=86 Ind. Cas. 156 but see 31 C.W.N. 337=28 Cr. L.J. 347=100 Ind. Cas. 827 and S. 537 *infra* would not cure the defect. Where after examining the accused a new prosecution witness is examined, it is obligatory on the Magistrate to further examine the accused under this section and failure to do so vitiates the trial as it is an illegality which cannot be cured, 30 Bom. L.R. 385 *following* 27 Bom. L.R. 1405. See also 29 Cr. L.J. 382=108 Ind. Cas. 381. But where the accused filed a written statement at the close of the case for the prosecution and before entering on his defence, it is not essential for the Magistrate to question him generally on the case, 28 Cr. L.J. 480=101 Ind. Cas. 608. It is also not obligatory to examine the accused over again when a Court witness is examined under s 510, *infra* 30 Bom. L.R. 1086=29 Cr. L.J. 1057=112 Ind. Cas. 561 where 30 Bom. L.R. 651; 24 C. 167; 23 Cr. L.J. 354=71 Ind. Cas. 290; 50 B. 42 are *followed* but see 29 Cr. L.J. 932=111 Ind. Cas. 852, which takes a different view. The obligation to ask the accused whether he wishes the prosecution witnesses to be summoned and further cross-examined under S. 256, *supra*, is distinct from the obligation imposed by this section to examine the accused, 25 Cr. L.J. 690=86 Ind. Cas. 70. Cross-examination of the accused by putting questions to him to incriminate himself is a thing wholly unknown to law. 17 C.W.N. 354; 2 Lah. 129; 4 Lah. 85; 27 M. 238; 5 M.L.T. 216=11 Cr. L.J. 193=4 Ind. Cas. 1126; 15 Cr. L.J. 474=24 Ind. Cas. 562; S. 537 cannot cure an omission to comply with the express provision of law contained in this and S. 360, *infra*, 29 C.W.N. cxviii; 52 C. 522; 38 C.L.J. 281=28 C.W.N. 119; see 4 Pat. 488 where it was held that the test is whether the accused has been prejudiced by absence of judicial questions and whether S. 537 cures the defect. Omission to examine an accused person under this section is cured by S. 537, *infra* when the accused has not been prejudiced thereby, 27 Cr. L.J. 852=95 Ind. Cas. 932. See also 29 Cr. L.J. 932=111 Ind. Cas. 852 where 3 Pat. 1015 is *explained*. See also 31 C.W.N. 337=28 Cr. L.J. 347=100 Ind. Cas. 827; 30 Cr. L.J. 530 at 535=115 Ind. Cas. 872, but see 7 Lah. 564 where it was held that non-compliance with the mandatory provisions of the section vitiates the whole trial. Failure to examine the accused even though the accused were acquitted by the Judge vitiates the trial and such acquittal without a proper trial was set aside by the High Court, 4 Ran. 361. Recording statements collectively instead of separately is an illegality which vitiates the trial; 29 Cr. L.J. 469=109 Ind. Cas. 107, where 6 Lah. 554 is *followed*.

Sub-section (1).—The examination is for the purpose of enabling the accused to explain the circumstances appearing in evidence against him and not to supplement the case, for the prosecution and to show that he is guilty, 10 M. 295; 12 M. 431; 29 A. 685; 10 Cr. L.J. 509—4 Ind. Cas. 160. What the section contemplates is that the Court may, at any stage examine the accused but the complainant can never put questions to the accused and such questions ought not to be put by the Court to convict the accused out of his own mouth, 10 M. 121 at 123. The object of the examination of an accused person under this section is only to enable him to explain any circumstances appearing in evidence against him. It has been repeatedly held that the examination ought not to be conducted in the manner of cross-examination of an adverse witness and that a Judge or Magistrate is not entitled to establish a sort of a Court of inquisition to force a prisoner to commit himself, by making some incriminating or embarrassing admissions after a series of questions the exact effect of which he may not be able to comprehend, 10 Lah. 223 following 10 C. 140; 6 C. 96; 2 Lah. 129; 10 M. 295 1 Fat. 680; 6 Bom. L.R. 94=1 Cr. L.J. 105. The accused cannot be asked to make admissions for the purpose of enabling the Crown to procure a legal decision. It is not the function of a Court of justice to supplement the deficiencies of the prosecution and the subject cannot be made to suffer because of the neglect or omission of the Crown in the mode in which it conducts a criminal proceeding, 5 Lah. 404. The object is therefore not to fill up gaps in the prosecution evidence but to enable the accused to offer any explanation, 4 Lah. 55; 27 M. 238; 25 C. 49; 27 Cr. L.J. 66=31 Ind. Cas. 242; 39 M. 770; 28 C. 689; 6 Fat. L.J. 241. Where a *prima facie* case is made out, an examination of the accused is imperative, 10 Bom. L.R. 201; 9 Bom. L.R. 356; 17 Bom. L.R. 892=16 Cr. L.J. 765=31 Ind. Cas. 365; Weir II. 403. The question ought not to be of an inquisitorial nature conducted in the manner of cross-examination and forcing him to make incriminating statements, 6 C.L.R. 521; 5 A. 253; 17 C.W.N. 354; 10 C. 140; 2 C.W.N. 702; 7 C.W.N. 347; 21 C. 642; 6 C. 96 and 279; 1 M.H.C.R. 199, 5 A.L.J. 515. The questions put must be confined strictly for the purpose of enabling the accused to explain circumstances appearing in evidence against him, 30 A. 540; 5 A. 253. It is entirely within the discretion of the Judge to take or not to take a statement from a co-accused after the accused had given an explanation under this section, 35 C. 853 at 869. Questions ought not to be put to elicit information in regard to statements made by a witness, 7 C.W.N. 345 or to know the nature of his defence, 14 A. 242. An accused person should not be examined by the Court where there is no evidence against him as the object of the examination is only to give him an opportunity to explain any circumstances appearing in evidence against him and not to make him supplement the prosecution case or to make incriminating statement, 9 M. 224; 10 M. 295 and 121; 27 M. 238; 28 C. 689; 39 M. 770; 1915 M.W.N. 413; 4 Lah. 55; 13 A. 345; 4 Cr. L.J. 471 (F.B.). This section will not enable a Court to question the accused about his previous convictions, 28 C. 689; 23 B. 129. The proper method is to draw the attention of the accused to specific matters which appear in evidence against him and ask him to explain them, merely questioning the accused generally whether they had anything to say or anything to add to what they said, before the committing Magistrate is not enough, 25 Cr. L.J. 572=85 Ind. Cas. 715. Under this section it is obligatory on the Magistrate to question the accused generally on the case after the close of the prosecution, i.e., when all the prosecution witnesses have been examined-in-chief, cross-examined and re-examined although the accused has stated that he intends to file a written statement and he had done so. The examination of the accused after the charge and the examination-in-chief of only some of the prosecution witnesses is not a compliance with law and examination after cross-examination of only some of such witnesses is not a compliance with law and the trial is bad even though the accused is not prejudiced on the merits. Where a Magistrate has after such examination transferred the case for trial to another Magistrate who completes the cross-examination of the remaining prosecution witnesses, it is incumbent on the latter Magistrate to examine the accused again generally on the case and the omission to do so renders the trial bad in law, 30 C. 223 followed in 30 C. 518. Again in 30 C. 303 it was held that the examination of the accused, only after the examination-in-chief of the prosecution witnesses and before the close of their cross-examination and re-examination, is not a sufficient compliance with law and the conviction was set

aside. See also 50 B. 42 and 27 C.W.N. 28. The Madras High Court in 45 M. 520 took the same view, that examination after further cross-examination was necessary and the omission was an illegality not cured by S. 537, *infra* but that decision was overruled by a later Full Bench of five Judges in 45 M. 449. There it was held, the examination of the accused is mandatory and failure to do so vitiates the trial, but when in a warrant-case the accused after examination-in-chief of the prosecution witnesses did not avail himself of the opportunity to cross-examine, the accused was then questioned generally on the case and he did file a written statement and after framing of charge, the accused cross-examined the prosecution witnesses under S. 256, *supra*, on a later date, and the witnesses were re-examined and accused adduced his defence evidence, but the accused was not further questioned generally on the case after cross-examination and re-examination, of the prosecution witnesses, there was sufficient compliance with the provisions of this section and the conviction was legal. Questioning the accused has to take place after the prosecution witnesses have been examined and before the accused is called on for his defence. "After the prosecution witnesses have been examined" means when the prosecution has finished calling evidence. Generally speaking, in most cases, the examination will include cross-examination and re-examination of prosecution witnesses if there be any. In Sessions cases, this will always be the case, but the position is different in proceedings before Magistrates. In warrant-cases the prosecution witnesses are to be re-called and can then be cross-examined on behalf of the accused and, if necessary, re-examined 25 Cr. L. J. 713-81 Ind. Cas. 201, 45 A.124 followed in 27 Cr. L. J. 405-93 Ind. Cas. 69. The prosecution witnesses called at this stage are generally the whole prosecution evidence and the prosecution case is closed. The Magistrate may then either dismiss the case on the ground that no case is made out, or after questioning the accused generally to enable him to explain any circumstances appearing against him from the evidence, formulate a charge under S. 254 *infra*. The charge is then read over and explained to the accused under S. 255 and he is asked whether he is not guilty or has any defence to make. It may be that accused is not going to ask the prosecution witnesses to be recalled for cross-examination under S. 256, but proposes to call at once his evidence, or, it may be, that he is not going to call any, but to rely on his address to the Court. In either event he would have been called on for his defence and by the words of the statute, the questioning has to be after the re-examination of the prosecution evidence and before he is called on for the defence. Although under S. 256 *infra* he has not availed himself of the first opportunity of cross-examining, he can ask the witnesses to be recalled for that purpose. That does not make that cross-examination part of the examination of the prosecution witnesses within the meaning of S. 342 nor does re-examination generally amount to giving fresh evidence. If new and material matter in support of the prosecution case is elicited in cross-examination or in the re-examination, it is desirable that the accused should again be questioned on the case and asked generally to explain the circumstances, and indeed if fresh evidence on material matters in support of the prosecution case is elicited in re-examination it would probably be obligatory on the Court to question the accused on that. It is open to the prosecution to call fresh evidence after the formulation of the charge and if that is done, on the termination of that evidence, the accused must be questioned generally under this section after this further examination of prosecution witnesses, 45 M. 449 at 455-457 (F.B.). When *de novo* trial is demanded by the accused on account of the change of Magistracy, the succeeding Magistrate should, not only examine over again the prosecution witnesses but also should examine the accused after the examination of those witnesses even though he was examined before. Such a failure vitiates the whole trial. It is not only a rule but a principle that a Magistrate who tries a case in the sense decides he must give the accused an opportunity to explain any points made out against him and must hear what he has to say himself, 29 Cr. L.J. 125-105 Ind. Cas. 717. An accused person should be examined after all the prosecution witnesses were examined and this is imperative even in a case where he has been examined at first, 50 B. 42, but see 25 A.L.J. 196 where it was held that as the omission did not occasion a failure of justice, S. 537 *infra*, applied to the case. Under this section it is left to the discretion of the Court after examining the accused generally on the case, whether specific questions on particular points in the evidence should be put to him, 26 Bom. L.R. 109-25 Cr. L. J. 1127-81 Ind. Cas. 951. The accused in a Sessions trial should be

examined carefully by the Sessions Judge himself even though the committing Magistrate has done so with great care. It makes a considerable difference to listeners like the Jury whether a statement is read over by the Interpreter of the Court or whether the accused is carefully examined by Sessions Judge in the presence of the Jury and his answer and demeanour noted. Such examination will fully impress on the mind of the Jury the defence of the accused and its hollowness when untenable, 26 Cr. L.J. 1576=90 Ind. Cas. 536; 9 Bom. L.R. 730=5 Cr. L.J. 741; 9 Bom. L.R. 356. In a warrant case tried summarily this section requires that the Court should examine the accused. It is not necessary in such a trial to record each question put to the accused and his answers to the same, 6 Pat. 504.

The *Madras High Court* has also held in another Full Bench in 46 M. 758 that the provisions of this section do not apply to summons-cases, dissenting from the view taken by the Bombay High Court in 48 B. 441; 45 B. 672. See also 9 Lah. L.J. 109=28 Cr. L.J. 490=101 Ind. Cas. 608 which took the same view as 46 M. 758, but the Calcutta High Court has adopted the view of the Bombay High Court. See 54 C. 286 (F.B.). The former view is also opposed to that taken in Calcutta in 49 C. 1073; 51 C. 933; 54 C. 286; 33 C.W.N. 917, and in Patna, Allahabad and Lahore in 6 Pat. L.J. 174; 27 Cr.L.J. 405=93 Ind. Cas. 69; 10 Lah. 406 at 412, respectively, where it was held that the words "if any" occurring in S. 245, *supra*, do not exclude the operation of this section; See 26 Cr. L.J. 1554=90 Ind. Cas. 434. See also 27 Cr.L.J. 632=94 Ind. Cas. 408 following 46 M. 758. The prisoner in summons-cases does not enter on his defence as in warrant-case, and Chapter XX provides a complete procedure for the hearing of summons-cases, but in summons-cases there is no objection to a Magistrate questioning the accused generally, to enable him to explain circumstances appearing in evidence against him, and when unrepresented, and in complicated cases it is a desirable course, but it is not obligatory. So also in summary trials in summons-cases under Chapter XXII, 45 M. 766 (F.B.) followed in 28 Cr. L.J. 478=101 Ind. Cas. 606 and dissented from in 54 C. 286. (F.B.) See 43 M. 511. The *Madras High Court* has also held that failure to examine the accused a second time when the accused had filed an elaborate written statement will not vitiate the conviction. See 45 A. 124; 50 C. 223; 27 C.W.N. 399; 4 Lah. 61 at 65; 23 Cr. L.J. 697; 49 C. 1075; 24 Cr. L.J. 311=72 Ind. Cas. 71, 27 Cr. L.J. 403=93 Ind. Cas. 69; 27 Cr. L.J. 1335=98 Ind. Cas. 407.

At any stage.—Although it is not desirable to examine the accused at great length before the prosecution evidence has been closed yet such examination at that stage cannot be said to be illegal and is no ground for quashing the entire proceedings, 30 Cr. L.J. 18=112 Ind. Cas. 850. See also 54 C. 286 (F.B.).

Question him generally on the case.—The section does not lay down and has not been the practice in Madras that specific questions should be put to the accused in detail and he cannot be prejudiced by not doing so as the general questioning is followed by the specific charge, 26 L.W. 33=28 Cr. L.J. 383=100 Ind. Cas. 991 where 26 Cr. L.J. 714=86 Ind. Cas. 156 and 52 C. 522 are not followed.

After the prosecution witnesses have been examined.—These words do not occur in Ss. 244 and 250 *supra*. They refer without any ambiguity whatever to a definite stage in any kind of trial and their equivalent in the sections mentioned above leaps to the eye, 54 C. 285 (F.B.) The initial statement of the accused in summons-cases under S. 242 *supra* when he is called upon to show cause under S. 243 *supra* before evidence is led, does not dispense with the necessity for the examination after the prosecution evidence has been closed and such an omission is an illegality, 27 Cr. L.J. 1290=93 Ind. Cas. 156 following 45 B. 441 and 6 Pat. L.J. 430=21 Cr. L.J. 703=53 Ind. Cas. 43. See also 50 B. 42, but in 26 A. L.J. 196 a different view is taken holding S. 537 *infra* cured the defect.

Before he is called on for his defence—To call on the accused to enter on his defence is a necessary incident in every trial, 45 B. 672; 45 B. 441; and in this section the phrase is used not only without any special or limited intention but in a chapter which is expressly devoted to general provisions applying to any stage of an inquiry or trial, 54 C. 235 (F.B.).

Sub-section (2).—The sub-section guarantees perfect immunity to the accused. Neither in the language of the section nor on principle is there any valid reason for extending

this immunity to a statement made otherwise than in answer to questions put to him, to explain any circumstances appearing in the evidence against him by the Court. There is no law which confers upon an accused person immunity from prosecution in respect of a false affidavit in support of an application for transfer which can be made the subject of a charge for perjury, 6 Lah. 34 following 3 Lah. 46 dissenting from 28 A. 331; 19 A. 209. The Allahabad High Court in the decision reported in 29 Cr. L.J. 336 at 339=108 Ind. Cas. 121, held that according to the practice of that Court an accused person can legally tender his own affidavit in support of an application for transfer and he can be prosecuted for false statements contained therein. Having regard to the provision contained in S. 539A *infra*, it is submitted that the accused can now tender his own affidavit in support of a transfer application and the practice has now grown up to accept such affidavits in the High Court without objection. This sub-section ensures to the accused his right to offer no explanation, to answer no question but to say simply '*I reserve my defence prove me guilty, if you can. I am not bound to help you.*' There is no legal obligation cast on him to answer questions put to him. Statements of a defamatory nature made by an accused person, in the course of his statement which he was asked to make, are privileged, 5 M.L.T. 236. See 36 M. 216 (F.B.). An accused in making a defamatory statement in his defence in answer to questions put to him by the Court is absolutely privileged and cannot be held liable for defamation and he is, protected by this sub-section, 50 A. 169 following 36 M. 216; 43 C. 383 and not following 50 B. 162 (F.B.) where absolute privilege is negatived, but this protection does not extend to statements in a written statement filed by the accused, 24 A L.J. 329=27 Cr. L.J. 253=92 Ind. Cas. 429. See also the Full Bench decision in 49 M. 728 which held against absolute privilege in criminal prosecutions. See also 29 Cr. L.J. 262=107 Ind. Cas. 561. The accused is not bound to answer. He has the right to refuse to answer the questions put to him, 41 C. 743 at 745. By his refusal to answer or by answering the questions falsely he does not render himself liable to any punishment, but the Court and the Jury (if any) may draw such inference from such a refusal to answer, as it thinks just. See S. 114, Indian Evidence Act, Illustration (h). But this section does not protect the accused when he goes out of the way, and makes to the Court which is trying him, a false charge against other persons, 23 Cr. L.J. 1194=82 Ind. Cas. 58.

A Counsel is no doubt within his rights when he advises his client in open Court, on being examined by the Judge, to say nothing in answer to the questions put to him and the accused taking the hint refuses to answer the questions put to him. Counsel commits no offence under S. 228, I.P.O., by asking his client to do so. A Counsel's position between his duty to the client and the respect due to the Court was a difficult one and he, believing that the questions put to his client were not warranted by the Code and the answers which may be given might possibly be damaging to his client, asks him not to answer the questions, he commits no offence, 1905 P.L.R. (Cr. J.) 200 p. 671; See also 10 Cr. L.J. 509 at 512-513=4 Ind. Cas. 60.

Sub-section (3).—The answers given by the accused may be taken into consideration at the trial and proper inference may be drawn therefrom and even in a subsequent trial for any other offence, they may still be used as evidence for or against the accused. From the answers given by the accused under this section explaining the evidence, all proper inferences may be drawn by the Court, 6 Pat L.J. 241 at 243. S. 30 The *Ind. Ev. Act*, refers to statements made before and proved at the trial and not to statements made at the trial. An accused is entitled to know what the evidence against him is before he is called upon to enter on his defence and the closing of the case for the prosecution is no mere form but with certain exceptions closes the door for further evidence against him. If a prior confession has to be proved, he can attack it by cross-examination of the witness who proves it. Against a confession made at the dock after close of prosecution case he has no protection whatever. A conviction cannot be supported on the mere confession of a co-accused from the dock at the trial without anything further, 1929 M.W.N. 391=30 Cr. L.J. 932=118 Ind. Cas. 512 following 45 A. 323 at 324 25 and not following 39 M. 302. The Code itself says in this sub-section that the statement may be taken into consideration, a phrase also used in S. 30, *Ind. Ev. Act* with regard to confession of a co-accused, and various decisions have held that the Court

may take the confession into consideration to determine whether the issue of guilt is proved or not; to that extent it becomes practically on the same footing as other evidence although technically it is not evidence in the case according to the definition in the *Ind. Ev. Act*. Inference of guilt against the accused from his own conduct and his explanation to the same could be taken into consideration to decide the question of accused's guilt or otherwise, 49 B. 878 at 839 90. In a case where there are several accused with conflicting and varying defences, the Judge after taking a statement from an accused and comparing it with the defence of a co-accused took another statement from the co-accused, it was held that he was entitled to do so and the procedure was legal, 55 C. 838. The statement of an accused which is not clearly a confession cannot be taken into consideration as against a co-accused. A mere admission of certain facts from which an inference of guilt may be drawn is not a confession when it is itself *exculpatory* and therefore cannot be taken into consideration against his co-accused, 31 Bom. L.R. 645 at 655; 53 B. 479. It has been pointed out in many cases that a statement made by an accused person before it can be taken into consideration against a fellow prisoner as is provided in S. 30, of the *Ind. Ev. Act*, must amount to a confession on the part of the maker in respect to the offence with which all are charged. It must be a confession, or as was put in 2 A. 415 at 416, "the test under S. 30, of the *Ind. Ev. Act*, intended to be applied to a statement of one prisoner to be used in evidence as against another is to see whether it is sufficient by itself to justify the conviction of the person making it of the offence for which he is jointly tried with other or others against whom it is tendered. In fact to use a popular and well understood phrase, the confessing prisoner must tar himself and the person or persons he implicates, with one and the same brush." Where in a case of difficulty one of the accused stated that he went to the scene under pressure and threat of imminent death, that he took no part, that he stood outside the house and then went away, it was held that the statement being self exculpatory and not incriminating was not a confession and could not be taken into consideration against the other accused jointly tried, as the statement becomes admissible only if it is incriminating which involves the maker as it does those whom it incriminates, 47 C.L.J. 526 at 529. See also 1929 M.W.N. 391; 45 A. 823; [1910] 2 K.B. 658. The law laid down by Courts in India in regard to S. 30 *I.E. Act* is coloured by the dislike felt by the English lawyers for any provision in an Indian Statute that departs from English law. In 20 L.W. 202, the late Chief Justice described S. 30 as needless tampering of the wholesome rule of the English law. The Indian Statute does depart from the English rule and there is no reason why its effect should be whittled down till the two are indistinguishable, 30 L.W. 403. As to the use of the statement of the accused this section simply says that the Court may take the same into consideration. This is purposely wide. The Court is invited to come to the proper conclusion by taking into consideration not only the evidence for the prosecution and the defence (if any) but also the statement of the accused which if it satisfactorily explains the prosecution evidence there can be no conviction but if such statement and the defence evidence, if any, do not rebut the prosecution evidence and the Court feels justified in acting on the latter, it will convict the accused. But it is not open to the Court to supplement evidence, by itself selecting out of the statement of the accused passages which might corroborate the prosecution evidence and reject the passages which go to exonerate the accused, 26 A.L.J. 1334 at 1331 = 30 Cr. L.J. 101 at 105 = 113 Ind. Cas. 213 following 39 M. 770 and 7 C.W.N. 1343. Where two accused are tried jointly, each accused cannot be examined in the absence of the other so that neither of them might hear what the other said, and the statement so made cannot be taken into consideration against the other, 6 B. 121. The accused's statement may be taken into consideration and shall be put in evidence for or against him. The expression "may be taken into consideration" means that the statement of the accused is not to have the force

Sub-section (4).—The 'accused' herein means the accused under trial and examination of the Court. 3 Ran. 11; 64 C. 52 at 56; 45 C. 720 at 723. This

intended to relate to the proceedings which are specified in this section, and S. 5 of the Indian Oaths Act, applies only to an accused person while he is under trial. It is going too far to hold, that because the applicant was an accused who was tried and convicted, was still an accused after his conviction, when applying for leave to appeal from the conviction to the High Court. He is competent to swear to an affidavit in support of his application for leave to appeal, 23 Cr. L.J. 431=101 Ind. Cas. 657 following 45 C. 720 at 723. No oath can be administered to the accused when examined under this section, 25 C. 413; 10 C.W.N. 962; 12 M. 153; 14 B 261. In India a person accused of an offence is not as in England a competent witness on his own behalf. This section influenced by the principles of Common law before they were modified by statute renders it clear that no oath can be administered and the accused shall not be liable to punishment for statements made during the inquiry or trial within the purview of the section. This safeguard was necessary because in the peculiar circumstances of this country the Legislature has decided to depart from the Common law by giving the Court, holding the inquiry or trial a power to put such questions to the accused as it considers necessary to enable the accused to explain the circumstances appearing in evidence against him and questions can be put at any stage without previous warning, 10 Cr. L.J. 509 at 512=4 Ind. Cas. 690. See also 52 B 768; 50 C. 518; 52 C. 522; 23 Cr. L.J. 417=101 Ind. Cas. 449; 51 A. 313 at 321. See S. 340, (2) newly added, which permits a person against whom proceedings are instituted under Chapters X, XI, XII and XXXVI and S. 552 of the Code, being examined on oath as a witness. Oath can be administered to a person accused with others not jointly tried, 20 A. 426; 23 B. 213. None of the parties to a proceeding under S. 146, *supra*, can be called accused persons, and therefore the provisions of this section do not prevent their examination on oath, 26 Cr. L.J. 70=83 Ind. Cas. 630.

Procedure when provisions of the section are not complied with.—When it is found that the mandatory provisions of this section have not been complied with the proper course for the appellate Court to follow is, to set aside the conviction and remit the case to the trial Court in order to comply with its provisions, 27 C.W.N. 28=25 Cr. L.J. 524=77 Ind. Cas. 933; 25 Cr. L.J. 119=81 Ind. Cas. 976. See also 17 Bom. L.R. 892; 9 Bom. L.R. 365, Weir II, 45. See also the cases cited at page 626.

343. Except as provided in sections 337 and 338, no influence, by means of any promise or threat or otherwise, shall be used to an accused person to induce him to disclose or withhold any matter within his knowledge.

No influence to be used to induce disclosures.

Except as provided by sections 337 and 338.—This section provides that except by way of pardon, no influence by means of any promise or threat or otherwise shall be used to an accused person. This section is not applicable to a case in which the inducement is offered to a person, not as an accused but as a witness. There are no words in this section to show that the prohibition contemplated by this section refers to the Court and not to any other person, and that an accused person within the meaning of this section is the accused under examination and trial, 18 Bom. L.R. 266 at 281; 25 B. 422. The provisions of this section are not applicable to a person who is not an accused person but who has been discharged. The accused person referred to in this section is the same accused person as specified in S. 342, *supra*, 27 Cr. L.J. 807=93 Ind. Cas. 471 where 18 Bom. L.R. 266=17 Cr. L.J. 258=34 Ind. Cas. 976 is followed.

344. (1) If, from the absence of a witness, or any other reasonable cause, it becomes necessary or advisable to postpone the commencement of, or adjourn any inquiry or trial, the Court may, if it thinks fit, by order in writing stating the reasons therefor, from time to time, post-

Power to postpone or adjourn proceedings.

pone or adjourn the same on such terms as it thinks fit, for such time as it considers reasonable, and may by a warrant remand the accused if in custody :

Remand. Provided that no Magistrate shall remand an accused person to custody under this section for a term exceeding fifteen days at a time.

(2) Every order made under this section by a Court other than a High Court shall be in writing signed by the presiding Judge or Magistrate.

Explanation.—If sufficient evidence has been obtained to raise a suspicion that the accused may have committed an offence, and it appears likely that further evidence may be obtained by a remand, this is a reasonable cause for a remand.

Scope of the section.—This section applies only to adjournments of cases from time to time and the Court has no power under this section to stay proceedings, 39 M.L.T. 103. See 50 M. 839. This section occurs in Chapter XIV of the Code which deals with general provisions as to inquiries and trials. It is applicable to cases even before the issue of process under S. 201, *supra*, and the Magistrate is entitled under this section, if there be a reasonable cause for doing so, to postpone any inquiry or trial, and to postpone the issue of process under S. 201, *supra*. S. 202, *supra*, deals with inquiries after a Magistrate has taken cognizance of an offence on complaint and before he dismisses under S. 203, *supra*, or issues process under S. 204, *supra*, and there is nothing in the law which prevents a Magistrate from postponing issue of process under S. 201 if there is reasonable cause for so doing, if the case be a warrant case. Magistrates should understand that the power under this section is a power which is to be exercised in cases which come really within the terms of the section. It is not a power to be exercised arbitrarily and not according to rule, 9 B.L.R. 354; no adjournments are to be granted in other cases, 17 W.R. (Cr.) 35; 21 W.R. (Cr.) 26. This section empowers the Magistrate not only to adjourn an inquiry or trial but also to postpone its commencement and 201 *supra* is one of the sections which come in the Chapter headed, commencement of proceedings before Magistrates. That being so, the Magistrate has power to postpone the commencement of the hearing under this section and this may include also postponement till the disposal of a Counter case, 43 C.L.J. 388. The power given to a Court to postpone the hearing is to be exercised when there is any reasonable cause for so doing and it is a matter of discretion and if the Magistrate does not exercise his discretion judiciously in postponing the case, High Court will interfere and set aside the order. But if the discretion is exercised in a sound and judicial manner, the High Court should not be interfering with the discretion. It is the policy of the law, that Courts, should proceed to inquire into and try the cases as soon as they take cognizance of a complaint, and it is only when reasonable grounds exist for postponing the inquiry or trial, they should do so, as there is no provision of law preventing such postponement. 26 Cr. L.J. 1178=53 Ind. Cas. 603 where 28 C.W.N. 437 is referred to. *The Bombay High Court Criminal Circular (Bomb. Gaz. 1896 Pt. I, p. 1104) for prompt disposal of cases and as to the impropriety of undue protraction of trials before lower Courts is worth reproducing.* "The Hon'ble Judges regret to observe that the trial of cases is at times unnecessarily and unduly protracted. Their Lordships therefore desire to point out for the guidance of Magistrates that it is their duty to despatch their criminal work with the least possible delay, it being essential for the proper administration of justice that it should be promptly dealt with. As far as possible, criminal work should be given precedence over other work, cases in which the accused are in custody being taken up for disposal in preference to those in which the accused are on bail. Magistrates should so arrange for the despatch of their criminal work that the hearing of one case should, as far as possible, not be allowed

interfere with the hearing of another case, each being fixed for hearing for distinct days, due regard being had to their probable duration. Every effort, should be made to minimise delay and hardship to the parties and witnesses. When a case is once commenced, it should be heard *de die in diem* and completed with every possible despatch, the whole or as much of the working day as could be spared, being devoted to its hearing. Witnesses remaining over from one day should be examined at the first sitting of the Court on the following day. The practice of taking up a case for an hour or so and then dropping it again should be avoided and cases should be disposed of, as far as possible, in continuous sittings. Adjournments, should, as a rule, be avoided especially when the accused are likely to be prejudiced thereby, and if from any unavoidable cause an adjournment is deemed indispensable it should be for as short a time as possible. Any case once commenced should be continued from day to day, except in Sundays and other days when Public Treasuries are closed and days when Native usage absolutely requires the intermission of all business. Every Court should sit daily and punctually at the hour appointed for its opening, unless prevented by circumstances which should be recorded in its proceedings. When a Magistrate is on tour every care should be taken so as to obviate, as far as practicable, the inconvenience which must be caused to them by their being called away to long distance from their residences and the hearing of cases should, as far as possible be completed at the appointed place without obliging them to move from camp to camp with the Magistrate." This section which relates to inquiries or trials has nothing to do with police investigations, 22 B. 32 at 34. Public policy and public safety demand that every criminal trial should be conducted as expeditiously as possible. The adjournment must be to a day fixed and only in exceptional cases criminal trials are to be adjourned *sine die*, e.g., on account of prevalence of plague in the locality and such similar causes. (There is no authority for holding that once a date had been fixed for the hearing of a case that date cannot be altered to an earlier one. There is no reason why a case could not be heard at an earlier date due notice being given to the accused or to his pleader. The intention of the Code is that a criminal trial should proceed forthwith and should be continued from day to day until its termination. The section only provides for adjournments for definite reasons but where there is no longer any reason for an adjournment the trial should proceed and the changing of the date to an earlier one cannot be considered as even a technical irregularity, 29 Cr. L.J. 1092=112 Ind. Cas. 676. Once a Magistrate has taken cognizance of a case his powers of postponement and adjournment are governed by this section, 23 C.W.N. 437 and 430=25 Cr. L.J. 63=93 Ind. Cas. 628. It is highly undesirable that the same dispute should be allowed to be fought out both in the criminal and civil Courts simultaneously and under these sections the criminal proceedings may be stayed during disposal of the civil dispute, 43 A. 60; 27 Cr. L.J. 1114=97 Ind. Cas. 526. See notes under next heading. This section contemplates a remand to jail and not to police custody contemplated by S. 167, *supra*, 23 B. 32 at 34. Under this section a Magistrate has jurisdiction to postpone *sine die* proceedings under S. 145, *supra*, but he must assign sufficient reasons for the same, 13 C.W.N. 601 at 603=11 Cr. L.J. 7. This section is applicable where a Judge desires to stay the trial in a case, pending an appeal in a connected case. The Public Prosecutor may, under S. 491, *infra*, withdraw with the permission of the Court from the prosecution, 6 M.L.T. 90=9 Cr. L.J. 493=2 Ind. Cas. 123. It is most inexpedient for a Sessions trial to be adjourned. The intention of the Code is that a trial before a Court of Session should proceed and be dealt with continuously and adjournments when they become necessary should be granted only on strongest possible grounds and for shortest possible period, 35 A. 3. This section does not apply to appeals and costs cannot be awarded for adjourning an appeal, 21 Cr. L.J. 201=31 Ind. Cas. 953.

Any other reasonable cause.—Reasonable cause is same cause which will enable the Court to have before it all the materials relevant to the inquiry or trial, 1903 A.W.N. 234. It is impossible to lay down rules for the conduct of the Court. It must be left to the Court to decide in each case whether consistently with the rights of the parties and also the interests of justice it would be proper to grant an adjournment when the liberty of the subject is at stake. Every precaution should be taken to see that no unfair means is resorted to by the parties to get adjournments for purposes which may not be justifiable

in law. A trial once opened should be proceeded with throughout the day, and as far as possible, from day to day until completed. Piecemeal method of dealing with cases necessitates the preparation of unnecessary voluminous records by giving to parties and witnesses opportunity for consultation and for concoction and fabrication of evidence. The system must necessarily result in much waste of public time, entailing upon the parties intolerable inconvenience, loss of time and expense, 19 C.W.N. 273 at 282. Absence of a witness is specially mentioned in this section as a reason for postponement of the trial. A trial held without giving the accused a reasonable opportunity to adduce evidence is bad, 19 M. 375 ; 5 M.H.C.R. Appx. 27 ; 11 W.R. (Cr.) 15. The power conferred by this section is to be exercised only in cases which come really within the terms of this section and not arbitrarily. The Magistrate being busy with the executive work in the interior of the district is not a "reasonable cause" 9 B L R 354=17 W.R. (Cr.) 55. Whether there are reasonable grounds are not, is a question which must be decided judicially, that is, there should be some tangible evidence on which the court might come to the conclusion that, if unrebutted, the accused might be convicted, 36 C. 174 at 178. An important ceremony in which the party is obliged to take part, or the death of a nearest relation, may justify an adjournment. So also the fact that the accused's Counsel had to fulfil a longstanding engagement in a criminal case at another place, and the Magistrate will not be justified in taking the extreme step of deciding the case without hearing the defence about such an engagement, 12 Cr. L.J. 474=12 Ind. Cas. 82. The explanation to this section shows what is a reasonable cause for a remand. There is no hard and fast rule that a criminal case should be adjourned pending the disposal of a civil suit in relation to the same matter. Pendency of a civil litigation with regard to the same subject-matter may be a reasonable cause of a postponement of the inquiry or trial within this section, Weir II 415 ; 1 M.H.C.R. 66 ; 17 Cr. L.J. 7=32 Ind. Cas. 133 ; 27 Cr. L.J. 1114=97 Ind. Cas. 426. Where a charge in a criminal case is the defence in a civil suit it is better that criminal proceedings should be adjourned and stayed provided there is a probability of a speedy termination of the civil suit, 15 Cr. L.J. 568=24 Ind. Cas. 976 ; See also 15 Cr. L.J. 433=24 Ind. Cas. 576 ; 13 Cr. L.J. 567=24 Ind. Cas. 976. No hard and fast rule can be laid down that a criminal trial should of necessity be stayed simply because a civil suit has been instituted between the parties in which some or all the matters in issue would have to be determined until the civil litigation is finally decided, 13 C.W.M. 393=11 Cr. L.J. 4=4 Ind. Cas. 495 where 34 C. 848 is referred to. See 50 M. 839 where it was held that there was no invariable rule that when the same issue is agitated both on the civil and the criminal side, the civil Court shall take precedence of the Criminal Court. Each case must be considered on its merits and the only general rule that can be adumbrated is, that every court should be left, as far as possible, to dispose of the cases on its file with the utmost expediency. The rule is in the interests not only of public administration but also of private individuals involved in criminal courts, for no one wishes to have a criminal case kept hanging indefinitely over his head but in cases arising from disputed title, it is difficult to draw the line between *bona fide* claim and a criminal trespass. If the title to property is already before the civil Court prior to the institution of criminal proceedings it may be advisable for the criminal Court to abide the result of the civil suit. See also, 23 Cr. L.J. 326=103 Ind. Cas. 710 ; 23 Cr. L.J. 47=106 Ind. Cas. 463 ; 1916 P.W.R. (Cr.) 8=17 Cr. L.J. 235=34 Ind. Cas. 317 ; 13 Cr. L.J. 175=13 Ind. Cas. 927 where 5 C.L.J. 233=5 Cr. L.J. 199 and 5 C.W.N. 44 are referred to. Criminal Courts have no authority to order an accused person to pay the cost of an adjournment consequent on his failure to appear on the date fixed for hearing of the complaint against him, 20 A.L.J. 280 ; where an adjournment was granted to suit the convenience of the police who were conducting the prosecution, a complainant cannot be ordered to pay costs of the accused, 24 Bom. L.R. 380. Even when the complainant has a reasonable cause, it is discretionary with the court to postpone the hearing ; when the Magistrate finds that the complainant was wasting the time and protracting the trial unnecessarily and therefore refuses to adjourn the case for examining further prosecution witnesses, an adjournment was rightly refused, 26 Cr. L.J. 933=87 Ind. Cas. 110. Trial held on a Sunday or other holiday is not necessarily invalid unless the accused is prejudiced, say, his being unable to secure the services of Counsel, 16 Cr. L.J. 752=31 Ind. Cas. 352.

Postpone any inquiry or trial.—This section enables the Court to postpone commencement of or adjourn any inquiry or trial. An appeal before a sessions Court strictly be said to be an inquiry or trial within the meaning of this section and costs be awarded under this section for the adjournment of an appeal, 21 Cr. L.J. 231=54 Ir 335, where 28 A. 207 and 1905 A.W.N. 59, are referred to

Court may, if it thinks fit.—The words "*if it thinks fit*" have been added Code of 1893 and this gives the court a wide discretion to postpone the inquiry or trial is discretionary with the court to adjourn the inquiry or trial under this section a discretion is to be exercised not arbitrarily and not according to rule, 9 B.L.R. 333=1 (Cr.) 53.

Order in writing stating reasons therefor.—The order of adjournment must be in writing and must state grounds for such adjournment, 28 C.W.N. 437.

May adjourn on such terms as it thinks fit.—The expression "*On terms*" means something more than a mere power to adjourn. It implies that a court is granted to one side only on condition that the other side suffers in some manner. In criminal cases the right to award costs rests in every case on statute. There is no provision enabling criminal courts to award costs in favour of the prosecutor against the accused in a prosecution for an offence. In order to encourage due prosecution of offences criminal Courts have power to grant, to those prosecutors and witnesses for the prosecution who attend on recognisance or summons, such costs as will reimburse for the expenses they have incurred or shall incur. The power to award costs for granting an adjournment is vested in the court under this section 9 Cr. L. Rev. 338 where 28 A. 207; 9 C.W.N. 18 and Cr. R.C. Nos. 485 and 486 of 1916 (M.H.C.) are followed. These words are wide enough to cover an order making payment of costs by one party to another, a condition of granting an adjournment, and the power can be exercised even in a case initiated by a police officer. 40 M. 1130. Unlike the Civil Procedure Code there is no general clause in the code providing for costs in every case. The sections providing for costs are among others 88, 144, 483, 526 and 545, *infra*. Where there are specific instances in which power to grant costs is given the manner *expressio unius est exclusio alterius* applies with the result that any right of granting costs except that specially provided is excluded, 45 M. 913 (F.B.) = 1. The Code does not make a special provision for costs, in the course of a criminal trial. One thing seems to be perfectly clear, viz., that if this section is to be regarded as justifying order as to costs, it can only be where the circumstances are exceptional and where for reason or other the ordinary method of conducting criminal cases must be departed from. 42 B. 234. Where a Magistrate had to postpone a case owing to the failure of the complainant to take necessary steps to summon his witnesses, the Magistrate has power to direct the complainant to pay costs to accused or his witnesses. 9 A.L.J. 13 Cr. L.J. 268=15 Ind. Cas. 552. This section dealing with proceedings in criminal cases expressly empowers the Court to postpone or adjourn an inquiry upon such terms as it thinks fit. This clearly entitles a Court to award costs to a party who has been put to unnecessary expense by the conduct of the other side. It would be regrettable to be deplored if the Court has no such power. The Court has power to award costs and in proper cases it is a power that the Court should exercise, and a just exercise of the power would have the effect of preventing many useless adjournments. 28 A. 207 at 208. An order requiring an accused to pay the costs of an adjournment which a Magistrate in his discretion may make under this section, and when such an order is found to be not unreasonable under the circumstances of the case, it was not disturbed by the High Court, 9 C.W.N. 18. But when a case had necessarily to be adjourned on account of the absence of the accused the Court will not be justified in awarding costs in addition to the issue of a warrant of arrest. The question of imposing terms for adjournment can therefore possibly arise and it would be entirely opposed to the spirit of conducting criminal trials to impose such terms for adjournment, 1906 P.R. (Cr.) 8=3 Cr. L.J. 78; 12 Cr. L.J. 8 Ind. Cas. 851; 20 A.L.J. 239. A complainant ought not to be saddled with costs of adjournment consequent on his failure to produce evidence when one of the accused

happens to be absent on that day, 27 Cr. L.J. 573=93 Ind. Cas. 140. An order as to costs can be made only against the person who gave the information to the police although the crown conducts the prosecution, 40 M. 1130.

May by a warrant remand accused to custody.—The word "remand" connote that the accused is brought up before the Court and re-committed to custody. Remand to jail must be distinguished from police custody which can be done on noncompletion of the investigation against the accused. To remand is to recommit to custody, and can be made only in the presence of the accused, Weir II 469. This section contemplates a remand to jail and not to police custody, 23 B. 32 at 34. The section clearly shows that occasions for remand to Jail custody of undertrial prisoners should be as few as possible, 27 Cr. L.J. 1063 at 1069=97 Ind. Cas. 39. This section does not empower the Magistrate to remand an accused in the custody of the Magistrate to police custody for the purpose of obtaining information as to the commission of the alleged offence, 4 Bom. L.R. 878. Detention is not intended to be penal but it is intended to secure attendance of accused, considering the gravity of the offence and the nature of the evidence implicating him, 35 C. 174. When the offence is bailable the accused ought not to be remanded but released on bail as the terms of S 496 *infra* are imperative, 8 C.W.N. 779. A remand should not ordinarily be ordered under this section without first recording some evidence, where such is already available, to show that good grounds exist for believing the accused to have committed a non-bailable offence. The ordinary course is to examine a police-officer to ascertain the complicity of the accused. When after one remand the accused is again brought up, some direct evidence of his guilt should be required to justify a refusal of bail, and with such remand the necessity of producing such evidence increases, 16 Cr. L.J. 705=30 Ind. Cas. 923, following 6 M. 69. Whether there are reasonable grounds for believing the accused guilty of the offence or not is a question which must be decided judicially, that is to say, there must be some tangible evidence on which a Court might come to the conclusion that, if unrebutted, the accused might be convicted. The detention of an accused under trial is not intended to be penal but its object is to secure attendance, 36 C. 174 at 178-179. The High Court in revision set aside an order of remand where the reason given was that the Magistrate was engaged on executive work in the interior of the District, 9 B.L.R. 354=17 W.R. (Cr). 55. Where a Magistrate remands an accused person to custody under this section he shall record reasons for his order. *Rule 52. Mad. Cr. Rules of Pr.*

Revision.—The High Court has power to revise an order under this section and to use the power freely, the wording of the section is purposely made wide, 40 M. 1131; see also 23 A. 207; 1902 A.W.N. 59; see also 26 L.W. 113; =28 Cr. L.J. 812=104 Ind. Cas. 252=39 M.L.T. 14, where it was held that the High Court will not ordinarily interfere if the Court below had exercised a judicial discretion in refusing to act under this section, see Weir II 415; see also 11 W.R. (Cr) 15 and 21 Cr. L.J. 201=54 Ind. Cas. 585 where the High Court in revision set aside the order of the Sessions Judge adjourning an appeal on condition that the appellant paid Rs 100 as costs to the Crown. Where the application is rejected without proper reasons the order can be revised, 24 Cr. L.J. 640=73 Ind. Cas. 529. But a reasonable order as to costs will not be interfered with by the High Court, 9 C.W.N. 18=2 Cr L.J. 1.

345. (1) The offences punishable under the sections of the Indian Penal Code specified in the first two columns of the table next following may be compounded of offences. compounded by the persons mentioned in the third column of that table:—

Offence.	Sections of the Indian Penal Code applicable.	Persons by whom offence may be compounded.
Uttering words, etc., with deliberate intent to wound the religious feelings of any person.	298	The person whose religious feelings are intended to be wounded.
Causing hurt	323, 331	The person to whom the hurt is caused
Wrongfully restraining or confining any person	311, 342	The person restrained or confined,
Assault or use of criminal force ...	352, 355, 358.	The person assaulted or to whom criminal force is used
Unlawful compulsory labour ...	374	The person compelled to labour.
Mischief when the only loss or damage caused is loss or damage to a private person.	426, 427	The person to whom the loss or damage is caused.
Criminal trespass	447	The person in possession of the property trespassed upon.
House trespass	448	Do.
Criminal breach of contract of service.	490, 491, 492	The person with whom the offender has contracted
Adultery	497	The husband of the woman
Enticing or taking away or detaining with criminal intent a married woman.	498	Do.
Defamation	500	The person defamed.
Printing or engraving matter, knowing it to be defamatory.	501	Do.
Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter	502	Do.
Insult intended to provoke a breach of the peace	504	The person insulted.
Criminal intimidation, except when the offence is punishable with imprisonment for seven years.	506	The person intimidated.
Act caused by making a person believe that he will be an object of divine displeasure.	508	The person against whom the offence was committed.

(2) The offences punishable under the sections of the Indian Penal Code specified in the first two columns of the table next following may, with the permission of the Court before which any prosecution for such offence is pending, be compounded by the persons mentioned in the third column of that table :—

Offence.	Sections of the Indian Penal Code applicable.	Persons by whom offence may be compounded.
Voluntarily causing hurt by dangerous weapons or means.	324	The person to whom hurt is caused.
Voluntarily causing grievous hurt ...	325	Do.
Voluntarily causing grievous hurt on grave and sudden provocation ...	335	Do.

Offence.	Sections of the Indian Penal Code applicable.	Persons by whom offence may be compounded
Causing hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others.	337	The person to whom hurt is caused.
Causing grievous hurt by doing an act so rashly and negligently as to endanger human life or the personal safety of others.	338	Do.
Wrongfully confining a person for three days or more.	343	The person confined.
Wrongfully confining a person in secret.	346	Do.
Assault or criminal force in attempting wrongfully to confine a person.	357	The person assaulted or to whom the force was used.
Dishonest misappropriation of property.	403	The owner of the property misappropriated.
Cheating	417	The person cheated.
Cheating a person whose interest the offender was bound, by law or by legal contract, to protect.	416	Do.
Cheating by personation	419	Do.
Cheating and dishonestly inducing delivery of property or the making, alteration or destruction of a valuable security	420	Do.
Mischief by injury to work of irrigation by wrongfully diverting water when the only loss or damage caused is loss or damage to a private person.	430	The person to whom the loss or damage is caused.
House trespass to commit an offence (other than theft) punishable with imprisonment.	451	The person in possession of the house trespassed upon.
Using a false trade or property mark.	482	The person to whom loss or injury is caused by such use
Counterfeiting a trade or property mark used by another.	483	The person whose trade or property mark is counterfeited.
Knowingly selling, or exposing or possessing for sale or for trade or manufacturing purpose, goods marked with counterfeit trade or property mark.	486	Do.
Marrying again during the lifetime of a husband or wife.	491	The husband or wife of the person so marrying.
Uttering words or sounds or making gestures or exhibiting any object intending to insult the modesty of a woman or intruding upon the privacy of a woman	509	The woman whom it is intended to insult or whose privacy is introduced upon.

(3) When any offence is compoundable under this section, the abetment of such offence or an attempt to commit such offence (when such attempt is itself an offence) may be compounded in like manner.

(4) When the person who would otherwise be competent to compound an offence under this section is *under the age of eighteen years or in an idiot or a lunatic*, any person competent to contract on his behalf may *with the permission of the Court* compound such offence.

(5) When the accused has been committed for trial or when he has been convicted and an appeal is pending, no composition for the offence shall be allowed without the leave of the Court to which he is committed, or, as the case may be, before which the appeal is to be heard.

(5A) *A High Court acting in the exercise of its powers of revision under section 439 may allow any person to compound any offence which he is competent to compound under this section.*

(6) The composition of an offence under this section shall have the effect of an acquittal of the accused *with whom the offence has been compounded.*

(7) No offence shall be compounded except as provided by this section.

Amendment.—The offence under S. 508, I.P.O., has been added newly to the list of offences, under sub-section (1) and to sub-section (2) fifteen new offences, such as wrongful confinement, criminal misappropriation, cheating, mischief, house-trespass, using false trade mark, bigamy, uttering words to outrage modesty of a woman, etc., are added which are now made compoundable with the permission of the Court. In sub-section (4) for the word "minor" the words "under the age of eighteen years" are substituted and the guardian or a curator can compound only with the permission of the Court. By the new sub-section (5A) power is given to the High Court to permit the compounding of an offence and the addition of the words "with whom the offence has been compounded" in sub-section (6) make it clear that the composition with one accused will not work a composition with the other accused in the case.

Scope of the section—This section is divided into two sub-sections. Sub-section (1) deals with certain offences under the I.P.O. mentioned therein and these offences may be compounded by persons mentioned in column 3. Sub-section (2) contains a list of certain other sections of the I.P.O. and it provides that these offences can be compounded by the persons mentioned in column 3 only with the permission of the Court before which the prosecution is pending. It may be taken as settled law that this section is exhaustive on the subject of the composition of the offences mentioned therein. The case reported in 39 M. 936, lays down that if the parties in a pending case arrive at a compromise outside the Court and one of the parties resiles from, it is competent to the Court to inquire whether or not the parties had settled their dispute and if it finds that there has been a valid composition, the Court should pass an order of acquittal. In other words the jurisdiction of the Court to go on with the trial comes to an end when the parties had arrived at a valid composition. Under sub-section (1) as soon as the compromise has been arrived at by the parties the Magistrate has nothing more to do except to record a judgment of acquittal. In cases governed by sub-section (2) the permission of the Court before which the prosecution is pending is essential before the case is validly compounded. The Magistrate has to perform the judicial act of deciding whether in the interests of justice the parties should be allowed to compound the offence. In 41 M. 633, it was held that under sub-section (2), the operation of the composition is necessarily suspended until the Court sanctions it. In other words no effect can be given to a compromise as a plea in bar of conviction in cases covered by sub-section (2) unless the Court has given its sanction. Without the sanction of the Court the so called compromise arrived at between the parties outside the Court is of no legal effect and cannot be taken cognizance of, by any Court dealing with the offence. The jurisdiction of the Court to try the case on the merits remains unaffected and there is no rule of law based either upon express language or deducible from any general principles which would enable the court in a case falling under sub-section (2) to order an inquiry into the *factum* of a compromise alleged by one party and denied by the other.

other, 9 Lah. 400. It is not competent in every case to compound an offence under this section. Any person may act the criminal law in motion but it is only the person specified in the third column of the table attached to the section who can compound the offence, 51 B. 512 at 514. To compound an offence is to accept some consideration for forbearing to prosecute or continue to prosecute an offence. Any person who honestly considers that a criminal offence has been committed against him has a right to lay a complaint before a Criminal Court and on the other hand, any accused person is justified in pleading not guilty who considers the facts alleged cannot be proved or if proved they do not constitute an offence, 10 Cr. L.J. 228. The compounding of an offence does not mean that the offence has not been committed, but that it had been committed, though the victim is willing either to forgive or to accept some form of *solatium* as sufficient compensation for what he has suffered, 43 M. 257 at 259 where 17 C.W.N. 443 is distinguished. The principle of English law is that the composition of an offence is illegal if the offence is one which is of public concern, but if the offence is of a private nature and one for which the complainant might have recovered damages in a civil action the composition is lawful. The test for deciding whether the offence affects the individual rather than the State is the compoundability or non-compoundability of the offence charged, as laid down by this section, and Courts of Law cannot go beyond that test and substitute for it one of their own, 23 B 326 at 328; 14 Cr. L.J. 292=19 Ind. Cas. 948 following 23 B 326; 41 M 685; 1 B. 147; 6 Cr.L.J. 336=1517 P.R. (Cr.) 11; 9 Lah. 400. The composition referred in this section is in the nature of a contract, but does not require any consideration, 2 L.W. 1200=18 M.L.T. 602; 39 M. 945. This section is exhaustive of the circumstances and conditions under which a composition can be effected, 9 Lah. 400. No other meaning can be given to sub-section (7). This section makes provisions with regard to (a) the persons who may compound, (b) the nature of the offences that may be compounded; (c) the stage of the criminal proceeding at which composition is sought to be made; (d) it also provides that in regard to some offences which are specified, the mere consent of the injured person shall not suffice but the permission of the Court should be obtained, 39 M 604. The question whether a case is compoundable or not must be decided with reference to the state of the facts existing at the date of the application to compound and it is not possible for the Court to see what the ultimate result of the case will be. Where a case is one under S. 325, I.P.C., which could not at the date of the application be compounded without the leave of the Court and no orders were passed by the Court on the application, when presented, and the complainant withdrew her application after medical evidence was recorded and the petition was rejected by the Court and a charge under S. 323, I.P.C. was framed, and the accused ultimately convicted under S. 352, I.P.C., it was held that the accused was not entitled to an acquittal as the compromise petition was presented at a stage when the offence charged was not compoundable without the permission of the Court, and no petition was before the Court when the charge was found to be a compoundable one, 26 Cr. L.J. 1428=89 Ind. Cas. 900 where 3 C.W.N. 322. is referred to. A petition of compromise agreeing to be bound by the award of certain arbitrators and the grant of an adjournment by the Court for settlement of dispute without a valid award being passed and accepted by the parties, has not the effect of a compounding under this section, 26 Cr. L.J. 1584=90 Ind. Cas. 544. Compounding an offence is more than a mere promise to withdraw a prosecution. It supposes an arrangement by which the parties have settled their differences and in the more usual acceptance of the term implies that the prosecutor has received some consideration or gratification, for dropping the prosecution. Although the provisions of the Contract Act may not apply, the proof of the arrangement must be similar to that which the Court requires for proof of any agreement which is in issue, 21 C. 103 at 115. Where the accused alleges the composition of the offence with which he is charged the onus is on him to show that a real and valid composition with the person against whom the offence is committed had been arrived at, 51 B. 512 at 514 following 21 C. 103. Compounding signifies that the person injured has received some gratification, not necessarily of a pecuniary character, to act as an inducement for his deciding to abstain from a prosecution and the law provides that if the offence is compoundable a composition shall have the effect of an acquittal, 21 C. 103 at 112 followed in 43 M.L.J. 544=22 L.W. 390=1923 M.W.N. 753; 26 Cr. L.J. 1594=90 Ind. Cas. 666.

Where the parties wish to have a composition recorded under this section it is neither necessary for the accused to plead guilty nor is it the duty of the Court to inquire into the nature or value of the consideration given by the complainant for compounding the offence. The complainant may consider that his grievance has been redressed by the mere fact of respectable persons intervening, though he has received no money payment or even a direct apology from the accused. He is nevertheless at full liberty to compound the offence, 10 Cr. L.J. 223. It is not incumbent on the Court before allowing the case to be compounded and acquitting the accused to make an inquiry into the complainant's authority. The order of acquittal made without inquiring into such authority is a valid one made with jurisdiction and such order of acquittal operates as a bar to further proceedings, 22 A.L.J. 820. The essence of an offence under S. 143 or S. 147, I.P.C., is the combination of several persons united in the purpose of committing the offence and that consensus of purpose is itself an offence distinct from the criminal offence which those persons agree and intend to commit. The compounding of an offence does not mean that the offence has not been committed but it has been committed although the victim is willing either to forgive it or to accept some form of *solatium* as sufficient compensation for what he has suffered. The law allows the compounding of an offence under S. 447 I.P.C., but not an offence under S. 143 I.P.C., even though Criminal trespass was the common object of the unlawful assembly, 46 M. 257 where 17 C.W.N. 943 is accepted. The offence of rioting under S. 147 I.P.C. is a non-compoundable offence and the Magistrate cannot allow its composition. It is an offence against public tranquillity, primarily concerning the State more than the individual. That is probably one reason why it is not included in the list of compoundable offences by persons immediately affected, even with the permission of the Court. The reason that it was better for the complainant to be on good terms with the accused who wish to 'compromise or probably the case may ultimately turn out to be one under Ss. 323, 324 or 325, I.P.C., is no reason for allowing composition. The acquittal by the Magistrate under such circumstances is illegal and was therefore set aside and the Magistrate was directed to proceed with the trial, 6 Cr. L.J. 336=1907 P.R.(Cr.) 11. See also 37 B 369; 1 B 64; 24 Cr. L.J. 186=71 Ind. Cas. 602. When an accused is charged under S. 147 and 325, I.P.C., and permission is granted by Court to compound the offence under S. 325, I.P.C., this will not have the effect, of *ipso facto* operating as a compromise and acquittal of the offence under S. 147, I.P.C. S. 403 (2) and S. 235 (f) and illustration (g) to that section clearly show that the acquittal under S. 325, I.P.C. will not bar a subsequent trial for the offence under S. 147, I.P.C. If however circumstances seem to require that the accused should not be proceeded with, he may be discharged of the offence under S. 147, I.P.C., 26 Cr. L.J. 686=83 Ind. Cas. 62. It is not necessary that the composition should be arrived at after a complaint has been filed. The words of the section are 'The offences.....described in the first two columns of the table next following may be compounded by the person mentioned in the third column of that table.' An offence, say, wrongful restraint can be compounded by the person restrained. An offence is complete when the acts constituting the offence have been committed apart from whether any complaint or charge has been laid in Court or not. The allusion in para. 6 of this section to the 'accused', only describes his character at the time of trial, when the question of the effect of a composition is under consideration, 25 A.L.J. 396=28 Cr. L.J. 495 (2)=101 Ind. Cas. 671 (2). The question whether an offence could be compounded before a complaint is actually filed in Court came for consideration in 41 M. 683, where it was held that in cases where no permission of the Court is needed for the compounding of an offence, there can be a valid composition before a complaint was actually filed in Court. There is no apparent reason why the Legislature having permitted certain offences to be compounded by the parties themselves without any reference to the Court should insist that the composition should take place only after the accused has been brought before the Court. There is no necessity that for a valid composition it should be effected in Court. This section does not imply any such necessity at any rate in the case of offences mentioned in sub-section (1), 21 C. 103; 30 M. 946. A Magistrate has no power to prevent the compounding of offences mentioned in the table given under sub-section (1) even when cases are sent up by the police, 10 C. 551; 1884 A.W.N. 236. Permitting the compounding of an offence is a judicial power the exercise of

which is vested in the Magistrate and the Police ought not to be allowed to interfere in the matter, Ratanlal 91 and the permission of the Court is not required for compounding such offences. Such permission will be required only with regard to offences specified in the table to sub-section (2). For distinction between withdrawal of a complaint under S. 219 and the compounding of an offence under this section, see notes under S. 218, *supra* at p. 470. When the parties compound the offence and produce a writing signed by them before the Court, the Court is bound to act on it and is not at liberty to call upon the parties to prove that the case has been compromised, 16 Bom. L.R. 833=16 Cr. L.J. 83=26 Ind. Cas. 1000, nor can the Court proceed with the case and convict the accused, 45 A. 145; 39 M. 915; 21 C. 103. But a Magistrate is not bound to accept an application for compromise at a very late stage of the case especially where some of the offences are not compoundable even with the permission of the Court and one of the parties had repudiated the compromise, 31 Bom. L.R. 789. Where a petition to compound the offence is presented, the Courts should at once pass orders on it and should not keep it pending for consideration at the close of the trial, 3 C.W.N. 543 and 322. Under this section a case may be compounded at any time before sentence is passed and, therefore a Magistrate cannot refuse to accept a petition of compromise presented to him while he is writing the judgment on the ground that it was presented at a very late stage, 45 C. 816. But after a conviction, composition is permissible only with the leave of the appellate Court which is not bound to recognise and give effect to an agreement entered into after conviction, 11 L.W. 33=20 Cr. L.J. 832=53 Ind. Cas. 832; 11 A.L.J. 13. Where after a charge has been framed under S. 500, I.P.C., through certain mediators, the accused and the complainant signed a *muchlisika* to arbitrate the dispute but no arbitration took place and no award was made, and the Magistrate dismissed the complaint on the ground that the offence was compromised by the signing of the *muchlisika* by both parties it was held that the *muchlisika* was only one step towards composition, which was not complete before an award, and till then *muchlisika* was a mere agreement, a preliminary step towards composition and not composition itself, 49 M.L.J. 544=22 L.W. 390=(1925) M.W.N. 753=26 Cr. L.J. 1591=90 Ind. Cas. 666. The only sections of the Code which contemplate the termination of a criminal prosecution by private arrangement are S. 218 and this section. The former deals with trial of summons cases only and in a warrant case relating to a non compoundable offence, it is not competent to a Magistrate on a private complainant's offering to withdraw from prosecution, to enter an order of acquittal, 37 B. 359. The general principle of law in England, that felonies and serious misdemeanours should not be compounded is embodied in this section and it is the duty of the Court to decide on the evidence that a compoundable offence has been committed before allowing a compounding, Ratanlal 699; 1 L.B.R. 319; 7 Sind L.R. 200. The composition is permissible only up to the time of the judgment and not after. Therefore a Magistrate cannot refuse to accept a compromise petition on the ground that it was presented when the judgment was actually being written by him, 45 C. 816. When a compoundable offence is compromised and the complaint is withdrawn, it may be revived if it appears that the compromise was the result of a promise on the part of the accused which he failed to fulfill. The fact of such a promise should be inquired into and if proved the complaint should be investigated 1904 P.L.R. (Cr. J.) 94, p. 224.

Sub-section (1).—Under this sub section as soon as the parties have arrived at a compromise in a compoundable offence, the composition is complete and if one of the parties subsequently resiles from the composition, it is competent to the Court to take evidence as to the *factum* of the composition and give effect to it, if it is found to have been entered into by the parties. If such a contingency does not arise the Magistrate has only to accept the composition and record a judgment of acquittal, 9 Lah. 430 following 39 M. 915 and 41 M. 685. The offences are described in the first two columns of the table and they are all offences under the Indian Penal Code. The offences punishable under other laws are only compoundable, if punishable with imprisonment of not more than six months or with fine only, with the permission of the Court. See Schedule II for offences against other laws.

May be compounded by persons mentioned in third column.—It is not necessary that the person who has filed the complaint that can compound the offence but it is

only the persons specified in the third column that can lawfully compound, 51 B. 512 at 514. Thus if hurt is caused to three persons and one of them dies the other two cannot lawfully compound with regard to the hurt caused to the deceased person, 31 A. 606. See also 37 A. 419. Even though a husband can complain of defamation of his wife, as an aggrieved person, still it is the wife who can lawfully compound the offence even without the consent of the husband, the complainant, and against his wishes, 14 M. 379 at 331; 25 B. 151 at 157. If the offence is compromised by any other, it will not be a valid compounding and the person so compounding may be held liable under S. 214, I.P.C. Compounding with one of the complainants will not work an acquittal so far as the other persons were concerned, 37 C.L.J. 234=27 O.W.N. 168=24 Cr. L.J. 578=73 Ind. Cas. 322, and this is in accordance with the new amendment in sub-section (6). So, in a case of hurt, the person to whom the hurt is caused is alone entitled to compound, 31 A. 606. Where a widow complained of hurt caused to her husband in consequence of which he died, and subsequently compounded the offence and the Magistrate thereupon acquitted the accused, it was held that the composition was invalid and the acquittal was wrong. *Weir II*, 418. In a fight between two sets of persons when hurt is caused to a person who dies subsequently, the offence cannot be compounded by the other members of the party to which the deceased belonged, 31 A. 606; 15 A.L.J. 467; 6 A.L.J. 882=10 Cr. L.J. 473=3 Ind. Cas. 24. An agent prosecuting under powers granted under S. 199, *supra*, for alleged abduction of another's wife, when he was in jail, is not legally competent to compound the offence under this section on behalf of the husband and an acquittal passed on such a composition is void, 24 C.L.J. 420=71 Ind. Cas. 248. The mere fact that the case has been sent up by the police cannot prevent the offence which is legally compoundable from being compounded. It is not the law that no Magistrate under any circumstances has power to allow such a case to be withdrawn, 10 C. 551 at 553; 1886 A.W.N. 256.

In cases of mischief the offence is compoundable only when loss or damage is caused to a private person. S. 425, I.P.C. which defines mischief includes also damage to the public and such an offence cannot be compounded, 22 B. 889. But now the aggravated form of mischief under S. 430, I.P.C., is compoundable with the permission of the Court. In cases of defamation under S. 500, I.P.C., S. 198 *infra* permits a complaint being preferred by the aggrieved party, say the husband. But if a husband prefers a complaint, the wife could compound the offence without the consent of the husband and even against his wishes. This was pointed out in 25 B. 151 (F.B.) ; 15 M. L.J. 224.

Sub-section (2).—This sub-section contains a list of offences which may be compounded by persons mentioned in column 3, only with the permission of the Court before which the prosecution is pending. It may be taken as settled law that this section is exhaustive on the subject of the composition of offences mentioned in this, and sub-section (1). In cases governed by this sub-section the permission of the Court is essential before the case is validly compounded. The Magistrate has to perform a judicial act of deciding whether in the interests of justice the parties should be allowed to compound the offence. The operation of the composition is necessarily suspended until the Court sanctions it. In other words no effect can be given to a compromise as a plea in bar of conviction in cases covered by this sub-section, unless the Court has given its sanction. Without such sanction the so-called compromise arrived at by the parties is of no legal effect and cannot be taken cognisance of by the Court dealing with the offence. The jurisdiction of the Court to try the offence remains unaffected and there is no rule of law or any general principle which would enable the Court in a case falling under this sub-section to order an inquiry as to the *factum* of a composition alleged by one party and denied by another, 9 Lah. 400, *following*, 41 M. 685 and *referring to*, 39 M. 946; 21 C. 103. The permission of the Court is compulsory and not a mere formality and the fact that the Magistrate would have allowed the party to compound does not make the slightest difference, 4 Ind. Cas. 809=1908 (P.R.) (Cr) 109. The offences under Ss. 313, 316, 357, 403, 417 to 420, 430, 451 (first part), 482, 483, 486, 491 and 500, I.P.C., are newly added. The offences mentioned in this sub-section can be compounded only with the permission of the Court. The Court which has to grant permission is the Court before which a prosecution of such offence is pending. The Court has to exercise a judicial discretion for granting permission. Permission to compound shall be given by the Court if the parties

are related very closely, viz., husband and wife and it is to their mutual interest to patch up their quarrels and the Magistrate by so permitting to compound will be restoring peace and goodwill between the parties, 30 Cr. L.J. 960=118 Ind. Cas. 681 *relying* on 26 C.W.N. 536=35 C.L.J. 353=24 Cr. L.J. 355=72 Ind. Cas. 355. It is the duty of the Magistrate to decide in each case whether he will or will not permit a compounding. The responsibility rests entirely with him, unless the offence is so serious that the punishment is absolutely necessary, the Magistrate would do well in his discretion in permitting a composition. Where without sufficient reason a composition was not permitted, the High Court in revision set aside the order and enforced the composition, 23 Cr. L.J. 85=65 Ind. Cas. 437. The only Court which has power to grant permission is the Court before which a prosecution for such offence is pending and that Court has to exercise a judicial discretion in granting permission. Where an accused was convicted of a compoundable offence but on appeal the conviction was set aside and a retrial ordered, it is open to the complainant to compound the offence with the leave of the Court, 1906 A.W.N. 200. When an accused is convicted of a non-compoundable offence, but on appeal he is acquitted of that offence and found guilty of a compoundable offence, it is only fair that the accused should be given if possible, permission to effect a composition before he is convicted by the appellate Court. Where an accused is charged and convicted of hurt, a compoundable offence, and on appeal the conviction is set aside and a retrial ordered by the appellate Court, it is still open to the complainant in the same manner in which the case may be compounded before conviction and for effecting the composition no permission of Court is necessary, 3 A.L.J. 523=1906 A.W.N. 200=4 Cr. L.J. 33.

Sub-section (3).—The sub-section provides that abetments and attempts to commit the offences that may be compounded, may also be compounded.

Sub-section (4).—The change effected in this sub-section renders it necessary that the permission of the Court ought to be obtained to the compounding of an offence complained of on behalf of a person below eighteen years, idiot or lunatic, by a guardian or other person lawfully entitled to the care and custody of his person or property and thus safeguarding the interest of incapacitated persons.

Sub-section (5).—This sub-section was newly introduced in the Code of 1893 and refers to cases where an accused has been committed for trial or when he has been convicted, and an appeal against such conviction is pending 37 A. 127. In such cases, it is provided that a composition shall be allowed with the leave of the Court concerned. A compounding of the offence is permitted after conviction in the appellate Court and no reference was made in this section before the amendment, to the High Court exercising its powers of revision under S. 439, to allow a composition. Now the new sub-section (5A) empowers the High Court in revision to allow a composition in the revision stage. This is in accordance with the decision in 32 A. 153; 37 C.L.J. 254; 15 Cr. L.J. 557=24 Ind. Cas. 975.

Sub-section (5A).—This sub-section is newly added empowering the High Court to allow compounding in revision and the following decisions are no longer law,--37 A. 127; 43 C. 1143; 39 M. 604; 23 Cr. L.J. 80=65 Ind. Cas. 432; 18 C.W.N. 1212; 29 M.L.J. 521; 21 Cr. L.J. 447=56 Ind. Cas. 239; see 30 Cr. L.J. 960=118 Ind. Cas. 681, *following* 26 C.W.N. 536=35 C.L.J. 353=24 Cr. L.J. 355=72 Ind. Cas. 355. Under this sub-section the High Court acting in the exercise of its powers of revision under S. 439, *infra*, may allow any person to compound any offence which he is competent to compound under this section, 45 A. 91. See Cr. A. No. 839 of 1923 and also Cr. M.P. No. 467 of 1925 (M.H.C.) where an offence of grievous hurt was allowed to be compounded by the High Court. Where two accused who were convicted under S. 325, I.P.C. had, pending an appeal from the convictions, settled their differences with the complainant and their application to compound the offence had been rejected by the appellate Court, the High Court in revision granted the necessary permission as there was no good ground for withholding the permission and the accused were accordingly acquitted by the High Court in revision, 55 C. 1190.

Sub-section (6).—This sub-section indicates that the composition has the same effect in a criminal trial as it would have in a civil suit. It operates as an acquittal putting an

end to the prosecution, 14 Cr. L.J. 292=10 Ind. Cas. 493. When the composition effected is valid whether made in Court or outside it, the Court is bound under this sub-section to acquit the accused and it has no jurisdiction to convert the compoundable offence the subject of the charge before it into a non-compoundable offence holding that the complaint had also disclosed a non-compoundable offence, 27 L.W. (Sh. N.) 26. The effect of the composition of a compoundable offence is immediate acquittal of the accused and once a composition has been arrived at, the complainant cannot be permitted to withdraw from it, 25 Cr. L.J. 810=81 Ind. Cas. 316. Though the composition of an offence under this section has the effect of an acquittal of the person with whom the offence has been compounded, yet it is not an acquittal within the meaning of S. 250 *supra* to enable the Magistrate to award compensation under that section, Ratanlal 957 and 700. Where an offence under S. 324 I.P.O., has been compounded and the composition under this sub-section worked an acquittal, such an acquittal does not operate as a bar to the trial of the accused person for an offence of 'going armed' under S. 19 (c) of the Arms Act as the latter offence is a distinct one from the former as to which there was an acquittal, 31 Bom L.R. 356 *following* 40 B. 97 and 23 C. 174. When a withdrawal petition is presented, the Magistrate is to apply his mind to the question of the disposal of that petition and should not refer it to the police thus allowing himself to be guided by what the police thought about the matter. This procedure is highly improper. The Magistrate was sitting as a judicial officer charged with the duty of determining the matter judicially and it did not and ought not to have mattered to him the least what the police thought of the petition. Such a course will give rise to an impression that the Police have considerable influence with Magistrates as to the way in which cases are disposed of, and such an impression ought never to be allowed to exist, 27 Cr. L.J. 543=93 Ind. Cas. 1031. After a valid composition of an offence which can lawfully be compounded without the permission of the Court, a Magistrate has no jurisdiction to go on with the trial of the case as he is bound to give effect to the composition as soon as the compromise petition is filed in Court. The fact that the prosecution evidence had been closed and a charge had been framed against the accused is no bar to the composition of the offence which can legally be done before the passing of the sentence by the Magistrate, 29 Cr. L.J. 1053=112 Ind. Cas. 562. Similarly where an offence of hurt was compounded and a *ravarnama* was presented to the Court by complainant's pleader the Court is not entitled to refuse to accept the composition and institute an inquiry whether the charge was not frivolous or vexatious under S. 250, *supra* and the Magistrate ought to have accepted the *ravarnama* and acquitted the accused, 10 Bom L.R. 1036. When a District Magistrate had made an order calling for the records in a case pending before a subordinate Magistrate with a view to transfer the case to another Magistrate the subordinate Magistrate on receipt of the order calling for records cannot record a composition when the offences are compoundable and acquit the accused, as his jurisdiction was suspended, the case being no longer on his file, 49 B. 533. The provisions of this sub-section indicate that the composition has the same effect in a criminal trial as it would have in a civil suit. It operates as a complete bar to the prosecution as if the accused has been acquitted. There is no necessity to the composition to be effected in Court in a criminal trial any more than in the civil suit. The section does not imply any such necessity, at any rate in cases which can be compounded without the sanction of the Court. This was the view taken in 21 C. 103, where the accused, pleaded, a composition out of Court and the Judges held that that if the composition was proved, the Magistrate would have had no jurisdiction to go on with the trial. See 41 M. 685; 14 Cr. L.J. 292=19 Ind. Cas. 943; 39 M. 946; 16 Cr. L.J. 81=25 Ind. Cas. 993. Before the amendment there was a conflict as to the exact scope of this sub-section. It was held that the moment a composition is voluntarily effected under the section, it operates as an acquittal of all the accused irrespective of the fact that process had been issued to one of the accused only. The compounding relates to the offence charged and not to any of the accused's offence. 7 C.W.N. 176 *followed* in [1921] Pat. 144. But this view was not accepted in 41 M. 323 where it was held that there was nothing in the language of the section to warrant the conclusion that the composition with one of several accused will effect an acquittal of the others. This decision was approved and *followed* in 1 Lah. 169, and the new amendment is in accordance with the decision in 41 M. 323; 45 B. 346 and 19 A.L.J. 374; 26 Cr. L.J. 238=24 Ind. Cas.

¶2; See also 7 Lah. 344. It is not necessary that any petition setting forth the compromise should be presented to the Court.

When a party to a compoundable offence alleges that the case had been compromised and the other denies the same, it is competent to the Court before which the case is pending to take evidence concerning the *factum* of the alleged compromise and decide whether a compromise had been arrived at, 2 L.W. 1200=18 M.L.T. 602=16 Cr. L.J. 808=31 Ind. Cas. 819. The onus is on the accused who disputes the jurisdiction of the Magistrate to prove that there was valid composition in law barring the trial, 21 C. 103. A composition under this section is not limited to any act done in Court nor to cases in which the parties continue to be of the same mind till the case comes on for further hearing before the Court, 2 L.W. 1200=18 M.L.T. 602=16 Cr. L.J. 803=31 Ind. Cas. 819, see also 41 M. 685. When a non-compoundable warrant case is dismissed the matter having been settled by the parties the dismissal is only a discharge and the composition will not prevent a revival of the prosecution, 1 B. 64; Ratanlal 330 and 391. A composition can be pleaded as accord and satisfaction and would be a complete bar to a Civil suit for damages, 6 Sind L.R. 285.

Sub-section (7).—Before this sub section was enacted in the 1882 Code considerable doubt existed as to what offences could be compounded, see 1 B. 147. It is now made clear that the offences mentioned in the section can alone be compounded 1891 P.R. (Cr.) 17, the prohibition contained in this sub section is a perfectly general one which governs the composition of offences whether any steps to prosecute the alleged offender have been taken or not, 46 Ind. Cas. 421. The words are "no offence shall be compounded except as provided for by this section." This sub section clearly shows that this section is exhaustive of the circumstances and conditions under which a composition can be effected, 39 M. 604. A Magistrate has no authority to allow any other offence than those mentioned in this section to be compounded, *eg.*, an offence under S. 143, I.P.C., and he usurps jurisdiction not vested in him by law by allowing that offence to be compounded. The reason given by the Magistrate to allow a non-compoundable offence to be compounded, *viz.*, that it would be better for the complainant to do so and the accused also desired the composition and probably the case in the end may turn out to be a compoundable offence is faulty, and any order so made is without jurisdiction, 4 Bom. L.R. 718.

346. (1) If, in the course of an inquiry or a trial before a Magistrate in any district outside the presidency-towns, the evidence appears to him to warrant a presumption that the case is one which should be tried or committed for trial by some other Magistrate in such district, he shall stay proceedings and submit the case, with a brief report explaining its nature, to any Magistrate to whom he is subordinate, or to such other Magistrate, having jurisdiction, as the District Magistrate directs.

Procedure of Provincial Magistrate in cases which he cannot dispose of

Magistrate in any district outside the presidency-towns, the evidence appears to him to warrant a presumption that the case is one which should be tried or committed for trial by some other Magistrate in such district, he shall stay proceedings and submit the case, with a brief report explaining its nature, to any Magistrate to whom he is subordinate, or to such other Magistrate, having jurisdiction, as the District Magistrate directs.

(2) The Magistrate to whom the case is submitted may, if so empowered, either try the case himself or refer it to any Magistrate subordinate to him having jurisdiction, or commit the accused for trial.

It is a general principle of the Code that evidence taken by a Magistrate is not evidence in a trial before another Magistrate unless some provision of law expressly makes it so. Mere consent of parties will not do, 17 L.W. 217. The word 'evidence' in this section is not restricted to the depositions recorded by the Magistrate. It includes all the facts and statements disclosed by the inquiry. For example, where a Magistrate directs an inquiry by another Magistrate or the Police under S. 201 *supra*, he is doing so in the course of his own inquiry into the offence and that his own inquiry is therefore already begun. He is entitled therefore to proceed upon the facts disclosed in the report made to him and then take action under this section, 28 Cr. L.J. 334=100 Ind. Cas. 992. This section applies only to

Provincial Magistrates and to cases which they cannot dispose of. If a complaint states facts which disclose an offence which the Magistrate receiving the complaint is not competent to try he ought to send the case to the Magistrate or Court competent to try all the offences disclosed in the complaint, 17 M.L.J. 559=7 Cr.L.J. 6. A Magistrate may also be incompetent to try an accused due to some personal interest, S. 556, *infra*. It is only to such cases the section applies and not to a case in which a Magistrate is competent to make a valid commitment to the Court of Session, 7 C.W.N 457. A Magistrate when he finds, he has no jurisdiction, cannot discharge the accused but must proceed under this section, Weir II, 323. When during the course of the trial, aggravating circumstances are disclosed by the evidence, it is the duty of the Magistrate to act under this section, Weir, II, 421; 13 B. 502; 25 L.W. 86=28 Cr. L.J. 164 (2)=99 Ind. Cas. 596 (2). When a Magistrate finding that the offence constituted by the evidence on record is one which he is not competent to try and submits the case to a superior Magistrate who transfers the case to a Magistrate competent to try the same, the latter cannot act on the evidence recorded by the Magistrate who had no jurisdiction to try the offence and consequently submitted the case to the superior Magistrate, and the conviction based on a consideration of such evidence is bad in law, 55 C. 65. Where a Subordinate Magistrate after completing the trial is of opinion that he could not adequately punish the accused, send the case to the District Magistrate who after asking the accused, whether he wanted the witnesses to be re-called and heard, and the accused replying in the negative, proceeded to give judgment convicting the accused, without trying the case afresh, it was held, that the procedure adopted was illegal and the consent of the accused cannot dispense with the provisions of the Code and such an illegality cannot be cured by consent, 2 Cr. L.J. 369. A Magistrate cannot intentionally ignore facts disclosing circumstances of aggravation which show an offence beyond his jurisdiction, 10 C. 85. When the accused in an old offender, the Magistrate may act properly under this section, 1834 A.W.N. 200. But a conviction had, ought not to be set aside merely because the facts disclosed a more serious offence. The proceedings of the original Magistrate are not void and a re-trial ought not to be ordered after setting aside the conviction unless the accused has been really prejudiced, 25 M.L.J. 434. When a case is submitted under this section to another Magistrate, he may try the case himself or refer the case to any Magistrate subordinate to him, or he may commit the accused to the Court of Session. Where evidence was recorded by a Magistrate who sent up the case he having no jurisdiction to try the case it cannot be said that the superior Magistrate was trying the case himself, 17 L.W. 247. It was held in 12 C.W.N. 133=6 Cr. L.J. 427 that the Magistrate when he commits may act on the evidence recorded by the Magistrate who submitted the case under this section and S. 531 *infra* and did not apply to such a case. When a Sub-Magistrate submits a case to a Sub-divisional Magistrate under this section, the latter has no power to refer the case back to the former, but is bound to dispose of it in one of the ways prescribed by this section, 45 M. 846; Ratanlal 439 and 534. Where the superior Magistrate to whom the case has been sent up, was of opinion that the facts of the case disclose a more serious offence which the subordinate Magistrate was not competent to try, he cannot remand the case for retrial, unless the accused was prejudiced or the sentence was inadequate where, the subordinate Magistrate had power to try the offences taken cognizance of by him, 2 Cr. L. Rev. 257 following 24 M. 675; 13 B. 502; 4 Cr.L. Rev. 393; 27 M.L.J. 594=14 Cr. L.J. 640=21 Ind. Cas 688.

347. (1) If in any inquiry before a Magistrate, or in any trial before a Magistrate, before signing judgment, it appears to him at any stage of the proceedings that the case is one which ought to be tried by the Court of Session or High Court, and if he is empowered to commit for trial, he shall commit the

Procedure when, after commencement of inquiry or trial, Magistrate finds case should be committed.

accused under the provisions hereinbefore contained.

(2) If such Magistrate is not empowered to commit for trial, he shall proceed under section 346.

The words "stop further proceedings and" have now been omitted to set right the conflict of rulings in Calcutta, Madras and Allahabad, see 36 C. 43; 18 Cr. L.J. 43, 36 M. 321; 23 A. 264; 26 A. 177.

Scope of the section.—This section is couched in general terms and gives the Magistrate very wide powers. There is no suggestion, that the only possible reason for a competent Magistrate, to commit a case is, that he will not be able to pass a sufficiently severe sentence and if that were the intention of the Legislature it is extraordinary that there should be no indication of this in this section, 3 Ran. 42. This section is not intended to deprive the accused of any of his rights conferred by Chapter XVIII of the Code, 15 Cr. L.J. 366 = 23 Ind. Cas. 734. The terms of this section are general and give a Magistrate, who is empowered to commit, a discretion in committing cases for trial which is not limited by S. 254, so as to make it obligatory on him to try every case which he can adequately punish. S. 254 makes it imperative on the Magistrate only to frame a charge and not to complete the trial to a conviction or acquittal; the wide words of this section should not be curtailed by reference to S. 254 while there is a specific section, viz., S. 449, which deals with circumstances referred to in S. 254, and the decision in 1 M. 289 (F.B.) seems to be conclusive on the point, which is to the effect that it is competent to a Magistrate to say whether from the gravity of the matter or for any other sufficient reason the sessions Court is the proper tribunal for the disposal of the case, 42 M. 83 followed in 3 Ran. 42. It has been repeatedly decided that where a case is within the powers of a Magistrate to try and punish adequately, a commitment in such cases is improper and illegal, 1503 A.W.N. 23; 6 A.L.J. 939, 24 C. 429; 11 Bom. L.R. 18; 1917 P.R. (Cr.) 13; but where the offence charged is a serious one punishable with transportation for life and the High Court sessions will be in a better position than a Presidency Magistrate to pass an adequate sentence on conviction and a trial by jury cannot be considered unreasonable, the High Court held that an overriding reason had been made out to have the case committed to the High Court session for trial and directed the case which is triable by a Presidency Magistrate according to Sch. II of the Code to be committed to the Sessions, 31 Bom. L.R. 634, following 42 M. 83; 3 Ran. 42, dissenting from 41 A. 451 and distinguishing 4 Bom. L.R. 35 and 24 C. 429 referring to 42 B. 172 and 23 Bom. L.R. 293. This section empowers a Magistrate in any trial at any stage when he makes up his mind to commit, to stop further proceedings of the trial before him and commit the accused under the provisions of Chapter XVIII. This section applies only to those inquiries or trials which have been started by the Magistrate with the intention of concluding them himself and then at a later stage he is satisfied that his intention was inappropriate and the case was one which ought to be committed to the Court of Sessions, and cannot be made use of to shorten inquiries under Chapter (XVIII) 6 L.B.R. 129 (F.B.)—13 Cr. L.J. 877 (2)=17 Ind. Cas. 813 (2) compare this section with S. 441, *infra*. Both these sections must be read together. This section empowers the Magistrate at any stage of the trial of a warrant case to commit the accused to the Court of Sessions instead of himself completing the inquiry. The new charge which will have to be drawn up will have the effect of cancelling any previous charge framed against the accused but they can only be with respect to the subject-matter of the new charge. So far as the subject-matter is concerned the previous proceeding may be regarded as preliminary to commitment, 20 Cr. L.J. 520=85 Ind. Cas. 360. The fact that some of the defence witnesses were summoned and some were examined before he made up his mind will not prevent him from stopping further proceedings, 36 M. 321, where 36 C. 43 is not followed and 26 A. 177 and 20 A. 264 are followed; 12 Bom. L.R. 201. Where, after a Magistrate has made up his mind to commit a case to the Sessions but before the case for the prosecution has absolutely closed, one witness for the prosecution yet remaining to be examined, the defence applied for the cross-examination of the witness, it was held they were entitled to this indulgence of cross-examination, 16 C.L.J. 45=13 Cr. L.J. 633=16 Ind. Cas. 338 where 36 C. 43 is explained; see 51 C. 412, where it was held that the Magistrate has no discretion in the matter, if the application is made to him for cross examination before a charge is framed and before he had made up his mind to commit the accused.

Before signing judgment.—This section extends the period when a commitment may be made, namely, any time before the pronouncement of the judgment, 25 Cr. L.J. 133

at 150=83 Ind. Cas. 708 but a Magistrate cannot treat the offence complained of as minor offences up to the stage of judgment and then turn round and commit the accused to the Court of Session on graver charges and thus deprive the accused of the rights conferred on him by chapter XVIII, 3 Cr. L. Rev. 314=15 Cr. L. J. 366; 6 L.B.R. 129 (F.B.)=13 Cr. L. J. 877=17 Ind. Cas. 813 (2). Signing the judgment takes place after pronouncing the same in open Court and it actually completes the trial which ends in an acquittal or conviction. Therefore action under this section, if desired, should be taken before the signing of the judgment. The Magistrate has no discretion but is bound to allow the cross examination, 51 C. 442.

At any stage.—These words give very wide powers to the Magistrate. A Magistrate is well within his powers to alter the charge and when the altered charge is not cognizable by him, to commit the accused to the Court of Session. A Magistrate of the second class to whom a complaint of attempt at rape, S. 376 and S. 511, I.P.O., was made, took cognizance of the offence and after hearing the prosecution evidence framed a charge against the accused under S. 354, I.P.O., took the plea of the accused, allowed the prosecution witnesses to be cross-examined, heard the evidence for the defence under chapter XXI (warrant case chapter) and reserved judgment, but the Magistrate instead of delivering judgment framed a charge under Ss. 376 and 511, I.P.C. and committed the accused to the Court of Session, it was held that the procedure adopted by the Magistrate was legal, 6 L.B.R. 129 (F.B.)=13 Cr. L. J. 877 (2)=17 Ind. Cas. 813 (2). See also 3 Cr. L. Rev. 314=15 Cr. L. J. 366=23 Ind. Cas. 734 where 6 L.B.R. 129 is followed, see also 30 L.W. 646 where the above decisions were approved. Even after summoning defence witnesses and examining them, the Magistrate can under this section commit the accused, 36 M. 321; Ratanlal, 973.

Which ought to be tried by the Court of Session.—S. 28 *supra* enables any offence under the I.P.C. to be tried by a Court of Session subject to the provisions of the Code. This Chapter deals with general provisions as to inquiries and trials and this section is very wide in its terms and it leaves to the discretion of the Magistrate which cases he should commit to the Sessions Court but the discretion should be exercised judicially and not capriciously. The provisions of S. 234, *supra* do not override the provisions of this section. The former provides the framing of the charge and it occurs in the Chapter dealing with the procedure to be followed after charge. In this section the language is wide and the discretion given cannot be limited in such cases, except when the Magistrate cannot adequately punish. There may be other good reasons which may in the exercise of a sound and wise discretion justify a committal, and in such cases, the discretion ought not to be lightly interfered with. For example in the investigation of a complaint which forms the subject of two distinct charges arising out of the same transaction one of which is a summons case, and the other a warrant case, a committal to the Court of Session is not improper especially as this section makes no distinction between a warrant case and a summons case, 21 Cr. L. J. 791=53 Ind. Cas. 519 where 11 Bom. L.R. 18=9 Cr. L. J. 163=1 Ind. Cas. 104; 13 Cr. L. J. 664=23 Ind. Cas. 992; 42 M. 83 are referred to and 1903 A.W.N., 23=3 A.L.J. 14=3 Cr. L. J. 84 is distinguished. The words "ought to be tried" occurring in this section must be read with S. 251, *supra*, and therefore a case which ought to be tried by a Court of Session is one which the Magistrate is not competent to try or adequately punish, 4 Bom. L.R. 83=20 Cr. L. J. 97=48 Ind. Cas. 977; 23 C. 429. This section empowers a Magistrate, after a charge has been drawn up, to stop further proceedings and commit the accused for trial, 3 C. 433, 33 M. 321 at 324, but in such a case the procedure laid down in Chapter XVIII must be followed, and such a course can be adopted only before signing the judgment. The words "stop further proceedings" have been omitted now to bring the section in conformity with S. 208, *supra*. This section merely extends the period when a commitment may be made to any time before pronouncing the judgment. It enables the Magistrate to commit after recording the defence evidence in whole or in part. But the concluding words of the section that the Magistrate "shall commit the accused under the provisions hereinbefore contained" clearly point to S. 213, *supra*, and when applicable, to S. 214, *supra*, and in the absence of any other provision except S. 215, *supra*, for quashing the commitment, it appears clear that the commitment made under this section falls never-

theless within Ss. 213 and 214, *supra*, and where there is any question, of quashing, under S. 215 *supra*, 26 Cr. L.J. 148=83 Ind. Cas. 708. When so committing, the new charge which will have to be drawn up will have the effect of cancelling the previous charge. But this is only so in respect of the subject-matter of the charge and the previous proceeding before him must be regarded as preliminary to commitment, 26 Cr. L.J. 520=85 Ind. Cas. 360. A Magistrate acts without jurisdiction in trying a case *prima facie* triable by the Sessions Court and then convicting the accused and sentencing him for a minor offence, Ratanlal 382; 1 C.L.R. 141; 10 C. 85; 9 W.R. (Cr.) 5.

Commit the accused.—This section confers a special power to commit the accused, when it appears to the Magistrate that the case is one which ought to be tried by the Court of Session. See Ss. 207 and 254, *supra*. A case which ought to be tried by the Court of Session is one which the Magistrate is not competent to try or one which he could not adequately punish, 4 Bom. L.R. 85. The decision of the Magistrate to try the case himself is not final, as under this section it is open to him at any stage of the case before signing judgment to commit the accused to the Court of Session. The fact that there is congestion of work in the High Court is no ground to decline to commit the case to the High Court Session.

Under the provisions hereinbefore contained.—This section only authorises the Magistrate to commit the accused for trial by the Court of Session "under the provisions hereinbefore contained", which means after observing the procedure prescribed in Chapter XVIII. The section is not intended to enable the Magistrate to deprive the accused of any of the rights conferred by Chapter XVIII though when an order has been made under this section proceedings under Chapter XVIII need not necessarily be commenced *de novo*, 3 Cr. L. Rev. 314, where 13 Cr. L.J. 877=17 Ind. Cas. 813 is followed. This expression must relate to those provisions of Chapter XVIII of the Code which define the procedure to be adopted in inquiries into cases triable by the Court of Session. It cannot be disputed that in all ordinary circumstances the procedure which a Presidency Magistrate follows in the trial, of a criminal case is not identical with that laid down in Chapter XVIII for the conduct of a preliminary inquiry and this section in no way overrides and in no way dispenses with the obligation of following the procedure laid down in Chapter XVIII, where the Legislature has laid down provisions for the procedure before commitment obviously and rightly intended for the benefit of the accused and therefore an omission to read over the depositions of the witnesses is not a mere formal omission as the accused by such omission is deprived of the valuable right to contradict the witnesses during the sessions trial. In such a case the procedure adopted will be bad irrespective of any consideration of prejudice to the accused 30 L.W. 646 following, 13 Cr. L.J. 877=17 Ind. Cas. 813 and 3 Cr. L. Rev. 314=15 Cr. L.J. 366=23 Ind. Cas. 734. The words 'commit the accused under the provisions hereinbefore contained' clearly point to S. 213 *supra* and when applicable to S. 214, *supra*, and in the absence of any other provision except S. 215, *supra*, for quashing commitment, it appears clear that the Commitment made under this section falls none the less within the purview of Ss. 213 and 214, *supra* and where there is any question of quashing the commitment under S. 215, *supra*, 26 Cr. L.J. 148 at 150=83 Ind. Cas. 703.

348. (1) Whoever, having been convicted of an offence punishable

under Chapter XII or Chapter XVII of the Indian Penal Code with imprisonment for a term of three years or upwards, is again accused of any offence punishable under either of those chapters with imprisonment for a term of three years or

Trial of persons previously convicted of offences against coinage, stamp-law or property.

upwards, shall if the Magistrate before whom the case is pending is satisfied that there are sufficient grounds for committing the accused, be committed to the Court of Session or High Court, as the case may be,

at 150=83 Ind. Cas. 708 but a Magistrate cannot treat the offence complained of as minor offences up to the stage of judgment and then turn round and commit the accused to the Court of Session on graver charges and thus deprive the accused of the rights conferred on him by chapter XVIII, 3 Cr. L. Rev. 314=15 Cr. L.J. 366; 6 L.B.R. 129 (F.B.)=13 Cr. L.J. 877=17 Ind. Cas. 813 (2). Signing the judgment takes place after pronouncing the same in open Court and it actually completes the trial which ends in an acquittal or conviction. Therefore action under this section, if desired, should be taken before the signing of the judgment. The Magistrate has no discretion but is bound to allow the cross examination, 51 C. 442

At any stage.—These words give very wide powers to the Magistrate. A Magistrate is well within his powers to alter the charge and when the altered charge is not cognizable by him, to commit the accused to the Court of Session. A Magistrate of the second class to whom a complaint of attempt at rape, S. 376 and S. 511, I.P.C., was made, took cognizance of the offence and after hearing the prosecution evidence framed a charge against the accused under S. 354, I.P.C., took the plea of the accused, allowed the prosecution witnesses to be cross-examined, heard the evidence for the defence under chapter XXI (warrant case chapter) and reserved judgment, but the Magistrate instead of delivering judgment framed a charge under Ss. 376 and 511, I.P.C. and committed the accused to the Court of Session, it was held that the procedure adopted by the Magistrate was legal, 6 L.B.R. 129 (F.B.)=13 Cr. L.J. 877 (2)=17 Ind. Cas. 813 (2). See also 3 Cr. L. Rev. 314=15 Cr. L.J. 366=23 Ind. Cas. 734 where 6 L.B.R. 129 is followed, see also 30 L.W. 646 where the above decisions were approved. Even after summoning defence witnesses and examining them, the Magistrate can under this section commit the accused, 36 M. 321; Ratanlal, 975.

Which ought to be tried by the Court of Session.—S. 23 *supra* enables any offence under the I.P.C. to be tried by a Court of Session subject to the provisions of the Code. This Chapter deals with general provisions as to inquiries and trials and this section is very wide in its terms and it leaves to the discretion of the Magistrate which cases he should commit to the Sessions Court but the discretion should be exercised judicially and not capriciously. The provisions of S. 254, *supra* do not override the provisions of this section. The former provides the framing of the charge and it occurs in the Chapter dealing with the procedure to be followed after charge. In this section the language is wide and the discretion given cannot be limited in such cases, except when the Magistrate cannot adequately punish. There may be other good reasons which may in the exercise of a sound and wise discretion justify a committal, and in such cases, the discretion ought not to be lightly interfered with. For example in the investigation of a complaint which forms the subject of two distinct charges arising out of the same transaction one of which is a summons case, and the other a warrant case, a committal to the Court of Session is not improper especially as this section makes no distinction between a warrant case and a summons case, 21 Cr. L.J. 791=58 Ind. Cas. 519 where 11 Bom. L.R. 18=9 Cr. L.J. 163=1 Ind. Cas. 104; 15 Cr. L.J. 664=25 Ind. Cas. 992; 42 M. 83 are referred to and 1903 A.W.N. 23=3 A.L.J. 14=3 Cr. L.J. 94 is distinguished. The words "ought to be tried" occurring in this section must be read with S. 254, *supra*, and therefore a case which ought to be tried by a Court of Session is one which the Magistrate is not competent to try or adequately punish, 4 Bom. L.R. 85=20 Cr. L.J. 97=48 Ind. Cas. 977; 24 C. 429. This section empowers a Magistrate, after a charge has been drawn up, to stop further proceedings and commit the accused for trial, 3 C. 433; 30 M. 321 at 324, but in such a case the procedure laid down in Chapter XVIII must be followed, and such a course can be adopted only before signing the judgment. The words "stop further proceedings" have been omitted now to bring the section in conformity with S. 203, *supra*. This section merely extends the period when a commitment may be made to any time before pronouncing the judgment. It enables the Magistrate to commit after recording the defence evidence in whole or in part. But the concluding words of the section that the Magistrate "shall commit the accused under the provisions hereinbefore contained" clearly point to S. 213, *supra*, and when applicable, to S. 214, *supra*, and in the absence of any other provision except S. 215, *supra*, for quashing the commitment, it appears clear that the commitment made under this section falls never-

unless the Magistrate is competent to try the case and is of opinion that he can himself pass an adequate sentence if the accused is convicted :

Provided that, if any Magistrate in the district has been invested with powers under section 30, the case may be transferred to him instead of being committed to the Court of Session.

(2) *When any person is committed to the Court of Session or High Court under sub-section (1), any other person accused jointly with him in the same inquiry, or trial shall be similarly committed, unless the Magistrate discharges such other person under section 209.*

Amendment.—In sub-section (1) the words "if the Magistrate before whom the case is pending, etc.," have been added. For the words "District Magistrate" the words "any Magistrate in the district" have been substituted. Sub-section (2) is new.

Chapter XII, I.P.C. (Ss. 230—264A) deals with offences relating to coins and Government stamps and Chapter XVIII (Ss. 378-463) deals with offences against property.

Scope of the section—This section does not permit a Magistrate to find the accused guilty and then commit him to the Sessions. The effect of the conviction would seem to bar a trial by the Court of Session under S. 403, *infra*. It is not easy to deal with cases under this section. The Magistrate is bound to commit if there has been a previous conviction of one of the offences described unless he can adequately punish ; consequently he must either as a preliminary matter or at any rate before framing a charge determine whether there has been a previous conviction ; having decided that, he will have to consider whether he could pass a sufficiently severe sentence. If he thinks they do so permit, he may either commit the accused or try himself. If they do not so permit but the evidence does not warrant a discharge, he must frame a charge under S. 210, *supra* and commit him for trial under Chapter XVIII, 38 M. 552 at 553. The combined effect of this and S. 350 *infra*, is that the Magistrate can rely on the evidence already on record but he cannot proceed both to recommence the inquiry and also rely on the evidence already taken, 28 Cr. L.J. 302=100 Ind. Cas. 332.

Is again accused of any offence, etc—Under this section if the Magistrate makes up his mind to commit, he should not record a finding as to the accused's guilt. Such a course is wrong and *ultra vires*, 17 Cr. L.J. 201=34 Ind. Cas. 313.

Unless the Magistrate is competent to try and pass adequate sentence.—The addition of the words "competent to try the case" removes all doubt that existed before. If the Magistrate is competent to try the offence and he could adequately punish, he is not bound to commit. This is in accordance with the view expressed by the Bombay High Court. The last portion of the section and the proviso were added in the Code of 1898. The District Magistrate to whom a case has been transferred under the proviso to this section should himself record evidence. He cannot act on the evidence already recorded before the case was transferred to him under this section. A District Magistrate cannot be regarded as a Court of Session to whom cases should be committed, nor can a case be sent up to him under S. 349, *infra*, 7 C.W.N. 457. If the District Magistrate considers that the case ought to be committed he must himself do so and should not send back the case to the Magistrate with a direction to commit, 9 M. 377 ; 10 B. 196. See 45 M. 846.

Sub-section (2).—This new sub-section provides that when any person is committed to the Court of Session or High Court under this section, another person accused jointly with him whom the Magistrate believes to be guilty, shall be similarly committed, thus according to all accused identical treatment.

349. (1) Whenever a Magistrate of the second or third class having jurisdiction, is of opinion, after hearing the evidence for the prosecution and the accused, that the accused is guilty, and that he ought to receive a punishment different in kind from, or more severe than, that which such Magistrate is empowered to inflict, or that he ought to be required to execute a bond under section 100, he may record the opinion and submit his proceedings, and forward the accused, to the District Magistrate or Sub-divisional Magistrate to whom he is subordinate.

(1A) When more accused than one are being tried together and the Magistrate considers it necessary to proceed under sub-section (1) in regard to any of such accused, he shall forward all the accused who are in his opinion guilty to the District Magistrate or Sub-divisional Magistrate.

(2) The Magistrate to whom the proceedings are submitted may, if he thinks fit, examine the parties and recall and examine any witness who has already given evidence in the case, and may call for and take any further evidence, and shall pass such judgment, sentence or order in the case as he thinks fit, and as is according to law.

Provided that he shall not inflict a punishment more severe than he is empowered to inflict under sections 32 and 33.

Amendment.—Sub-section (1A) has been newly added.

Scope of the section.—It is a general rule that only an authority who has heard the evidence is competent to decide the guilt or innocence of an accused person. Any exception to this rule such as is contained in this section should be strictly construed, 24 Cr. L.J. 733=74 Ind. Cas. 66. Under this section Magistrates of the second or third class alone can act. A first class Magistrate cannot refer under this section as he has ample powers to dispose of the case himself, 7 A. 414 (F.B.). This section confers special powers, or, what may be called, a special jurisdiction and confers it only on District and Sub-divisional Magistrates. Every case which is referred to under this section must be disposed of by a Magistrate who has that special jurisdiction, 38 B. 719 at 723. Under this section the trying Magistrate can only refer the case to the District or Sub-divisional Magistrate to whom he is subordinate. When Nagpur City had not been declared a sub-division of the Nagpur district with reference to S. 4 (1) (u), S. 8 and S. 14, *supra*, the City Magistrate of Nagpur cannot be described as a Sub-divisional Magistrate for purposes of reference, under this section, by second and third class Magistrates in that city, and any order passed on such illegal reference by the city Magistrate is void and without jurisdiction, 23 Cr. L.J. 433=101 Ind. Cas. 663. The provisions of this section are subject to the express provisions of S. 318, *supra*, and the case of an old offender ought not to be referred to the superior Magistrate under this section, but ought to be committed to the Court of Session under S. 318, *supra*, Weir II, 423. It is in the discretion of a subordinate Magistrate trying a case to send up the case to the superior Magistrate under this section. The order of a superior Magistrate to a subordinate Magistrate to send up the case under this section is *ultra vires*, Weir II, 427, nor can a superior Magistrate to whom a case has been referred under this section return the case to the subordinate Magistrate directing him to commit the accused, but he should himself dispose of the case, 9 M. 377; 45 M. 816; 13 Cr. L.J. 16=13 Ind. Cas. 110. Nor can the

superior Magistrate send the case to another Magistrate for disposal, 36 M. 470; 4 M. 233; Weir II, 424; 6 M.H.C.R. (Appx.) 2.

Sub-section (1).—A subordinate Magistrate having taken all the evidence in the case cannot send up the case to the District Magistrate under this section unless he is of opinion that the accused is guilty and ought to receive a punishment different in kind from, or more severe than he is empowered to inflict or that security ought to be taken from him, under S 106, *supra*, and when a case is referred to the District Magistrate, not on the grounds referred to in this section, and the District Magistrate acting on the evidence recorded by the subordinate Magistrate passes a judgment, it was held that the conviction by the District Magistrate cannot stand as neither this section nor S. 250, *infra*, applied to the case, 12 A. 66. The referring Magistrate must record his opinion that the accused is guilty but he cannot convict the accused and send up the case. The recording of the conviction will not have the legal effect of prohibiting the superior Magistrate from dealing with the case under this section or as constituting a bar to further trial under S. 403, *infra*. In effect it is a mere surplusage which reiterates the opinion of the Magistrate that the accused is guilty of a particular offence. There is no legal objection, to the conviction by the referring Magistrate being treated as a legal surplusage and a nullity, so that the superior Magistrate can proceed with the case without reference to the High Court to have the conviction had, formally quashed, 52 B. 456 where Ratanlal 387 is referred to. A superior Magistrate is not precluded from acting on the evidence already recorded by the subordinate Magistrate or from adopting his opinion, Weir II, 428 and 429. A case cannot be referred under this section after conviction by the subordinate Magistrate for the purpose of taking security from the accused under S 106, *supra*, 21 C. 622. The Magistrate is bound to refer the whole case to the superior Magistrate who is to pass such judgment or order as he thinks fit, 35 C. 1093; 11 Cr. L.J. 162=4 Ind Cas 1057; 21 C. 622. A superior Magistrate cannot direct a Subordinate Magistrate to send up a case under this section. It is a matter within the discretion of the Subordinate Magistrate whether he will send up a case or not, Weir II, 427, where in a joint trial by Sub-Magistrate of three accused, one of them was a juvenile offender of 15 years, the Magistrate while convicting the two adult accused, sent up the case of the juvenile offender alone to the Sub divisional Magistrate, it was held that the procedure adopted was clearly illegal as the case of all the three accused ought to have been sent up. The conviction of the two adult accused was therefore set aside by the High Court, 29 Cr. L.J. 624=109 Ind Cas. 816. But a superior Magistrate can send back the case on the ground that there ought to have been no reference at all, or that the reference is not proper on account of defective inquiry by the subordinate Magistrate. When a case is sent up to a Sub-divisional Magistrate, he cannot transfer it to a first class Magistrate and a committal by the first class Magistrate is illegal and without jurisdiction as this section confers such power on the District Magistrate and Sub-divisional Magistrate and on no others, 33 B. 719. The procedure prescribed in this section is not suited to a case tried summarily. So a Bench of Magistrates is not authorised to refer a case under this section for enhanced punishment, 8 Cr. L.J. 475=4 L.B.R. 282, followed in 17 Cr. L.J. 201=34 Ind. Cas. 313.

Sub-section (1A).—This was newly added to accord identical treatment to all the accused concerned. The Magistrate is not entitled now to submit the case of some of the accused only; he is to do so with regard to all the accused. See 26 Cr L.J. 1363=89 Ind. Cas. 451; 1927 M.W.N 72 The amendment is in accordance with the suggestion made in Weir II, 428 Under this sub-section only the case of those accused who were in the opinion of the Magistrate guilty, could be forwarded to the superior Magistrate. If the Magistrate finds one of the accused only guilty he cannot send up the case of all the accused, 24 A.L.J. 80=26 Cr. L.J. 1630=90 Ind. Cas 926.

Sub-section (2).—It is optional with the superior Magistrate to examine the parties or their witnesses who had already been examined. Under this section the Magistrate is not bound to hold a trial *de novo* and the recent amendment to S. 350 (2) only makes the position clearer, 26 Cr. L.J. 1363=89 Ind Cas. 451. He may call for and take any further evidence. It is not obligatory on the superior Magistrate to hear vakils at all and the section leaves it entirely to the discretion of the Magistrate to take further evidence or not.

But the discretion both as regards argument, and taking further evidence, should be exercised in a fair and impartial manner and when this is not done, the High Court will not hesitate to interfere in the interests of justice, 2 Cr. L. Rev. 185. When once a case has been referred to the superior Magistrate by the subordinate Magistrate, the superior Magistrate is bound to dispose of the case himself, and cannot send back the case to the subordinate Magistrate for disposal, 45 M. 846. The provision in this sub-section that the Magistrate to whom the case is referred may pass such order as he thinks fit means when taken in conjunction with the words immediately preceding it, viz., "*judgment and sentence*", that he may pass such final order disposing of the case as he may think fit, 36 M. 470. A Magistrate to whom a case is submitted has no power to send it back. He must dispose of it himself by acquitting or convicting and sentencing the accused or committing him for trial. The order referred to in this sub-section is, as was held in 4 B. 240 *ejusdem generis* with the words "*judgment*" and "*sentence*" which precede it and does not include an order returning the case, 26 A. 344 at 345; 43 M. 845; 38 B. 719; 9 M. 377. Under this section the superior Magistrate should find the accused guilty or not and write a judgment as required by S. 367, *infra*, 11 L.W. 398 = (1920) M.W.N. 120 = 21 Cr. L.J. 52 = 34 Ind. Cas. 494. The Magistrate to whom the case is submitted may commit the accused to the Court of Session, 1 M. 239 (F.B.); 4 B. 240 (F.B.) Ratanlal 143. The accused is entitled to be present before the District Magistrate or Sub-divisional Magistrate when he passes his final order in the case, 7 B.H.C.R. (Cr. Ca.) 31 and this is why sub-section (1) says that the accused is to be forwarded to the superior Magistrate. Reference under this section by a Magistrate not empowered to deal with the case does not give jurisdiction to a superior Magistrate to try the accused for the offence disclosed by the facts, but the superior Magistrate should treat the whole proceeding as void under S. 530, *infra*. See 1 Bom. L.R. 27 where it was held that a conviction of the accused by the District Magistrate, for an offence under S. 409, I.P.C., was void when the second class Magistrate found the accused guilty of an offence under S. 460, I.P.C., when submitting the case to him. But if the offence is one which the inferior Magistrate could have committed to the Court of Session, the superior Magistrate may, if he thinks fit, commit the case to the Court of Session, 13 C. 305. The Superior Magistrate cannot return the case to the inferior Magistrate with a direction to commit the accused, 10 B. 195.

350. (1) Whenever any Magistrate, after having heard and recorded the whole or any part of the evidence in an inquiry or a trial, ceases to exercise jurisdiction therein, and is succeeded by another Magistrate who has and who exercises such jurisdiction, the Magistrate so succeeding may act on the evidence so recorded by his predecessor, or partly recorded by his predecessor and partly, recorded by himself; or he may re-summon the witnesses and re-commence the inquiry or trial:

Provided, as follows:—

(a) in any trial the accused may, when the second Magistrate commences his proceedings, demand that the witnesses or any of them be re-summoned and re-heard;

(b) the High Court or, in cases tried by Magistrates subordinate to the District Magistrate, the District Magistrate may, whether there be an appeal or not, set aside any conviction passed on evidence not wholly recorded by the Magistrate before whom the conviction was held, if such Court or District Magistrate is of opinion that the accused

Conviction or commitment on evidence partly recorded by one Magistrate and partly by another.

has been materially prejudiced thereby, and may order a new inquiry or trial.

(2) Nothing in this section applies to cases in which proceedings have been stayed under section 346 or in which proceedings have been submitted to a superior Magistrate under section 349.

(3) When a case is transferred under the provisions of this Code from one Magistrate to another, the former shall be deemed to cease to exercise jurisdiction therein, and to be succeeded by the latter within the meaning of sub-section (1).

Amendment.—In sub-section (2) the words "or in which proceedings have been submitted to a superior Magistrate under S. 349" have been newly added. Sub-section (3) has been newly added to remove difference of opinion as to the position when cases are transferred from one Magistrate to another, by providing that the Magistrate from whose file the case is transferred shall be deemed to cease to exercise jurisdiction and to be succeeded by the new Magistrate within the meaning of sub-section (1).

Scope of the section.—The principle of law clearly is that the Judicial Officer who hears the evidence shall pronounce judgment as to the innocence or guilt of the accused. 23 C. 194; 23 W R (Cr.) 59. Owing to certain circumstances in this country, this is often found to be impossible to carry out. Hence the necessity for this section. Once the principle is departed from, it does not matter how often you depart from it, 47 M. 243 at 243; 19 Cr. L J. 657=45 Ind. Cas. 993. This section confers a right on the accused to demand rehearing and does not cast a duty on the succeeding Magistrate to ask the accused if the witnesses examined by the first Magistrate should be resummoned and reheard 2 Cr. L. Rev 20=14 Cr. L J. 175=19 Ind. Cas. 175. This section appears to be perfectly clear as to what the duties of a Magistrate are, to whom a case which has been heard in part by another Magistrate has been transferred. Under sub-section (3) the Magistrate is given a discretion to resummon the witnesses and to re-commence the inquiry or trial. If however he does not do so *suo motu* he is bound to do so if the accused asks for it under proviso (a) to this section. Therefore whether the second Magistrate acts *suo motu* or whether the accused demands a *de novo* trial, it is clear that the second Magistrate has to resummon the witnesses and to re-hear them. The word "re-hear" is not equivalent to "hear further," 27 Cr. L.J. 332=92 Ind. Cas. 733. The privilege under this section is that of the accused person and not that of the complainant, 27 Cr. L.J. 659=94 Ind. Cas. 707. The object of the section seems to be to leave it to the discretion of the Magistrate, to either act on the evidence recorded by his predecessor or to hear it over again himself, provided the accused does not claim a *de novo* trial, 38 M. 535, 2 L.W. 1214=17 Cr. L J. 1=32 Ind. Cas. 129. The general rule is that guilt or innocence of the accused must be decided by the Judge who has heard all the evidence, 23 C 194; 20 W.R. (Cr.) 59; 3 Lah. 115. But this section introduces an exception to the general rule which should not receive a more extended interpretation than its actual words clearly justify 19 Cr. L.J 657=45 Ind. Cas. 993. Both the letter and the spirit of the law require that all criminal cases should be decided by Magistrates who heard the evidence and the only exception to the rule being that contained in this section, 20 Cr. L J. 336=50 Ind Cas 672. A liberal construction should be placed on the provisions of this section, 39 C. 731; 40 A. 307; 19 Cr. L.J 703=46 Ind. Cas 299. Evidence recorded by a Magistrate who had no jurisdiction to try the case cannot be legally considered by the Magistrate to whom the case was ultimately transferred for trial and a conviction based partly on the evidence recorded by the Magistrate who had no jurisdiction, and partly on the evidence legally recorded by the Magistrate having jurisdiction, is illegal and void, 83 C. 65. This section is applicable only to Magistrates. A Sessions Judge is not competent to try a case on the evidence partly recorded by his predecessor, by virtue of this section, 26 B. 50; 3 M. 112; 8 C.L.J. 59 (F.B.)=8 Cr. L.J. 121

followed in 28 Cr. L.J. 402-401 Ind. Cas. 178; 26 B. 50; 21 W.R. (Cr.) 47; 23 W.R. (Cr.) 59; 21 W.R. (Cr.) 47; 1890 P.R. (Cr.) 1; 35 A. 63. This section is applicable to a case which has been transferred from the file of one Magistrate to another and is not restricted to cases in which the Magistrates succeed each other in their offices, 20 Cr. L.J. 41-49 Ind. Cas. 681, where 39 C. 781; 40 A. 307; 32 M. 218; 35 C. 457 are referred to. The provisions of this section are applicable to security proceedings under Chapter VII of the Code, 43 M. 511; 6 Lah. 176; 4 C.L.R. 452; 23 W.R. (Cr.) 62; 24 W.R. (Cr.) 52; 25 Cr. L.J. 1380-83 Ind. Cas. 349, and also to proceedings under Chapter XII, "Disputes as regards immoveable property," 37 C. 812; 4 C.W.N. 420-13 C.W.N. 420-9 Cr. L.J. 378. This section applies to summons cases also, and therefore a person against whom proceedings are taken under S. 107, *supra*, is entitled to demand a *de novo* inquiry when the Magistrate ceases to exercise jurisdiction and is succeeded by another, 25 Cr. L.J. 1380-83 Ind. Cas. 340. After commencing a *de novo* inquiry a Magistrate is not entitled to refer the proceedings for inquiry or dismiss the complaint under S. 203 *supra*, 9 M. 282; 19 W.R. (Cr.) 28; 1903 P.R. (Cr.) 13-1903 P.L.R. 175. This section is intended to provide for a case where an inquiry or trial has been commenced before one incumbent of a particular magisterial post, and that officer ceases to exercise jurisdiction in that post and is succeeded by another officer, 12 A. 66 at 68. Where one Magistrate heard the prosecution evidence, a second heard the defence evidence and a third went through the evidence and delivered judgment, it was held that this section was not confined to two Magistrates and the judgment, delivered by the third Magistrate was legal, as the section applied every time a succeeding Magistrate begins to exercise jurisdiction, i.e., every time another Magistrate takes cognizance of the matter which has been begun or continued by his predecessor, 47 M. 245. Where on the transfer of a Magistrate a case pending before him was taken up by another Magistrate the trial being started *de novo*, and subsequently the first Magistrate who originally started the trial was re-transferred it was held, that this section gave no jurisdiction to such Magistrate on re-transfer to proceed with the trial from the point where he had left it, 53 Ind. Cas. 820; 20 Cr. L.J. 638-52 Ind. Cas. 398 followed in 47 M.L.J. 926-22 L.W. 847-26 Cr. L.J. 510-85 Ind. Cas. 234. See also 24 L.W. 640-38 M.L.T. 137-28 Cr. L.J. 23-99 Ind. Cas. 55. Similarly where after a transfer of a Magistrate who had heard and recorded the evidence in the case, the succeeding Magistrate takes cognizance and commences a *de novo* inquiry, it is not competent to the District Magistrate to transfer the case to the file of the first Magistrate to enable him to continue the case from the point where he left it prior to his transfer, 24 L.W. 640. This section does not apply to cases tried by Benches of Magistrates as there is no provision of law authorising a change of the constitution of Benches of Magistrates and it is only the Magistrates who have heard the whole evidence who can decide the case, 18 Cr. L.J. 96-37 Ind. Cas. 160 where 23 C. 194; 20 C. 870 are referred to 2 Lah. 237; 12 C. 558; 18 M. 394; 21 M. 870, 41 A. 116; 43 B. 400; 18 C.W.N. 394; 21 M. 870. Where one Magistrate records a statement from an accused person under S. 342, *supra*, in an inquiry which results in a commitment by his successor, such statement is admissible at the Sessions trial, 7 Lah. 70 where 31 M. 40 is followed.

Sub-section (1).—This sub-section gives a Magistrate jurisdiction to decide a case on the evidence recorded by his predecessor but not to deliver a judgment written by his predecessor, 50 C. 664; 27 Cr. L.J. 406-93 Ind. Cas. 70; 23 C. 194; 20 C. 870; 12 C. 558; 18 M. 394; ; 21 M. 246 but in 40 M. 108, it was held that when a Magistrate, who tried a case wrote a judgment dated and signed the same and fixed a date for pronouncing judgment, was transferred meanwhile and is succeeded by another Magistrate, the latter is not bound to deliver his predecessor's written judgment. He has a discretion to proceed *de novo* and when no new trial is demanded he may in his discretion pronounce the predecessor's judgment. This sub-section leaves it to the discretion of the Magistrate either to act on the evidence recorded by his predecessor or to hear it over again for himself, 25 Cr. L.J. 1075-81 Ind. Cas. 899. The discretion is somewhat restricted by proviso (a). Proviso (b) gives the superior Courts special powers of interference. Subject to the proviso, the discretion is absolute. It is not clear why this should involve a cancellation of the charge or the transformation of the proceedings from "trial, back into an inquiry." Where proceedings

are recommenced from the inquiry stage, they are recommenced as an inquiry, and if they had already developed into a trial stage before the change of Magistrates, they are recommenced as a trial, i.e., a proceeding in which a charge has been framed. The second Magistrate cannot ignore the charge already framed by his predecessor, and his position is practically the same as that of his predecessor would have been, if after framing a charge he had heard further cross-examination of the prosecution witnesses and on a consideration thereof become satisfied that the charge was not well-founded. It has been held that a recommencement of the inquiry under this section did not cover a reference to the police under S. 202, *infra*. A discharge under the circumstances is to be viewed as an acquittal and no further inquiry could be had under S. 426, *infra*, 38 M. 585. See also 2 L.W. 1244=17 Cr. L.J. 1=32 Ind. Cas. 123. A *de novo* trial means a new trial from the very beginning of the case and not merely recalling the prosecution witnesses and giving leave to the accused's Vakil to cross-examine those witnesses. The object of granting a *de novo* trial is to enable the Magistrate who hears the case to see the way in which the witnesses give evidence before him, to mark their demeanour and thereby to be in a position to judge of their credibility. The object is lost if the witnesses are not examined again but are only allowed to be cross-examined by the accused. Such a course is not in accordance with the provisions of this section. Even if no objection is taken, the Calcutta High Court (12 C.W.N. 138) has held that the trial is still vitiated, 49 M.L.J. 423 at 424=(1925) M.W.N. 652=26 Cr. L.J. 1596=90 Ind. Cas. 668. See also 27 Cr. L.J. 659=94 Ind. Cas. 707. This sub-section provides for re-summoning and re-hearing witnesses, and re-commencement of the inquiry or trial by the Magistrate who succeeds after his predecessor had already heard the evidence. The section is silent on the question whether or not on such re-hearing any charge, that may have already been framed after the first hearing, must subsist. If it is considered that the charge already framed is wiped out, this assumption involves that the Legislature has also overlooked the point that the succeeding Magistrate ought in that case to be empowered to frame a fresh charge or to adopt the charge already framed, 38 M 585 at 598; 7 Cr. L. Rev. 331. This section enables the succeeding Magistrate to draw up an order of the committal of the accused upon the evidence recorded by his predecessor. In such cases no fresh evidence need be recorded nor is he bound to take the statement of the accused, 31 M 40. Proceedings in a warrant-case before a charge is framed are merely an inquiry and not a trial and at that stage the Magistrate is not bound to adopt the procedure laid down by this sub-section, 46 M. 719 following 32 M 220 (F.B.) 38 M. 585; 43 M. 511 (F.B.). The word "trial" governs the whole of the proceedings in a warrant case, 3 Lah. 115; 6 Lah 176.

Proviso (a).—The words are "demand that the witnesses or any of them be re-summoned and reheard." It is not necessary to have all the witnesses re-summoned and re-heard. The accused has an option to ask some of the witnesses only to be re-summoned and re-heard. The provisions herein contained apply to a case which is remanded, for taking further evidence, to a trial Court and the Magistrate who had originally tried the case had been transferred, and a new Magistrate had taken his place. The new Magistrate is bound to accede to the demand of the accused, to have a *de novo* trial even in a case where it is sent back not for calling further prosecution evidence but simply for calling further evidence for the defence, 27 Cr. L.J. 1125=97 Ind. Cas 643 following 25 C. 863. This proviso applies at a time when the succeeding Magistrate begins to exercise his jurisdiction, that is every time another Magistrate takes cognizance of a matter which had been begun or continued by his predecessor, 47 M 245. This proviso applies only to trials. An inquiry under Chapter XVIII of the Code, a register case or a preliminary inquiry into an offence triable exclusively by a Court of Session, is not a trial within the meaning of this proviso. Even if such a case is treated as a warrant case the accused will not be prejudiced because by S. 256 *infra*, as soon as the charge is framed he can recall for cross-examination all the prosecution witnesses whose evidence had been taken and therefore should the proceedings, become a trial he has a right equivalent to that of demanding a *de novo* inquiry, 32 M. 218 at 219. The demand must be made at the commencement of the trial, which commences when the accused appears or is brought before the Court, 25 C. 863. When a Magistrate refuses to re-summon and

re-hear the witnesses, he acts in contravention of this proviso and S. 537, *infra* cannot cure such an express violation of the provision of law. It is of the utmost importance that the first Court that has to try the case should have an opportunity of observing the manner and demeanour of the witnesses, to form a correct estimate of their evidence and the trial held by a Magistrate upon evidence not recorded by him and upon evidence given by witnesses whose manner and demeanour he had no advantage of observing, must be considered to be a trial held not according to law, 25 C. 863 at 858. The Magistrate is not bound to ask the accused whether he wishes to have the witnesses re-summoned and re-heard. It is for the accused to demand that the witnesses be re-summoned and re-heard. The fact that the accused at the time the charge was framed by the first Magistrate did not ask the witnesses to be recalled and re-heard, does not preclude him from ever exercising his right subsequently under this section, 2 Cr. L. Rev. 20=14 Cr. L.J. 175=19 Ind. Cas. 175, following 1903 P.R. (Cr.) 3; 39 C. 781. The general provisions of S. 33, of the Ind. Ev. Act are in no way affected by this section. Where in a *de novo* trial, at the desire of the accused, the Court re-summoned all the available witnesses but finding a witness dead allows his evidence, taken at the previous proceedings, to be proved as permitted by law, the procedure adopted is in accordance with law, 8 Lah. 570, where 3 Lah. 115 at 126 is *disapproved*. Under this proviso the right given to the accused is that of demanding that the prosecution witnesses or any of them be re-summoned and re-heard and it rests with the accused to say who shall be re-summoned and re-heard. The complainant however has no such right, the provision being entirely in the interests of the accused person. Fresh evidence might be concocted and blunders in the previous evidence might be explained away by allowing such a right to the complainant. When the accused is exercising his right under this proviso, the complainant cannot claim that he must have a *de novo* trial from the very beginning. The right which the accused exercises at one time of having certain witnesses re-summoned and re-heard can be waived by him afterwards and the complainant cannot object to this, 20 L.W. 916=26 Cr. L.J. 526=85 Ind. Cas. 356 where 20 Cr. L.J. 638=52 Ind. Cas. 393; 20 Cr. L.J. 820=53 Ind. Cas. 820; 3 Lah. 115 are *referred to*. See also 29 Cr. L.J. 229=107 Ind. Cas. 160 where it was held that the accused can certainly waive this right.

Proviso (b).—This proviso enables superior Courts to interfere with convictions had before the magistrate. Under the special powers conferred on a District Magistrate by this proviso, he may set aside a conviction by a first-class Magistrate even though an appeal from the conviction lies to the Sessions Court, 9 B. 100; 7 A. 853; 8 M. 18 (F.B.); 12 C. 473 (F.B.).

Sub-section (2).—This sub section expressly lays down that nothing in sub-section (1) applies to cases in which action has been taken under S. 346, *supra*, so that we are left without guidance in this section as to the procedure to be followed on receipt of a case under S. 346, *supra*. The correct inference to be drawn from the provisos to sub-section (1) is that in determining whether or not to commit, the Magistrate to whom the case is submitted is entitled to base his decision on evidence already on record and the report sent up to him. No doubt the guilt or innocence of the accused is to be decided by the Magistrate who heard the evidence but a commitment does not involve any such decision but he must be satisfied only that there are sufficient grounds for so committing, 18 Cr. L.J. 35=36 Ind. Cas. 851, where 12 C.W.N. 136 is *referred to*, but for basing a conviction, the evidence recorded by the Magistrate not competent to try, and who submitted the case under S. 346 *supra*, cannot be taken into consideration 55 C. 63.

Sub-section (3).—This sub-section is new and the purpose for which it is enacted is already noted above. A Magistrate to whom a case is transferred is now entitled to proceed on the evidence already recorded, subject to the right of the accused to demand a re-summoning and re-hearing of the witnesses, which right the accused may waive, if he likes. The Magistrate need not now proceed to record evidence *de novo* as was held in a number of decisions. See 35 C. 457; 39 C. 781; 13 C.W.N. 420; 32 M. 213; 36 A. 315; 40 A. 337. A *de novo* trial does not imply the cancellation of the charge previously framed against the accused and consequently an order subsequently passed letting off the accused is an acquittal.

and not one of discharge, 2 L.W. 1244, following 38 M. 585. The combined effect of S. 348 *supra*, and this sub-section is that the Magistrate may be entitled to rely on the evidence already recorded but he could not proceed to recommence the inquiry and then rely on the evidence previously recorded, 28 Cr. L.J. 302=100 Ind. Cas. 382.

350A. *No order or judgment of a Bench of Magistrates shall be invalid by reason only of a change having occurred in the constitution of the Bench in any case in which the Bench by which such order or judgment is passed is duly constituted under sections 15 and 16, and the Magistrates constituting the same have been present on the Bench throughout the proceedings.*

Changes in constitution of Benches.

This section is new. "This new section gives effect to the law as laid down by the High Courts. Briefly, it provides that the judgment of a Bench shall be valid when the Bench is duly constituted at the time of passing the judgment and the judgment is passed by Magistrates all of whom have heard the proceedings throughout" *Sel. Com. Report*.

Scope and object of the section.—The object of constituting a Bench is that the Magistrates concerned should individually and collectively give their attention and apply their mind in the hearing of the evidence and determination of the points at issue and arrive at an independent judgment in regard to the merits of the charge against the accused, 29 Cr. L.J. 310 at 311=107 Ind. Cas. 875, see also 52 M. 237. This section is enacted to deal with the case of the absence from a Bench of Magistrates of one member who was sitting at the previous hearing of the case. If the Bench is duly constituted and the Magistrates constituting the same have been present throughout the proceedings, the order or judgment passed cannot be vacated simply because a member or members are absent. This is in accordance with the decision in 38 M. 797; the principle is that the Magistrates who passed order or judgment must have been present throughout and have heard all the evidence recorded. See 38 M. 304; 21 M. 246; Weir II, 18; 18 M. 394; 10 L.W. 386; 20 C. 870; 23 C. 194; 15 A.L.J. 463; 16 A.L.J. 884; 4 Mys. L.J. 293. This section requires that the Bench should be duly constituted under S. 15 *supra*, and the Magistrates constituting the Bench have been present on the Bench throughout the proceedings. Reading this section with S. 15 *supra*, it would appear that at least two Magistrates ought to be present on the Bench throughout the proceedings to comply with the provisions of the section, 29 Cr. L.J. 310=107 Ind. Cas. 875. Where the hearing of a case commenced with three Magistrates constituting a Bench but only one of the Magistrates was present at all the hearings, sitting sometimes with one Magistrate and sometimes with the others and sometimes with both, the trial was held bad as it contravened the provisions of this section even though the quorum of the Bench consisted of two, 7 Lah. 122, followed in 29 Cr. L.J. 310=107 Ind. Cas. 875; 25 Cr. L.J. 198=76 Ind. Cas. 568. The Legislature has ordained that Benches of Honorary Magistrates shall be constituted for the decision of criminal cases in India. Once these Benches have been constituted, it is the duty of the superior Courts to regulate their proceedings and to prevent the abuses of law. But while exercising this power the superior Courts should keep in mind the fact that in dealing with the members of an unpaid judiciary who, in many cases, have had no judicial learning and little judicial knowledge, it is not practical to set up a standard of compliance with procedure such as would be reasonably expected from stipendiary Magistrates. If too much is expected, the work of such Benches would be often at a stand still. In the trial of a large number of cases slight defect of procedure will be found and if on every occasion that a slight defect in procedure is discovered and their proceedings be set aside, their activities will be seriously hampered and the object of the Legislature in permitting the creation of such Benches will be thwarted, 15 Cr. L.J. 516 at 518=24 Ind. Cas. 604.

351. (1) Any person attending a Criminal Court, although not under arrest or upon a summons, may be detained by such Court for the purpose of inquiry into or trial of any offence of which such Court can take cognizance, and which, from the evidence, may appear to have been committed, and may be proceeded against as though he had been arrested or summoned.

(2) When the detention takes place in the course of an inquiry under Chapter XVIII or after a trial has been begun, the proceedings in respect of such person shall be commenced afresh, and the witnesses re-heard.

The expression 'any person' is very comprehensive and will include a witness or a mere spectator attending Court.

This section is self-contained and complete in itself and is independent of the provisions of Ss. 190 and 191, *supra*, 10 Cr. L.J. 303=3 Ind. Cas. 568.

Section 351 & S. 190(1) (c) *supra*, compared.—This section appears in this chapter relating to general provisions as to inquiries and trials whereas S. 190, *supra*, finds a place in a sub-chapter dealing with conditions requisite for initiation of proceedings. While S. 190, *supra*, refers to initiation of proceedings, this section deals with a matter arising during the course of proceedings already initiated. Looking at the fundamental character of the subject-matter of the two sections appearing in two distinct parts of the code, it does not appear that the Legislature intended that one should be dependent on the other. On the contrary it would seem that this section deals with a state of things not covered by S. 190. When an inquiry or trial has already commenced in one of the methods specified in S. 190, the power of the presiding officer is no longer fettered by its provisions. He may, independent of them, take action against a person answering the description therein given 'as though he had been arrested or summoned.' These words seem to indicate that, that person proceeded against is to be regarded in the same light and subject to the same disabilities as though he had been arrested or summoned in pursuance of a proceeding under S. 190. The conditions for initiation of proceedings set forth in S. 190, *supra*, are to be dispensed with in his case which is regarded as having passed the stage contemplated therein. Sub-section (2) of this section indicates that proceedings are to be commenced afresh and no provision either by a special sub-section or by a reference to S. 191, *supra*, is made for transfer, at the option of the accused, of the case to another Magistrate, 10 Cr. L.J. 303 at 306=3 Ind. Cas. 568.

Sub-section (1).—A Magistrate proceeding under this section against any person who may appear upon the evidence taken by him to be concerned in the offence under investigation cannot be regarded as taking cognizance of the case upon information received or upon his own knowledge or suspicion within S. 190 (1) (c) *supra*, so as to enable the accused to object to the Magistrate proceeding further with the case, because the materials for initiating proceedings are to be found in the proceedings of the Court of justice which from their publicity stand on the same footing as a complaint. The accused has full information as to the source and particulars of the materials upon which the Magistrate acts. He can if he likes, dispute by argument or counter-evidence, their probative effect, of these materials as far as they affect him injuriously. He is not placed under a disability to combat the effect of the suspicious circumstances operating upon the mind of the Magistrate and influencing his judgment as in the case of a proceeding under 190 (1) (c), *supra*. This section is self-contained and complete in itself and is independent of the provisions of S. 190 and S. 191, *supra*, 10 Cr. L.J. 303; at 306, 3 Ind. Cas. 568 where 1 C.W.N. 105 is not followed and 3 C.W.N. 221 is followed. An accused person against whom action is taken under this section has full information as to the materials on which action is taken against him and he is under

no disability to combat the suspicions lurking in the mind of the Magistrate and influencing his judgment as in a case where action is taken under S. 190 (1) (c), *supra*. A Magistrate may under this section join as a co-accused any person attending his court who seems to him to be implicated in the case under trial, 12 Cr. L.J. 399=11 Ind. Cas. 533. But if the person is not in attendance in Court he cannot proceed under this section, 12 Cr. L.J. 92=9 Ind. Cas. 492; see also 10 Cr. L.J. 303=3 Ind. Cas. 558; 24 Cr. L.J. 519=73 Ind. Cas. 55.

Sub-section (2).—The necessity for this sub-section has been aptly put in 14 W. R. (Cr.) 20. A Magistrate is not justified in taking a person without any previous notice or summons from among the audience or attendant witnesses in open Court and place him in the dock to be immediately tried upon a charge which had already been commenced against other prisoners and on which evidence had already been let in. Such a case is not justified and is not covered by the provisions of this section. Injustice of this kind might be done by a proceeding of this kind by practically depriving a person of the opportunities of preparing his defence to which he is rightly entitled under the provisions of the Code and subjects him to be tried on evidence which was taken before he was put in the dock. This sub-section makes it clear that the Magistrate may join as co-accused any person attending his Court who seems to him to be implicated in the case under trial. A Magistrate acting under this section if he has already taken cognizance of the offence on a complaint or a police report is, therefore, not proceeding under S. 190 (1) (c), *supra*. That, this is the intention of the Legislature is manifest from the fact, that there is no proviso to the section corresponding to that to S. 191, *supra*, and indeed the contrary interpretation would render it almost nugatory, 12 Cr. L.J. 399=11 Ind. Cas. 533.

352. The place in which any Criminal Court is held for the purpose of inquiring into or trying any offence shall be deemed an open Court, to which the public generally may have access, so far as the same can conveniently contain them:

Provided that the presiding Judge or Magistrate may, if he thinks fit, order at any stage of any inquiry into, or trial of, any particular case, that the public generally, or any particular person, shall not have access to, or be or remain in, the room or building used by the Court.

At Common Law a trial on indictment or criminal information must be in a public Court, with doors open. In dealing with certain classes of criminal trials the presiding Judges, not infrequently, order women and young persons to leave the Court and there is undoubted power to exclude or eject persons who disturb the proceedings. All proceedings under the *Punishment of Incest Act, 1908* must be held *in camera* and S. 114 of the *Children Act, 1908*. In addition to and without prejudice to any power which the Court may possess, to hear proceedings *in camera*, the Court may, where a person who, in the opinion of the Court is under sixteen, is called as a witness, in relation to an offence against or any conduct contrary to decency or morality, direct the exclusion from Court of all persons other than members or officers of Court or parties in the case, their Counsel, Solicitors, or persons otherwise directly concerned in the case and other *bona fide* representatives of newspaper or paper agency and S. 115, provided that children under fourteen other than infants in arms are prohibited from being present in Court during the trial of other persons except so long as their presence is required as a witness or otherwise for the purpose of justice, *Arch. Cr. Pl. Ev. and Pr. pp 192-93 (25th Ed)*. Trying a case *in camera* is not permitted by the Code. Trying a case *in camera* ordinarily means that all persons except the Court officials and parties and their legal advisers are expressly excluded from the room in which the case is tried. When a case is tried in the Magistrate's private room instead of in the Court room without objection.

by the parties, the trial is not illegal, 3 Cr. L.J. 433=12 Bur. L.R. 59. Transaction of public business at the private residence of the Magistrate was condemned in 10 C.W.N. 1062.

This section gives power to the Court of ordering that any particular person shall not remain in the room used by the Court. It makes no exception to the case of a police officer. The Magistrate has not merely to think of the help, any police officer may be able to give him or the prosecution, but has also to consider the susceptibilities of the accused and the effect which the presence of the police officer is likely to produce in the minds of the accused and the witnesses. When the accused so objects, the Magistrate has to decide whether his fear of prejudice to his case is reasonable considering the intelligence and susceptibilities of the class to which he belongs. In the case of a prosecuting officer, the Court may put it to him whether under the circumstances he will withdraw. In any case it is not advisable that a police officer interested in the case before a Magistrate should receive exceptional treatment as a seat on the dais which will surely breed suspicion in the mind of the accused as to the independence of the Magistrate, 26 Cr. L.J. 1130 (1)=88 Ind. Cas. 362 (1). A Court is entitled to ask an investigating police officer not to remain in Court, 1885 A.W.N. 221.

CHAPTER XXV.

OF THE MODE OF TAKING AND RECORDING EVIDENCE IN INQUIRIES AND TRIALS.

The general object of this Chapter is to ensure the accuracy of the record and to enable the accused to know and understand what the evidence given against him is and the reading over of the depositions of witnesses is so essential to the framing of an accurate record. The provisions of S. 360, *infra* must be regarded as imperative and not merely directory. The criminal Courts must therefore comply with its clear provisions, 52 C. 159, 437, 470 429, 668, and 721; 23 C.W.N. 119 and 968; 42 C.L.J. 585; 29 C.W.N. 526, 43 M.L.J. 423.

353. Except as otherwise expressly provided, all evidence taken under Chapters XVIII, XX, XXI, XXII and XXIII shall be taken in the presence of the accused, or, when his personal attendance is dispensed with, in the presence of his pleader.

Evidence to be taken in presence of accused.

All evidence, *i.e.*, evidence for the prosecution as well as the defence, and when defence evidence is recorded in the absence of the accused it was held that S. 537, *infra*, will not cure such a defect, 14 Cr. L.J. 287=19 Ind. Cas. 719.

Chapter XVIII refers to inquiries into cases triable by the Court of Session or High Court. Chapter XX deals with summons cases, and Chapter XXI with warrant-cases, Chapter XXII summary trials and Chapter XXIII deals with trials before the Sessions Court and the High Court.

Shall be taken in the presence of accused.—This section requires that with certain exceptions the evidence should be taken in the presence of the accused or when his personal attendance is dispensed with in the presence of his pleader and failure to do so is not an irregularity cured by S. 537, *infra*, as it is a disobedience of an express provision as to the mode of trial and is more than an irregularity. Where the Code enacts positively that evidence should be recorded in a certain way, it cannot be said that a contrivance of this express provision comes within the description of error, omission or irregularity and there can be no waiver by which disregard to an express provision can be got over, 23 Cr.L.J. 260=107 Ind. Cas. 530. See 6 Pat. 691. See also 30 Cr. L.J. 736=117 Ind. Cas. 241. The wording of the section laying down that all evidence shall be taken in the presence of the accused includes the evidence for the defence as well as the prosecution. Where in a Sessions trial the accused when asked whether they had any defence witnesses stated they had none but wished that the evidence adduced on their behalf in a different case may be used as their defence evidence and the Judge acceded to their request and ultimately convicted the accused, it was

held that the procedure adopted was clearly illegal and in contravention to the provisions of this section and the fact that the accused consented to such an illegal procedure will not give it the legal sanction, 28 Cr. L.J. 771=104 Ind. Cas. 99 where 4 Lah. 376 is followed, see also 50 A. 457 at 462. When an accused who was tried with others under S. 323, I.P.C., absconded after the close of the prosecution evidence but before the defence witnesses were named by him and examined, it was held that the recording of the defence evidence in the absence of the accused was not an irregularity cured by S. 537, *infra*, and the conviction was set aside, 14 Cr. L.J. 287=19 Ind. Cas. 719. All depositions of witnesses in criminal cases should be taken and attested by the Magistrate in the presence of the accused, but there is no provision of law which makes it obligatory that the attestation of the Magistrate should be in the presence of the accused, 10 A. 174; where witnesses are not examined in the presence of the accused, the conviction is bad, 2 N.W.P.H.C.R. 49. Where in a summary trial the Magistrate examined some of the prosecution witnesses before one of the accused was actually served with summons to appear and when he appeared the witnesses already examined were not recalled for cross-examination on his behalf it was held that the trial was bad in law and was set aside, 28 Cr. L.J. 756=103 Ind. Cas. 836. The evidence so recorded cannot give, the look or manner of a witness, his hesitation, his doubts, his variation of language or his precipitancy, his calmness or consideration. It is the dead body of evidence without its spirit which is supplied when given openly and orally by the ear and eye of those who receive it, 3 B.L.R. (App. Cr.) 20 at 24=12 W.R. (Cr.) 3; 1864 W.R. (Cr.) 1 and 38; 1 B.L.R. (Cr.) 37. To satisfy the requirements of this section it is not enough to read over the sworn statement of the complainant in the presence of the accused treating it as examination-in-chief. Such examination must take place in the presence of the accused, Ratanlal 24; 24 W.R. (Cr.) 14. See S. 512, *infra*, which permits evidence to be recorded in the absence of the accused when the accused is *absconding* and there is no immediate prospect of arresting him or when the offender is *unknown* and an offence punishable with death or transportation is made out. S. 428 (3) gives a discretion to the appellate Court when directing additional evidence to be taken to have it recorded in the absence of the accused or his pleader, and under Chapter XL of the Code evidence of witnesses may be taken on commission. In a criminal trial it is clearly illegal to read out the deposition made by witnesses on a previous occasion to put a few additional questions to them and then tender them for cross-examination. Such a procedure is illegal and it cannot be cured by S. 537, *infra*, 23 Cr. L.J. 377=77 Ind. Cas. 425. See 30 L.W. 701=1929 M.W.N. 799, where the practice of tendering prosecution witnesses for cross-examination only, is condemned. See also Ss. 509 and 510, *infra*, which make an exception as to the medical evidence. The attendance of an accused person during his trial before the High Court Criminal Sessions may be dispensed with under this section on the ground of ill-health of the accused, 14 Bom. L.R. 236=13 Cr. L.J. 464=15 Ind. Cas. 96.

When personal attendance is dispensed with, in the presence of pleader.—

See S. 205, *supra* which enables a Magistrate issuing a summons, in his discretion, to dispense with the personal attendance of the accused. S. 116, *supra*, also gives similar power in cases under the security Chapter. When the accused's personal attendance is not dispensed with by the Court, it is clearly laid down in this section that all evidence shall be taken, in his presence. This can only mean that the evidence for the defence as well as for the prosecution is included in this section and S. 537, *infra*, cannot cure the defect even though it had not led to a miscarriage of justice, 14 Cr. L.J. 287 at 288=19 Ind. Cas. 719. Under S. 145, (1) *supra* a Magistrate may require, the parties concerned to attend in person or by pleader. It was held in 14 Bom. L.R. 236=13 Cr. L.J. 464=15 Ind. Cas. 96, that the High Court has power under this section to dispense with the attendance of an accused during his trial before the sessions on the ground of ill-health. When S. 205, *supra*, empowers a Magistrate to dispense with personal attendance of an accused it could not have been the policy of the Legislature that the High Court should not have similar powers in all proper cases. Such power may properly be exercised in favour of *pardanashin* ladies at least, until they are convicted, 43 M. 359, 17 C.W.N. 1243; 9 Cr. L.J. 158. See S. 503, *infra*, which authorises taking of evidence on commission.

354. In inquiries and trials (other than summary trial) under this Code by or before a Magistrate (other than a Presidency Magistrate) or Sessions Judge, the evidence of the witnesses shall be recorded in the following manner.

Manner of recording evidence outside presidency-towns.

Ss. 260 and 261, *supra*, make special provisions for summary trials and S. 362, *infra*, prescribes the mode of recording evidence by Presidency Magistrates.

355. (1) In summons-cases tried before a Magistrate other than a Presidency Magistrate, and in cases of the offences mentioned in sub-section (1) of section 260, clauses (b) to (m), both inclusive, when tried by a Magistrate of the first or second class, and in all proceedings under section 514 (if not in the course of a trial), the Magistrate shall make a memorandum of the substance of the evidence of each witness as the examination of the witness proceeds.

(2) Such memorandum shall be written and signed by the Magistrate with his own hand, and shall form part of the record.

(3) If the Magistrate is prevented from making a memorandum as above required, he shall record the reason of his inability to do so, and shall cause such memorandum to be made in writing from his dictation in open Court, and shall sign the same, and such memorandum shall form part of the record.

Scope of the section.—This section merely prescribes a briefer record in summons cases and other cases which may be tried summarily when tried as a matter of fact in the regular way, 17 A.L.J. 1146; 21 Cr. L.J. 28=54 Ind. Cas. 172; 3 L.B.R. 3=2 Cr. L.J. 375. This section applies to offences coming within clauses (b) to (m) of S. 260, *supra*, but when a case falls under clause (b) of S. 261, *supra*, this section would not apply, 29 Bom. L.R. 710; 28 Cr. L.J. 537=102 Ind. Cas. 345. The provisions of this section do not control Ss. 263 and 264, *supra*, see 49 A. 261 which decided that 48 C. 280 which took a different view is not good law. See also 25 A.L.J. 346=28 Cr. L.J. 412=101 Ind. Cas. 474. This section does not apply to summary trials. See S. 354, *infra*. The substance of the evidence alone is to be recorded and not the form in which the witness deposes, 23 Cr. L.J. 123=65 Ind. Cas. 552. The provisions of this section are obligatory and failure to comply with them may amount to an illegality and not a mere irregularity, 23 Cr. L.J. 114=65 Ind. Cas. 546. "We are not aware of any provision of law which renders it illegal for a native second class Magistrate to record the memorandum, referred to in this section, in English any more than it is illegal for an English Magistrate to do so." 19 M. 263 at 270. Evidence in maintenance cases under Chapter XXXVI should not be recorded as in summary trials but in the manner provided by this section, 20 C. 331 at 332. An order awarding maintenance under S. 468, *infra*, cannot be passed simply on the wife's verified application on oath, of the truth and correctness of the allegations made in her application for maintenance without examining her or her witnesses, if any, on oath. The application for maintenance cannot take the place of her examination on oath in the presence of the husband, and consequently, there is no legal evidence as against him for passing the order for maintenance, 25 Cr. L.J. 302=76 Ind. Cas. 874. In a summons case the reading over of the recorded deposition is not prescribed by law and its omission cannot therefore *per se* be regarded as a defect fatal to a conviction, Weir II, 433. Where evidence

is illegally recorded in the form of a memorandum when the Magistrate is not entitled to do so the conviction was set aside as illegal, *Weir II*, 432 ; 21 Cr. L J. 28=54 Ind. Cas. 172. When the substance of the evidence taken down by the Magistrate in a warrant-case tried summarily is not signed by the Magistrate, the procedure was held to be illegal and the trial bad, 23 Cr. L J. 114=65 Ind. Cas. 546. Though this section does not expressly refer to warrant cases it refers to all cases other than summons cases and cases mentioned in subsection (1) (b) to (m) of S. 260. The Code does not prescribe the manner for recording evidence applicable to all warrant cases. This section must be held to prescribe the manner in which evidence should be recorded in warrant cases, 52 C. 632.

Offences mentioned in S. 260 (1) (b) to (m).—These clauses (b) to (m) relate to offences punishable under the Indian Penal Code, but clause (a) refers to offences punishable under other laws also and this section has no application to that clause.

In all proceedings under S. 514.—S. 514 deals with procedure on forfeiture of bonds taken under the provisions of the Code.

Shall make a memorandum.—This section does not require a Magistrate to record the evidence of the witnesses but only to make a memorandum of the substance of the evidence of each witness as it proceeds. S. 357, *infra*, carefully prescribes the language in which the evidence of witnesses in the trials and inquiries referred to in S. 356 shall be taken down, but the Code is silent as to the language in which a memorandum of the substance of the evidence in the less important case enumerated in this section is to be recorded.

As the examination of witnesses proceeds.—The memorandum must be made as the examination of the witnesses proceeds and not after it is concluded, and from the recorded deposition of the witnesses ; 1 B.H.C.R. 91 ; 1864 W.R. (Cr). 18. The object is to make the Magistrate to give pointed attention to what the witnesses say and thus ensure accuracy. A defective memorandum under this section may perhaps be taken to be an illegality and not merely an irregularity, as unlike S. 356, *infra* the defective memorandum will be the only record available for evidence, see 23 Cr. L J. 114=65 Ind. Cas. 546.

356. (1) In all other trials before Courts of Session and Magistrates (other than Presidency Magistrates) and in all inquiries under Chapters XII and XVIII, the evidence of each witness shall be taken down in writing in the language of the Court, by the Magistrate or Sessions Judge, or in his presence and hearing and under his personal direction and superintendence, and shall be signed by the Magistrate or Sessions Judge

Record in other cases
outside presidency-
towns.

(2) When the evidence of such witness is given in English, the Magistrate or Sessions Judge may take it down in that language with his own hand, and, unless the accused is familiar with English, or the language of the Court is English, an authenticated translation of such evidence in the language of the Court shall form part of the record.

Evidence given in
English

(2A) When the evidence of such witness is given in any other language, not being English, than the language of the Court, the Magistrate or Sessions Judge may take it down in that language with his own hand, or cause it to be taken down in that language in his

presence and hearing and under his personal direction and superintendence, and an authenticated translation of such evidence in the language of the Court or in English shall form part of the record.

(3) In cases in which the evidence is not taken down in writing by the Magistrate or Sessions Judge, he shall, as the examination of each witness proceeds, make a memorandum of the substance of what such witness deposes; and such memorandum shall be written and signed by the Magistrate or Sessions Judge with his own hand, and shall form part of the record.

Memorandum when evidence not taken down by the Magistrate or Judge himself.

(4) If the Magistrate or Sessions Judge is prevented from making a memorandum as above required, he shall record the reason of his inability to make it.

Amendment.—Sub-section (2-A) is new.

Other than Presidency Magistrates.—See S. 362, *infra*, which deals with the mode of recording evidence in appealable cases by Presidency Magistrates. There is no provision in law requiring Presidency Magistrates to record evidence in cases other than those dealt with in S. 362, *infra*. In non-appealable cases it is left to the discretion of the Magistrate to do so or not, and the High Court would not interfere with such discretion, 31 C. 983; 33 C. 1036.

In all inquiries under Chapters XII and XVII.—It is remarkable that a distinction is drawn in S. 355 and this section between summons-cases and inquiries under Chapter XII; S. 355 directs that in summons-cases the Magistrate shall make a memorandum of the substance of the evidence of each witness, whereas this section directs that in inquiries under Chapter XII the evidence of each witness shall be taken down in writing in the language of the Court by the Magistrate or in his presence or hearing or under his personal supervision and superintendence, and shall be signed by the Magistrate, 30 C 508 at 514. Where a Magistrate holding an inquiry under Chapter XII only makes a memorandum of evidence purporting to act under sub-section (3) of this section, the proceedings were quashed, as he had violated the imperative provisions of sub-section (1) of this section, 42 C. 381. Though this section does not expressly refer to warrant cases it refers to all cases other than summons cases and cases mentioned in sub-section (1) (b) to (m) of S. 260. The Code does not prescribe the manner of recording evidence applicable to all warrant cases. 52 C. 632.

Shall be taken in writing in the language of Court by Magistrate, etc.—Under the provisions of this section there is no exception whatever made in favour of cases in which no appeal lies. An omission to record the evidence in the mode prescribed by this section is so material an error that the High Court is bound to quash the proceedings as being founded on no evidence, 11 B.L.R. Appx. 5=20 W.R. (Cr.) 14. In every Sessions trial, no matter how often the case has been before the Court, the witnesses must be examined *de novo* in the same manner as if the case was entirely new and the witness had not been examined before, W.R. (Gap.) 1 and 18 and a memorandum by the Judge that the witnesses had deposed the same as former witnesses is not in accordance with the requirements of this section, W.R. (Gap.) 18; 1 B.H.C.R. 91.

Sub-section (2).—This sub-section requires a record to be prepared in the language of the Court in addition to what is taken down by the Magistrate or Judge in English, and sub-section (3) requires that in addition to what is taken in the language of the Court in the presence and hearing and personal direction of the Magistrate or Judge and signed by him, the Magistrate or Judge must make a memorandum of the substance of what each witness deposes with his own hand and shall sign the same. This memorandum is something different from that made under S. 355, *supra*. A defective memorandum under S. 355, may

amount to an illegality whereas under this sub-section any such defect will be considered only as an irregularity since there is another record in proper form. In a warrant case when no vernacular record of the evidence was prepared the trial and conviction is illegal even though no objection was taken to such a course being adopted, 17 A.L.J. 1146.

Sub-section (2A).—This sub-section is new and supplies a real defect which existed in the Code before. Where evidence is given in any other language, not being English which is dealt with in sub-section (2), than the language of the Court, the Magistrate or Judge is empowered to take the evidence in that language or cause it to be taken down in that language in his presence and under his direction and an authenticated translation in the language of the Court or in English is to form part of the record.

Sub-section (3).—This sub-section is intended to secure accuracy. When the Magistrate is unable to record the evidence himself, he must carefully attend to the examination of the witness and exercise control over the clerk who takes down the evidence. Failure on the part of the Magistrate to comply with the provisions of this sub-section will entail a retrial 1891 A.W.N. 145; 19 C.W.N. 124, see also 19 M. 269.

357. (1) The Local Government may direct that in any district or part of a district, or in proceedings before any Court of Session, or before any Magistrate or class of Magistrates, the evidence of each witness shall, in the cases referred to in section 356, be taken down by the Sessions Judge or Magistrate with his own hand and in his mother-tongue, unless he is prevented by any sufficient reason from taking down the evidence of any witness, in which case he shall record the reason of his inability to do so, and shall cause the evidence to be taken down in writing from his dictation in open Court.

(2) The evidence so taken down shall be signed by the Sessions Judge or Magistrate, and shall form part of the record :

Provided that the Local Government may direct the Sessions Judge or Magistrate to take down the evidence in the English language, or in the language of the Court ; although such language is not his mother-tongue.

This section prescribes carefully, unlike S. 355, *supra*, the language in which the evidence of witnesses in trials and inquiries referred to in S. 356, *supra* shall be taken down, 19 M. 269 at 270. The authority conferred by this section is personal to the officer and remains in force only so long as he remains in the district in which it has been conferred, 5 M.H.C.R. Appx. 9. Where a Magistrate not empowered to record evidence in his own hand in English, did so, and committed the accused, it was held that the procedure of the Magistrate was only an irregularity cured by S. 537, *infra*, especially when there was nothing to show that the accused was prejudiced, Weir II, 433. The language in which the plea of the accused is to be recorded is the language in which it is conveyed by the interpreter to the Court, 5 C. 826.

358. In cases of the kind mentioned in section 355, the Magistrate may, if he thinks fit, take down the evidence of any witness in the manner provided in S. 356, or, if within the local limits of the jurisdiction of such Magistrate the Local Government has made the order referred to in section 357, in the manner provided in the same section.

Option to Magistrate
in cases under section
355.

Language of record
of evidence.

If he thinks fit.—For example where a Judge is of opinion that a witness is giving false evidence and he thinks that proceedings against him may be necessary in the interests of justice.

Mode of recording evidence under section 356 or section 357.

359. (1) Evidence taken under section 356 or section 357 shall not ordinarily be taken down in the form of question and answer, but in the form of a narrative.

(2) The Magistrate or Sessions Judge may, in his discretion, take down, or cause to be taken down, any particular question and answer.

The ordinary, proper and convenient way of recording evidence is to take it down in the first person, exactly as spoken by the witness, 8 B L R. Appx. 21=16 W.R. (Cr.) 36. As far as possible the Judge should use the words actually used either in the question put or in the answer given and not a more or less accurate paraphrase of the evidence, 2 Cr. L.J. 123 =11 Bur. L.R. 8 See S. 165, of the *Ind. Ev. Act*, as to the power of a Court to question the witness and take down the question and answer.

Procedure in regard to such evidence when completed

360. (1) As the evidence of each witness taken under section 356 or section 357 is completed, it shall be read over to him in the presence of the accused, if in attendance, or of his pleader, if he appears by pleader, and shall if necessary, be corrected.

(2) If the witness denies the correctness of any part of the evidence when the same is read over to him, the Magistrate or Sessions Judge may, instead of correcting the evidence, make a memorandum thereon of the objection made to it by the witness, and shall add such remarks as he thinks necessary.

(3) If the evidence is taken down in a language different from that in which it has been given, and the witness does not understand the language in which it is taken down, the evidence so taken down shall be interpreted to him in the language in which it was given, or in a language which he understands.

Scope and object of the section.—A careful study of the section will show that the object of the reading over of the deposition is to obtain an accurate record from the witness of what he really means to say, and to give him an opportunity of correcting the words which the Magistrate or his clerk has taken down. It is not to enable the accused or his advocate to suggest corrections. It must be remembered that the primary object is to fix the witness and to enable him to protect himself against any inaccuracy in the words taken down from his lips, by the Court, 5 Ran. 53 (P C). Further the accused should know and understand what evidence is given at the trial. The reading over of the evidence to the witness is so essential to the framing of an accurate record that the direction in this section is imperative and not directory, 25 C.W.N. 963. This wholesome provision of law is enacted not only for the benefit of the witness but also of the accused. But it is almost universally ignored. The result has been to set up a wholly erroneous practice in Courts in direct contravention

of the law on the subject, 29 C.W.N. 711. Non-compliance with the provisions of this section deprives the accused of the valuable right of checking the correctness of the depositions. He is virtually interested in the due compliance with the provisions of this section, 52 C. 159 and 721; 42 C.L.J. 585=27 Cr. L.J. 375=92 Ind. Cas. 887. It is fair both to the witness and to the Magistrate who takes down the deposition as well as to the accused to have the deposition read over as soon as the examination of the witness is over. It would avoid a conflict between any recollection of the accused's pleader, the recollection of the prosecuting Counsel and recollection of the Court as well as the recollection of the witness. Seeing these four different persons to be considered in this connection the provisions of these sections are not only a salutary provision, but a provision intended for the furtherance of justice. It is not fair to an honest witness not to have his deposition read over soon after he made it, for, if the Magistrate incorrectly recorded it and if it is read over to him some hours after, the question, would arise whether the witness is correct in saying that he did not make a particular statement and whether correction should be accepted or not, 49 M. 71. No doubt the evidence has to be read over in the presence of the accused or his pleader. He is entitled to be sure that it has been read over and that the witness has had an opportunity of correcting the written word. But the accused is not necessarily entitled to the opportunity of suggesting corrections. At the same time it would be a better course if the depositions other than mere formal ones are read over so that the accused or his pleader could hear them and give their undivided attention to them. Care would of course, have to be taken that no suggestion should be conveyed to a witnesses in the form of a correction which would make him alter the evidence but there might be obvious slips to which, under proper safeguard, attention might be called by the accused or his pleader, 5 Ran. 53 (P.C.). This section is mandatory. Omission to read over the deposition of a witness to him in the presence of the accused or his pleader, if he appears by pleader, is an illegality vitiating the trial and S. 537, *infra* has no application, 4 Pat. 231. The test for determining whether mandatory enactments are directory only or obligatory with an implied nullification for disobedience depends on the subject-matter, the importance of the provision disregarded and its relation to the general object of the statute, 52 C. 159 following 51 C. 1; see 52 C. 721; 42 C.L.J. 585; 49 M. 71; 4 Pat. 231. The evidence of each witness should be read over to him after it is completed before that of another witness commences. Reading over the deposition of all witnesses examined in one day at the close of the day does not satisfy the mandatory requirements of law. 42 C.L.J. 585=27 Cr. L.J. 375=92 Ind. Cas. 887; see 53 C. 129. The proper order to make when a committal order is made without complying with the provisions of this section is to send it back to the committal Court and have the defect in procedure cured by recalling the witnesses whose evidence was not read over to them in the presence of the accused, 28 C.W.N. 968. See 30 L.W. 646. The section applies to proceedings where a person is called upon to show cause why he should not furnish security for good behaviour and the omission to comply with its provisions vitiates such proceedings, 52 C. 632 where 52 C. 470 is followed. But the provisions of this section do not apply to proceedings under S. 107, *supra*, and it is not necessary to read over the depositions to the witnesses in the presence of the person called on to furnish security. S. 117 (2) says that such inquiry shall be made in the manner prescribed for summons cases and S. 355 *supra*, applies to trial of summons cases and so this section is not applicable, 52 C. 663. This section applies to proceedings under Ch. XII of the Code, 52 C. 437 where 52 C. 159 is followed. But see 52 C. 721, which took a very restricted view, that as the parties to those proceedings were not "accused" their attendance at the reading over of the evidence to the witnesses was not necessary. Again it was held in 29 C.W.N. 475=41 C.L.J. 357=26 Cr. L.J. 915=85 Ind. Cas. 979, that this section has no application to Ch. XII as such proceedings are summary proceeding of a quasi civil nature for preventing breaches of the peace and no right or title is decided and no one's life or liberty is in question. Reading over the deposition of the witness while other witnesses are being actually examined is not a sufficient compliance with the section as its object is that the accused may have the opportunity of ascertaining that the evidence has been correctly recorded. This is all the more important in an inquiry with a view to commit, since in certain circumstances the evidence so taken may be used as evidence against him at the trial. When such an objection is taken in the Sessions Court,

before the accused was called on to plead, the commitment was quashed and the case sent back again to be inquired into by the committing Magistrate, 23 Cr. L.J. 1237=53 Ind. Cas. 1043; 26 Cr. L.J. 927=86 Ind. Cas. 931; 52 C. 433. But the *Rangoon High Court* in 27 Cr. L.J. 669=91 Ind. Cas. 717 has differed from the view taken in 52 C. 159 and 433 and held that failure to comply with the provisions of this section unless it has resulted in any inaccuracy in the deposition of the witnesses prejudicing the accused or occasioning a failure of justice, is only a mere irregularity cured by S. 537, *infra*, and each case should be decided on its own merits. See also 3 Ran. 612 where 27 Cr. L.J. 669=91 Ind. Cas. 717 is followed. This difference of opinion is now set at rest by the recent decision of the Privy Council reported in 5 Ran. 53 (P.C.) where the view of the Rangoon High Court is accepted as correct and the Calcutta view was not followed. Reading over the deposition after completion, by the clerk, while the Court is examining other witnesses is not warranted by law and vitiates the trial, 26 Cr. L.J. 1016 (1)=87 Ind. Cas. 810 (1). This section is enacted for the protection of witnesses and the irregularity in procedure as to reading over the evidence to the witness will not afford any ground for the accused to have his conviction set aside, 7 C.L.R. 393; 12 W.R. (Cr) 44. It was sought to amend this section by providing that a witness reading over his deposition himself and also reading out the deposition in the presence of the accused only if the accused so desired, were sufficient compliance with law, but the amendment fell through and the marked conflict of judicial opinion with regard to the effect of failure to observe strictly the provisions of this section still remains. The mere reading of the deposition by the witness himself and his admitting the same to be correct is not a sufficient compliance with law, 52 C. 431; 26 Cr. L.J. 927=86 Ind. Cas. 931, 23 Cr. L.J. 951=87 Ind. Cas. 103. See also the remarks of the Privy Council in the decision reported in 5 Ran. 53 (P.C.).

Sub-section (1)—This section says that the deposition is to be read over to the witness. The provision is not complied within terms by giving the witness an opportunity of reading it himself. He may do so in a slovenly manner. He may not easily decipher the hand-writing. He may not feel the responsibility in the same way as he would, if it were read over to him. No doubt there are cases in which it would be more likely that accuracy would be obtained by the witness reading over the deposition himself, as for instance, if the pronouncement of the Magistrate or of the interpreter in a language not his own, was difficult to follow or if a witness was partially deaf. But it is dangerous in cases of criminal law to accept equivalents and except in cases where reading over to the witness would be absurd as, for example, with a stone deafman, the provision should be complied with, 5 Ran. 53 (P.C.) referring to 36 C. 955. In 36 C. 955 at 959 *Jenkins, O.J.*, condemned the practice prevailing in Courts in not reading the deposition of witnesses in the presence of the accused or his pleader as a departure from the terms of the section which are mandatory and not merely directory, and a custom to the contrary cannot alter the plain words of the Act. See also, 22 Cr. L.J. 568=62 Ind. Cas. 584 and 13 Cr. L.J. 569=15 Ind. Cas. 933. This condemnation of the practice of not complying with the provisions of this section has been approved in 23 C.W.N. 968. Again in 42 C. 240 it was held that where the deposition of a witness after being recorded was handed over to a witness to be read by him and signed in the presence of the accused, it was not a sufficient compliance with law and the deposition was inadmissible in evidence. It is clear from the wording of this section that if the accused is in attendance the evidence must be read over in his presence and it is only when he appears by pleader that the reading of the evidence in the presence of his pleader is sufficient; but on this ground alone further inquiry is not to be ordered unless it is demanded in the interests of justice, 30 C.W.N. 336=27 Cr. L.J. 509=91 Ind. Cas. 973. See also 52 C. 431. The words 'appear by pleader' are not defined in the Code and in ordinary acceptance, the words mean 'represented by a pleader' having a pleader to act and plead. In S. 205, *supra*, the word 'appear' seems to convey a double meaning seemingly connoting not merely an authority to act and plead but also authority to personate the accused but there is nothing to show that the double meaning was intended by the Legislature. It is necessary that some one should be present at the trial to look after the interests of the accused and all that S. 205 *supra*, provides is that where the Magistrate sees fit, the accused may be exempted

from personal attendance provided he engages a pleader to attend and see that the proceedings are properly and regularly conducted. The law considers that the accused's interests are properly safeguarded by the attendance of the person. A similar intention is gathered from the provisions of S. 361 *infra*, but there is nothing in the provisions of this section to indicate that the Legislature intended that the reading over of the depositions in the presence of the pleader should be complied with only in cases where personal attendance of the accused is dispensed with by the Court. The natural meaning is that if there is a pleader engaged by the accused who is present, the reading over of the deposition in his presence is full compliance with the provisions of the section if the accused does not happen to be present then, 45 C.L.J. 368 at 376-77=29 Cr. L.J. 49 at 53=106 Ind. Cas. 543. This section is enacted not only for the benefit of the witness but also of the accused. It is a mandatory provision and failure to comply with it deprives the accused of the very valuable right of checking the depositions of witnesses, 28 C.W.N. 968 where 42 C. 240; 36 C. 953 and 28 C.W.N. 119 are approved; See also 52 C. 499; 42 C.L.J. 585; 27 Cr. L.J. 1276=83 Ind. Cas. 1032; 49 M. 71. In 28 M. 308 followed in 12 C.W.N. 845 a similar view was taken and it was held that where the witness was taken aside by the clerk and evidence read over to him in a place where neither the Judge nor the Vakils were present, the deposition was taken in accordance with law and therefore inadmissible in evidence. But in 34 M. 141, it was held that a deposition irregularly recorded without complying with this section is not a nullity for all purposes even as against the person who made it and who had admitted it to be correct and in 21 M.L.J. 411, an objection taken to the admissibility of a deposition as not complying with the provisions of this section was overruled. See also 2 Cr. L. Rev. 45. In the later cases, 28 M. 308 was distinguished and a conviction for perjury of a witness was held to be sustainable even though the deposition did not comply with the provisions of this section. It is a sufficient compliance with the provisions of this section if the deposition of the witness is read over to him in the presence of a pleader for one of the several accused. A deposition so read over is admissible against the witness on his subsequent trial for perjury, 36 C. 803 at 815. But see 28 Cr. L.J. 631=103 Ind. Cas. 107, following 42 C. 250. Where it was held that a deposition signed by the witness himself after he had read over the same but not read over to him as required by this section cannot form the subject of a prosecution for perjury. There is no provision of law which makes the attestation of the deposition by the Court in the presence of the accused obligatory, 10 A. 174. Where evidence is not read over in accordance with the provisions of this section it cannot be held to be an irregularity to support the proposition that the Magistrate has decided the case on no evidence at all, 25 Cr. L.J. 89=76 Ind. Cas. 25. Where a retrial is ordered on account of the depositions of witnesses not being read over to the witnesses in the presence of the accused as required by this section, such depositions could be put to the witnesses under S. 145 of the Ind. Ev. Act for the purpose of contradicting the witnesses when examined at the subsequent trial, 6 Pat. 478. There is abundant authority to support the proposition that the accused is virtually interested in the due compliance with the provisions of this section and a failure in that respect amounts to a material irregularity which ordinarily must be taken as causing him prejudice, 28 C.W.N. 968 at 974, but it has been held after the Privy Council decision reported in 5 Ran. 53 that omission to comply with the terms of this section will not necessitate the setting aside of the proceedings unless a failure of justice has been occasioned, 28 Cr. L.J. 595=102 Ind. Cas. 172; 28 Cr. L.J. 636=102 Ind. Cas. 782; 28 Cr. L.J. 514=102 Ind. Cas. 210; 32 C.W.N. 691=28 Cr. L.J. 751=103 Ind. Cas. 799, following 5 Ran. 53 (P.C.). The word "accused" has been used in this sub-section in its wider significance as meaning a person over whom a criminal Court is exercising jurisdiction, 52 C. 437 at 439. In proceedings under S. 145, *supra*, the provisions of this section do apply to the extent at least that the evidence of each witness, when completed must be read over to him. But the parties to the proceedings are not "accused" and their attendance at the reading over the evidence of the witnesses is not necessary, 52 C. 721. The provisions of this section do not apply to proceedings under S. 107, *supra*, and the depositions of witnesses need not be read over to them in the presence of the persons called on to furnish security; S. 117 (2) says that such inquiry, shall be conducted as in summons cases to which S. 355, *supra* applies, and so this section is not applicable, 52 C. 663.

Sub-section (2).—A witness honestly desiring to correct an error in his evidence should not be deterred from doing so by the risk of a criminal charge, 10 C. 937 at 931 and if a Court instead of allowing the correction to be made proceeds to make a memorandum under this sub-section, such memorandum must be appended to the deposition itself, and care should be taken that the practice and form prescribed by law are strictly adhered to, 13 W.R. (Cr.) 17.

Sub-section (3).—This sub-section is not an additional provision requiring that the deposition in English should be translated into Vernacular to a witness who has deposed in the Vernacular, after having been first read over to him in English. It would be a grave insult to the Court, to question its integrity in giving a true rendering in the Vernacular of the deposition it has recorded. There is nothing in the wording of the section to indicate that it requires that the deposition shall first be read over as recorded in English and shall then be translated into the language in which the witness has deposed. If such had been the intention of the Legislature we should have expected the word 'also' to stand between the words 'shall' and 'be interpreted' in the sub-section, 46 C.L.J. 368 at 375=29 Cr. L.J. 49 at 52=106 Ind. Cas 545. The fact that the evidence recorded and read over to a witness in a language not understood by the witness, is no ground for setting aside the conviction of the accused in a case where the accused understood the language in which such evidence is recorded and read over to the witness, 7 C.L.R. 393.

361. (1) Whenever any evidence is given in a language not understood by the accused, and he is present in person, it shall be interpreted to him in open Court in a language understood by him.

(2) If he appears by pleader, and the evidence is given in a language other than the language of the Court, and not understood by the pleader, it shall be interpreted to such pleader in that language.

(3) When documents are put in for the purpose of formal proof, it shall be in the discretion of the Court to interpret as much thereof as appears necessary.

The distinction between this section and S. 360, *supra*, is very marked. Under this section if evidence is given in a language not understood by the accused or his pleader, it is to be interpreted into their language, while under the latter section when it is read over it is to be interpreted to the witness in his own language but there is no provision for its being interpreted to the accused. Thus if the deposition is taken down in English and the language of the accused is *Hindi* and the language of the witness is *Burmese*, the deposition will have to be taken by getting the witness's answers in *Burmese*, having them interpreted to the Court so that they may be taken in English and further interpreted to the accused in *Hindi* so that he may understand them. When however the deposition comes to be read over, as it will be in English, it will be interpreted to the witness in *Burmese*, but not to the accused in *Hindi* and if the accused knew neither English nor *Burmese*, he will be none the wiser, 5 Ran. 53 (P.C.). This section relates to the oral evidence of witnesses only, 13 W.R. (Cr.) 25. See also 24 W.R. (Cr.) 50 where it was held that not interpreting the evidence in English of a Civil Surgeon to the accused when it was understood by his Counsel who put all the necessary questions to the witness was not illegal. As to documentary evidence, though a prisoner has a right to have all or any part of any documents used in his trial translated or interpreted to him, yet documents such as *Gazette of India* or *Calcutta Gazette* merely proving a proclamation by the Government, need not necessarily be interpreted and will not come within this section, 7 B.L.R. 63 at 71.

See S. 519 *infra* which relates to the service of interpreters in Criminal Courts.

362. (1) In every case *tried by a Presidency Magistrate in which an appeal lies, such Magistrate* shall either take down the evidence of the witnesses with his own hand, or cause it to be taken down in writing from his dictation, in open Court. All evidence so taken down shall be signed by the Magistrate and shall form part of the record.

(2) Evidence so taken down shall ordinarily be recorded in the form of a narrative, but the Magistrate may, in his discretion, take down, or cause to be taken down, any particular question or answer.

(2A) *In every case referred to in sub-section (1), the Magistrate shall make a memorandum of the substance of the examination of the accused. Such memorandum shall be signed by the Magistrate with his own hand, and shall form part of the record.*

(3) Sentences *unless they are sentences of imprisonment ordered to run concurrently* passed under section 35 on the same occasion shall, for the purposes of this section, be considered as one sentence.

(4) *In cases other than those specified in sub-section (1), it shall not be necessary for a Presidency Magistrate to record the evidence or frame a charge*

Amendment.—Sub-sections (2A) and (4) are new as also the words in italics in sub-sections (1) and (3). The change is intended to remove the uncertainty which at present exists regarding the duties of a Presidency Magistrate in recording evidence and framing a charge in petty cases. It is also provided that when sentences in excess of the one, are passed, which are ordered to run concurrently, it is the heaviest sentence which determines the applicability of this section.—*Statement of Objects and Reasons.*

Scope of the section.—This section is not meant for a Presidency Magistrate to act arbitrarily and record nothing by way of evidence. The section gives him a discretion to take down the evidence or not and the discretion should be exercised judicially in a reasonable spirit and not arbitrarily. There may be no necessity to record any evidence in 'morning cases'. But where a respectable person is charged with an offence reflecting on his character and serious allegations are levelled against him, there ought to be some record of evidence to enable him in case of a conviction to go to the High Court, 10 Bom. L.R. 201=7 Cr. L.J. 194; 26 Bom. L.R. 1132. A warrant case should be tried by a Presidency Magistrate in the same manner provided by Chapter XXI of the Code subject to the provision of this section as to the mode of recording evidence, Ratanlal 539; this section does not apply to cases of security for good behaviour under S. 110 *supra* in which a reference may have to be made under S. 123 (2) *supra* to the High Court and therefore there should be a record of evidence for the High Court to exercise its powers effectively.

Sub section (1).—The wording of this section is evidently faulty, as it is not quite reasonable to suppose that the Magistrate should make up his mind as to the sentence he would pass before the evidence is recorded. The section, however, lays down by implication that the Magistrate may record evidence, when he intends, if he convicts the accused to impose a fine not exceeding rupees two hundred or to pass a sentence of imprisonment for a term not exceeding six months. Reading this and S. 411, *infra*, it may be inferred that a Presidency Magistrate need not record evidence in a case which under S. 411 is not appealable. But it does not necessarily follow from these sections that the framers of the Code intended that a Presidency Magistrate was not bound to record evidence or notes of evidence

in any case in which an appeal does not lie, and this section and S. 411 do not in themselves warrant such a conclusion, 33 C. 1036 at 1038. Where a Magistrate fails to comply with the provisions of this sub-section, the irregularity obviously prejudices the accused and the High Court will not be in a position to know exactly the allegations made in the evidence or the exact reasons on which the Magistrate based his conviction and this occasions a failure of justice which prevents the irregularity being cured by S. 537, *infra*, 26 Bom. L.R. 1232=26 Cr. L.J. 454=85 Ind. Cas. 134.

In which an appeal lies, i.e., imprisonment exceeding six months or fine exceeding rupees two hundred, the imprisonment must be a substantive sentence of six months and not imprisonment in default of payment of fine imposed, 33 C. 1036 at 1039.

Sub-section (2A) :—This Sub-section is new and refers to appealable cases. It is the duty of the Magistrate to take a note of all the material facts stated by a witness whether in examination in chief or in cross-examination, 46 C. 411. The parties are entitled to have copies of the notes of depositions made by the Presidency Magistrate and the Magistrate cannot refuse to grant such copies, 15 C.W.N. 770.

Sub-section (4) :—This Sub-section is newly added to remove doubt as to recording evidence and framing charge in petty cases. There is no obligation in law requiring a Presidency Magistrate to record evidence in cases other than those dealt with in this section. In non-appealable cases it is left to his discretion to do so or not, and the High Court would not interfere with the exercise of such a discretion, 31 C. 983. At the same time it is desirable that a Presidency Magistrate should keep some record of the statements made by the witnesses or that the judgment should indicate what these statements are, so that the High Court as a Court of Revision may judge of the propriety or legality of the orders passed, 33 C. 1036 at 1039 where 16 C. 799 is referred to 13 C.W.N. 318=9 C.L.J. 439=10 Cr. L.J. 122=2 Ind. Cas. 651; 30 A. 334. See also S. 441, *infra*, which enables a Presidency Magistrate to supplement the grounds of his decision when records are called for by the High Court in revision under S. 435, *infra*. This section does not mean that Presidency Magistrates can act arbitrarily and record nothing by way of evidence in non-appealable cases. In such cases the section merely gives them a discretion to take the evidence or not, and the discretion should be exercised judicially in a reasonable spirit and not arbitrarily. When a respectable person is charged with an offence reflecting on his character and serious allegations are levelled against him there ought to be some record of evidence to enable him in case of conviction to move the High Court in revision, 10 Bom. L.R. 201=7 Cr. L.J. 194. Failure to record evidence in the direct narration is only an irregularity and S. 537 *infra*, will apply, unless a failure of justice had occasioned thereby, 19 M. 269; 18 Cr. L.J. 336=38 Ind. Cas. 448. The discretion which is allowed to a Presidency Magistrate not to record any evidence should be exercised reasonably, 26 Bom. L.R. 1232=26 Cr. L.J. 454=85 Ind. Cas. 134.

363. When a Sessions Judge or Magistrate has recorded the evidence of a witness, he shall also record such remarks (if any) as he thinks material respecting the demeanour of such witness whilst under examination.

Remarks respecting demeanour of witness.

The object of this section is to assist the appellate Court in estimating the value to be attached to the evidence of witnesses recorded by the inferior Court. The appellate Court will have no opportunity to observe the look or manner of a witness, his hesitation, his doubts, his variations of language or his precipitancy, his calmness or consideration, 3 B.L.R. (Ap. Cr.) 20 at 24; where a Sessions Judge of experience stated in the most emphatic terms that the demeanour of a witness was evasive and inspired no confidence in him, the High Court must be assured in the most positive and convincing manner that there are no grounds for this remark before it will be justified in accepting the witness's evidence, 15 Cr. L.J. 203=32 Ind. Cas. 987. It is impossible for the High Court to ignore the very strong opinion expressed by the Sessions Judge regarding the demeanour of particular witnesses. The

learned Judge had the great advantage of seeing the witnesses in the box and of watching them as they gave their evidence, 1914 P.L.R. 125 see also 1898 P.R. (Cr.) 6; 1904 P.R. (Cr.) 7. The Magistrate's remarks on the record of the deposition of a witness are *prima facie* proof of the facts stated therein, 12 W.R. (Cr.) 51. The Magistrate no doubt is entitled to make such remarks as he thinks fit respecting the demeanour of the witness whilst under examination but his remarks "the witness falters and from his demeanour it appears he has not told the truth" would afford a good ground for transfer, as the Magistrate has already specified that he has altogether disbelieved the witness, 29 C.W.N. 316=26 Cr. L.J. 852 (1)=86 Ind. Cas. 708 (1). It is no doubt true that this section makes it incumbent on the Magistrate to record remarks, if any, as he thinks material respecting the demeanour of a witness while under examination but it is quite different thing to record a remark about the demeanour of the witness and to make or record a remark or opinion about the substance of the deposition of the witness. The parties are entitled to claim that unless expressly provided to the contrary by law, the Magistrate shall not prejudice their cases or form an opinion about the respective merits of their cases or about the deposition of their witnesses, till they have been fully and finally presented to him by Counsel, if any, in their concluding arguments and after the entire evidences has been recorded. An opinion formed and expressed by the Magistrate at an earlier stage of the case is bound to be prejudicial to the party concerned, 30 Cr. L.J. 129 at 131=113 Ind. Cas. 321. Although a Magistrate or Judge is entitled to note the demeanour of a witness when examined before him, it is generally undesirable to pronounce an opinion on the credibility of the witness until the whole evidence is recorded, Weir II, 335. A Magistrate is not entitled to take into consideration the appearance and the manner of speech of an accused person in arriving at his guilt, 23 Cr. L.J. 161=65 Ind. Cas. 625; see 39 B. 386. There is no law by which an accused person can either by words or gestures or exposing himself to certain physical treatment be made to implicate himself in the crime of which he is accused. Such an idea is highly repugnant to the proper administration of justice, 1 Pat. 242. The right of Magistrates to make disparaging remarks on persons who appear before them or are named in the course of a trial is one which should be exercised with great reserve and moderation especially when the person disparaged has had little or no opportunity of explaining or defending himself. It would involve a grave danger to the administration of justice if witnesses were restrained from stating their real opinions for fear of displeasing the Magistrate before whom they are giving their evidence and great caution should be taken to avoid producing such a result, 1904 P.L.R. (Cr. J.) 21 at p. 79-80.

364. (1) Whenever the accused is examined by any Magistrate or by any Court other than a High Court established

Examination of
accused how record-
ed.

by Royal Charter or the Chief Court of Oudh or the Chief Court of Sind* the whole of such exami-

nation, including every question put to him and every answer given by him, shall be recorded in full, in the language in which he is examined, or, if that is not practicable, in the language of the Court or in English: and such record shall be shown or read to him, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

(2) When the whole is made conformable to what he declares is the truth, the record shall be signed by the accused and the Magistrate or Judge or such Court, and such Magistrate or Judge shall certify under his own hand that the examination was taken in his presence and

* Added by Act XXXIV of 1926.

hearing and that the record contains a full and true account of the statement made by the accused.

(3) In cases in which the examination of the accused is not recorded by the Magistrate or Judge himself, he shall be bound, as the examination proceeds, to make a memorandum thereof in the language of the Court, or in English, if he is sufficiently acquainted with the latter language; and such memorandum shall be written and signed by the Magistrate or Judge with his own hand, and shall be annexed to the record. If the Magistrate or Judge is unable to make a memorandum as above required, he shall record the reason of such inability.

(4) Nothing in this section shall be deemed to apply to the examination of an accused person under section 263 *or in the course of a trial held by a Presidency Magistrate.

Amendment—In Sub-section (1) the words 'or the Chief Courts of Oudh or the Chief Court of Sind' are newly added in sub-section (3) the words "*unless he is a Presidency Magistrate*" have been omitted and in sub-section (4) the words "*or in the course of a trial held by a Presidency Magistrate*" have been added by Act XXXVII of 1923 to remove certain anomalies and to make it clear that in cases where an appeal lies the Presidency Magistrate shall take down a memorandum of the examination of the accused as provided by sub-section (2A) and in non-appealable cases no record of the examination of the accused need be made.

Scope of the section.—The provisions of this section are mandatory and omission to comply with them vitiates the trial, 29 C.W.N. 939=26 Cr. L.J. 1032=87 Ind. Cas. 920; 52 C. 403; 24 Cr. L.J. 497=72 Ind. Cas. 951. This section does not empower a Court to examine an accused person. It merely lays down the mode of recording the examination of the accused empowered by the other provisions of the Code. The examination referred to in this section is subject to the purpose mentioned in S. 342 *supra*, viz., to enable the accused to explain any circumstances appearing in evidence against him, 10 M. 293; 4 Bom. L.R. 461; 14 A. 242; 15 C.L.J. 323=13 Cr. L.J. 233=14 Ind. Cas. 667. A record of the examination of the accused under the provisions of this section is obligatory and where the absence of it causes serious prejudice to the accused the trial is vitiated and must be set aside, 52 G. 446. The rules laid down in this section as to the mode of recording statements are applicable to confessions taken before inquiry or trial under S. 164, *supra*, and to examination of accused under S. 342, *supra*, 1883 A.W.N. 243. This section applies only to inquiries and trials and does not apply to investigations, 10 B.H.C.R. 166. The examination may take place either before the commencement of the inquiry resulting in the commitment of the accused or during inquiry when the accused is questioned under S. 209 and S. 342, *supra*, 21 B. 495 at 498, but such examination cannot be had before the stage at which the examination of the accused is authorised, 2 C.W.N. 702. This section does not apply to proceedings under S. 202, *supra*, as the person examined was not in the position of an accused who was being tried for any offence, 32 C. 1033.

Sub-section (1): Any Court other than a High Court.—No special provision is made for recording the examination of the accused by the High Courts. S. 353, *infra* only deals with the manner of taking down evidence.

Every question put and every answer given must be recorded in full.—“Statements of accused persons should, as far as practicable be recorded in the language used by the accused, both answers and, be it noted, questions, being taken down as nearly as possible in the actual words. A statement may imperceptibly change its meaning in the process of passing through the mind of another person, who expresses in different, though

* Substituted by S. 2 (b) of Act XXXVII of 1923.

possibly, in better language what he considers to be the true meaning of the deponent but who has a preconception of the facts in his mind to which he is unconsciously aiming the narrative to conform".—*Report Eng. Pol. Commission*. To understand correctly the statement of the accused it is provided that every question put to him and every answer given by him must be recorded in full, but questions should not be put in the nature of cross-examination. Nor should they be put in such a way as to elicit incriminating answers from him, 6 C.L.R. 331; 13 A. 343, but the mere absence of questions in the accused's statement would not make it inadmissible in evidence, 12 C.L.R. 120. Unless the accused is prejudiced in his defence, 28 Cr. L.J. 341=100 Ind. Cas. 821. Confessions under S. 164, *supra*, are to be recorded in the manner provided by this section, and S. 533, *infra*, will not render a confession admissible when no attempt at all has been made to conform to the provisions of this section, 9 M. 224, but when it is not obligatory on a Magistrate holding an inquiry to record a statement in writing, such statement or confession may be proved by the oral testimony of the Magistrate, 45 M. 230.

In the language in which he is examined.—When the statement was made in one language and communicated in another language to the Magistrate through a sworn interpreter and again translated by the Magistrate into English and so recorded, the High Court in 21 C. 642 at 660 observed—"The law requires ordinarily that such a statement should be recorded in the language of the person making it, the object being so represent the very words and expressions used as to ensure accuracy, and prevent misrepresentation or misconstruction of what was said. If such a record is not practicable the law directs that the statement be recorded in the language of the Court or in English. If, however, as in this case, a second translation be made, and the statement be recorded as so understood, the accuracy which the law contemplates is made more remote." If an interpreter is employed, the examination should be recorded in the language in which it is communicated to the Court by the interpreter, 5 C. 826. If the answers to the questions put to the accused were not taken down in accordance with the provisions of this section, it is doubtful whether such a defect could be cured by S. 533, *infra*, 15 C. 593 (F.B.).

In the language of the Court.—The language of the Court is to be determined by the Local Government under S. 533, *infra*.

Shall be shown or read to him.—The examination of the accused after it is recorded in full is to be shown or read to him and not merely read over to him as contemplated by S. 360, *supra*. See 24 Cr. L.J. 497=72 Ind. Cas. 961.

The record shall be signed by the accused.—The recorded statement when not signed by the accused is inadmissible in evidence until the defect is remedied as provided by S. 533, *infra*, 1883 A.W.N. 243; 1896 A.W.N. 161; want of signature of the accused to the recorded statement will not vitiate the conviction if the record is admitted and used in evidence without objection, 11 B.H.C.R. 237. The omission to obtain the signature or mark of the accused to a confession was a defect which did not affect the defence on the merits and the defect was cured by S. 533, *infra*, and though the record of the confession is inadmissible, parol evidence could be given as to the terms of the confession and used against the accused, 23 B. 221; 4 Bom. L.R. 783, and objection to the admission in evidence of such unsigned statement may be waived and could not be taken as a ground in appeal, 11 Bom. L.R. 237. But when no record whatever was made of such a confession, S. 533, *infra* has no application, for that section only provides for cases where a confession recorded did not strictly comply with the provisions of this section, 35 A. 260. When the accused cannot sign his name, his mark is sufficient for the requirements of this section, Weir II, 437. A thumb impression affixed to a confession by an accused who is able to write his name is not a signature under clause (52) of S. 3 of the General Clauses Act. Even a mark is to be considered a signature only in the case of a person unable to write his name, 32 C. 550. Refusal of the accused to sign the statement is an offence punishable under S. 180, I.P.C., 39 A. 399. The provision as to the accused signing the record is merely directory of what the procedure should be. The section itself says that the record shall be signed by the accused but it imposes no penalty on him if he does not sign it. The procedure indicated involves the

Magistrate offering the record for the accused's signature but it does not empower the Magistrate to require his signature. It is only when a person refuses to sign a statement, which a public servant is legally empowered to require him to sign that he renders himself liable to punishment, 3 Cr. L.J. 203—3 L.B.R. 199 following 4 B. 13. But see 15 A.L.J. 291 which differs from the view taken in 4 B. 13.

Magistrate or Judge shall certify with his own hand.—The certificate need not be written by the presiding officer of the Court. It is sufficient if it is signed by him, 1900 A.W.N. 203; 8 W.R. (Cr.) 55. Unlike S. 164, *supra* this section does not prescribe any particular form for the certificate. Omission to certify the confession in the manner provided by this section is not such a material error as will justify the High Court in setting aside the conviction, Weir II, 436. A certificate which contained the words "taken by me," but did not mention that the statement was taken in his hearing, was treated as substantial compliance with this section, 5 C. 958, and the defect in the certificate could be cured by examining the Magistrate, 22 M. 15; 23 B. 221; 3 C.W.N. 387; 8 C.W.N. 22.

Sub-section (3).—The memorandum mentioned in this sub-section must be wholly written and signed by the Magistrate himself with his own hand and shall be annexed to the record, but it is not necessary that an English memorandum referred to herein should be made in respect of confessions recorded under S. 164, *supra* as the manner of recording such confessions is fully set out in sub-sections (1) and (2) of this section, 14 C. 539; this attestation is unnecessary when the confession is made to the trying Magistrate as such confession amounts to an admission of the accused on which the Magistrate may convict him without any further record, 3 C. 756.

Sub-section (4).—S. 263 deals with the preparation of record in cases where there is no appeal in summary trials. In a summary trial of a warrant case, it is not necessary for the Magistrate to take down the questions put and the answers given in detail, 6 Pat. 504.

365. Every High Court established by Royal Charter and the Chief Courts of Oudh and Sind† shall, from time to time, by general rule, prescribe the manner in which evidence shall be taken down in cases coming before the Court, and the evidence shall be taken down in accordance with such rule.

Record of evidence
in High Court.

Amendment.—The words 'and the Chief Courts of Oudh and Sind' have been newly added. The word "may" has been altered into "shall" and this makes it obligatory on the High Courts to prescribe the manner in which evidence should be taken down in cases coming before them, and for the words "and the Judges of such Court shall take down the evidence or the substance thereof in accordance with the rule (if any) so prescribed" the words "the evidence shall be taken down in accordance with such rule" have been substituted. Under this section a Judge is not bound to record evidence in his own hand. All that the section requires is that there should be a record of the evidence. None of the High Courts have yet framed any rules under this section.

CHAPTER XXVI.

OF THE JUDGMENT.

"Courts have but one function, that is to insure just and righteous judgments between parties who are not able to settle their differences. Criminal Courts deal with the State on the one hand and the offenders against its laws on the other. Both sides have the right to demand that the judgments of the Court shall speak the truth in every case. If the accused is guilty he should be so adjudged by the Court. If he is innocent, every consideration demands that he be acquitted. It is the final judgment of the Court, not the method of

† Added by Act XXXIV of 1925.

pronounced is open Court although it is written and even signed, 11 A.L.J. 743=14 Cr. L.J. 562=21 Ind. Cas. 162. As to what is meant by open Court see S. 352 *supra*. Where a Sessions Judge at the end of a trial wrote a judgment setting forth the finding of the Assessors and adding his own finding agreeing with the Assessors that the accused were not guilty, and acquitted them on a later date prefixed to it a more detailed judgment giving full reasons, it was held that the error in procedure was a mere irregularity cured by S. 537 *infra*, 43 M. 913 (F.B.). See 23 C. 502. When a Presidency Magistrate at the conclusion of the case passed a sentence orally and wrote his judgment afterwards, it was held that this is only an irregularity and not an illegality. The legality or illegality of a judgment in consequence of its delivery after sentence is a question which can only be answered in the light of circumstances of each case, 13 Bom. L.R. 635=12 Cr. L. J. 457=11 Ind. Cas. 993. A Magistrate should not pronounce judgment in the absence of the accused. Where an accused person present throughout a trial when evidence was taken, absconded, and on his re-arrest the Magistrate re-pronounced his judgment which he had pronounced during his absence, it was held that S. 537 *infra* applied to the case, Ratanlal 323, but when pronouncing a judgment of acquittal, it is unnecessary to have the attendance of the accused. A judgment is not considered as delivered as required by this section unless and until it is written, signed, dated, and pronounced in open Court. The last three requisites must take place on the same occasion, 40 M. 108.

Loss of judgment.—The Court has inherent power in case of loss or destruction of a judgment or a judicial record to re-write from memory the substance of it and place it on record, 38 M. 498 ; 11 C.L.J. 243 at 238 ; 8 C.L.J. 521 ; 25 M.L.J. 555. The loss of record after conviction is no ground for acquitting the accused for the logical conclusion from such an argument would be that in the event of a wholesale destruction of records by fire or earthquake etc., all the accused whose records have been so lost and who sought relief in appeal or revision would be entitled to acquittal. There is no authority in law for such a proposition, 18 Cr. L.J. 737=49 Ind. Cas. 737.

367. (1) Every such judgment shall, except as otherwise expressly provided by this Code, be written by the presiding officer of the Court or from the dictation of such presiding officer in the language of the Court, or in English ; and shall contain the point or points for determination, the decision thereon, and the reasons for the decision ; and shall be dated and signed by the presiding officer in open Court at the time of pronouncing it *and where it is not written by the presiding officer with his own hand, every page of such judgment shall be signed by him.*

Language of judgment
Contents of judgment

(2) It shall specify the offence (if any) of which, and the section of the Indian Penal Code or other law under which the accused is convicted, and the punishment to which he is sentenced.

Judgment in alternative.

(3) When the conviction is under the Indian Penal Code and it is doubtful under which of two sections, or under which of two parts of the same section, of that Code the offence falls, the Court shall distinctly express the same and pass judgment in the alternative.

(4) If it be a judgment of acquittal, it shall state the offence of which the accused is acquitted and direct that he be set at liberty.

(5) If the accused is convicted of an offence punishable with death, and the Court sentences him to any punishment other than death, the Court shall in its judgment state the reason why sentence of death was not passed :

Provided that, in trials by jury, the Court need not write a judgment, but the Court of Session shall record the heads of the charge to the jury.

(6) *For the purposes of this section, an order under section 118 or section 123, sub-section (3), shall be deemed to be a judgment.*

Amendment—The italicised words in sub-section (1) and sub-section (6) are new

Object of the section.—The object of the Legislature in formulating rules as to judgments was to insure that a criminal Court should consider the case before it, in its different headings and should on such a consideration arrive at definite conclusions and that the judgment should show that, in fact, that the Court had considered the evidence, in the case of first instance or in the case of an appeal and had found in a case of conviction that the facts proved to the satisfaction of the Court, brought an offence home to the accused person whom the Court convicted, 19 A. 506 (F.B.) ; 14 A. 242.

Particulars which a judgment should contain.—(1) Name of accused ; (2) offence charged ; (3) finding on all charges ; (4) punishment ; (5) list of witnesses, material objects and exhibits ; (6) opinion of Assessors in Assessor cases or verdict of Jury ; (7) signature and jurisdiction of the Presiding Officer.

Judgment shall be written by a Presiding Officer in the language of Court or in English.—The judgment is to be written by the Presiding Officer of the Court. But when the President of a Bench of Magistrates is in a minority as to conviction or acquittal, the judgment should be written by a member of the majority of the Bench to avoid a conviction without stating reasons or a judgment of acquittal, 51 M. 338. See also 29 Bom. L.R. 1870=28 Cr. L.J. 1025=108 Ind. Cas. 209. By the amendment made in sub-section (1) introducing the words "*or from the dictation of such presiding officer,*" dictating judgments orally to a shorthand writer is permitted. But by a further amendment it is made imperative that each page of the judgment transcribed from dictation should be signed by the Presiding Officer. Even before this amendment it was held that where the judgment was not in the handwriting of the Magistrate, but was actually dictated and signed by him, it was a mere irregularity cured under S. 537, *infra* 4 C.L.J. 411. The judgment must be written in the language of the Court or in English and if this is not strictly complied with, it is only an irregularity cured by S. 537, *infra*, 4 C.L.J. 232=4 Cr. L.J. 162.

Shall contain the point or points for determination.—"The decisions of judicial officers should be written in a uniform, concise and complete plan neither too prolix nor omitting all reference to facts. First there should be concise reference to the main facts and proofs on which the decision is founded ; secondly the deductions and reasons should follow and in due course will come the sentence or decisions. When the judgment makes a reference to witnesses or accused persons, Judges should not content themselves with merely mentioning their numbers in the list, but shall also mention their names. The name of the person referred to should be distinctly stated *Oudh. Cr. Dig. p. 22*, see also 19 A. 506 (F.B.). A judgment should fulfil the conditions in this section and shall contain the points for determination, the decision thereon, and the reason for the decision, and the omission to write a proper judgment is not an irregularity cured by S. 537, *infra*, 37 C. 194 ; 17 Bom. L.R. 1095 ; 27 Cr. L.J. 343=22 Ind. Cas. 835. Similarly an appellate Magistrate after hearing the parties passed the order "*appeal dismissed under S. 423, Cr. P.C.*," it was held that it did not fulfill the conditions of this section, and S. 537, *infra* cannot cure such a defect as it was not a case of omission or irregularity in a judgment, but the absence of a

conscientious scruples to pass death sentences in proper cases, they ought to resign their office and not to throw on the High Court the unpleasant duty of issuing notice to the accused to show cause why death sentence should not be passed and then enhance the sentence to one of death, (*M. H.O.*) *Cr. A. No. 835 of 1927*. See 3 L.B.R. 163=4 *Cr. L.J. 132*. Judges have no right to devolve their responsibility in respect of the sentence in capital cases on a higher tribunal, 3 L.B.R. 111. To justify the passing of the lesser sentence of transportation for life in a conviction for murder, the Judge should find extenuating circumstances. Death sentence is the normal sentence in a conviction for murder and the mitigated sentence of transportation for life is the exception. It is not for the Judge to ask himself whether there are reasons for imposing the penalty of death but whether there are reasons for abstaining from doing so, 1 L.B.R. 216 (F.B.). The rule is that primarily capital sentence is the normal punishment for murder and sufficient reasons should be assigned for passing the lesser sentence, 29 *Cr. L.J. 540*=109 *Ind. Cas. 364 following 22 Cr. L.J. 757*=64 *Ind. Cas. 277*. The fact that the accused is a woman is no ground for not passing a death-sentence 1888 A.W.N. 134. The law gives a discretion to the trial Court as to which penalty should be imposed in a case of murder. But this sub-section enacts that where an accused person is convicted of an offence punishable with death and the Court sentences him to any other punishment the Court shall state reasons why the sentence of death was not passed. The Code does not indicate what reasons should be considered sufficient for refraining from passing a sentence of death in a conviction for murder. Judges must not shirk from doing their duty however painful it may be and must pass capital sentences in cases of deliberate murder, 3 L.B.R. 163=4 *Cr. L.J. 132*. The reasons justifying the infliction of the lesser penalty must be such as are in accord with the established legal principles. Intoxication furnishes no ground for mitigating the punishment. Voluntary drunkenness does not take away responsibility of any kind unless drunkenness amounts to unsoundness of mind so as to enable insanity to be pleaded by way of defence, or the degree of drunkenness is such as to establish incapacity in the accused to form the intent necessary to constitute the crime; drunkenness is neither a defence nor a palliation, 7 *Lah. 141* where 1920 A.C. 479 and 13 *Cr. L.J. 864*=17 *Ind. Cas. 800*; 18 *Cr. L.J. 868*=41 *Ind. Cas. 930* are followed. Even where the accused is a pregnant woman, capital sentence should be passed but the execution of the sentence shall be postponed till after delivery, 15 *W.R. (Cr.) 66*. See S 382, *infra*. The fact that the dead body of the murdered person has not been found should not influence the Court from refraining to pass a capital sentence, 3 A. 383. The fact that the accused murdered his victim to escape from custody is not a sufficient reason for inflicting a lesser penalty, 28 *Cr. L.J. 860* (2)=104 *Ind. Cas. 636*. So also the fact that evidence for the prosecution is purely circumstantial, 1915 M.W.N. 34=16 M.L.T. 535=16 *Cr. L.J. 14*=26 *Ind. Cas. 318*. Youth alone in every case is not an extenuating circumstance as would justify the infliction of the lesser penalty, 29 *Cr. L.J. 540*=109 *Ind. Cas. 364 following 22 Cr. L.J. 757*=64 *Ind. Cas. 277* but the age of the accused may be a sufficient ground for passing a lesser sentence, 11 C.W.N. 904; 1915 M.W.N. 34=16 M.L.T. 535 =16 *Cr. L.J. 14*=26 *Ind. Cas. 318*. Mere suspicion of a wife's fidelity is no extenuation for not passing death sentence, 30 L.W. 630=1929 M.W.N. 269. See notes at page 57.

Proviso.—The object of the heads of charge to the Jury is to inform the High Court, should occasion arise, of what direction the Judge gave in law to the Jury and the nature of his summing up of the evidence not only for the prosecution, but also for the defence, 1 *Pat. L.J. 317*; 34 C. 693; 36 C. 281; 39 A. 349; 26 C.W.N. 996; 43 C.L.J. 537. In trials by Jury, the Court of Session is bound to record the heads of the charge to the Jury and need not write a separate judgment. No doubt the law requires that the heads of charge to the Jury should be recorded but it is equally clear that as the law allows an appeal in cases tried by a Jury on the grounds of misdirection, the charge should be in such a form as to enable the Court of appeal to say and be satisfied that it was delivered with sufficient fullness to the Jury and that it is such as to enable the Court of appeal to say that all the points of law and fact were clearly and correctly explained to the Jury, having regard to the evidence adduced in the case, 29 *Cr. L.J. 478*=101 *Ind. Cas. 698 following 34 C. 693*; 30 C.W.N. 693. The heads of charge should include such statement as will enable an appellate Court to decide whether the evidence has been properly laid before the Jury or whether there

has been any misdirection, 1903 A.W.N. 232. The Judge should give sufficient indication in his charge to the Jury that he has complied with the law, 25 C 736 and 561. It is not necessary that the heads of charge to the Jury should be reduced to writing before delivery of the charge, but they ought to be written as far as possible thereafter and when the facts are fresh in the Judge's mind, they should represent with absolute accuracy the substance of the charge and be such as to enable the High Court on appeal to see distinctly whether the case was fairly and properly placed before the Jury, 36 C. 231; 10 Bom. L.R. 565. The proviso does not require that the heads of charge to the Jury should be a *verbatim* reproduction of the Judge's observations. This is negatived by the language of the proviso itself. Where it is expressly stated that the judgment need not be written but merely the heads of charge and it is not feasible to have a *verbatim* report of the Session Judge's charge if he delivered it extemporarily as there is no staff of stenographers, as a rule available for such a purpose; Nor is it necessary that the charge must be written out, beforehand although many Sessions Judges do prepare their charges by writing out prior to the delivery. Such a practice would surprise most experienced Judges of Assize and would and must be a matter at times of considerable delay and inconvenience and not in the spirit of S. 297 of the Code which contemplates the Judge charging the Jury soon after the defence case and the prosecutor's reply, if any, are concluded or S. 296 which touches on the undesirability of the separation of the Jury prior to the charge. But whether the heads of charge are written out before delivery or not, or taken down *verbatim* they should be placed on record by the Judge as soon as it is possible for him to do so whilst what he said is fresh in his recollection. The record need not be meticulous or lengthy but it must give accurately the substance of what the Judge said to the Jury so that the High Court may, if occasion arises be able to ascertain from this record, whether the law and the facts relating to the case were fairly and properly put to the Jurors, which can only be decided by looking at the charge itself in the light of the circumstances of each case, 4 Pat. 626 following 1 Pat. L.J. 317=17 Cr. L.J. 353=35 Ind. Cas 657; 30 C.W.N. 693. The expression 'heads of charge' to the Jury must be construed reasonably and must be held to include such statements of the Judge as will enable an appellate Court to decide whether the evidence has been properly laid before the Jury or whether there has been misdirection, 10 Bom. L.R. 565; 1903 A.W.N. 232; 34 C 698 No doubt under this section a Judge is not required to write out in *extenso*, the charge which he addresses the Jury but the law requires that the Judge shall set forth in writing the headings of his charge to the Jury, and such headings afterwards form part of the record of the proceedings in the trial before him. As the term 'heads of charge' itself implies, the Judge must faithfully record the lines upon which he addressed the Jury, both on the evidence and on the law and the object of these heads is to inform the High Court should occasion arise, of what direction he gave in law to the Jury, and the nature of the summing up of the evidence not only of the prosecution but also of the defence. But the heads of charge do not purport, nor are they intended by Statute to be an exhaustive detail of every particular which the Judge may have addressed to the Jury. It is undoubted law that it is the sole function of the Judge to direct the Jury on all matters of law and the Jury must take their direction in law from the Judge. It is equally certain that the Judge must present the main case for the prosecution and for the defence fairly for the consideration of the Jury. But this does not mean that he must in every particular and in every detail address himself to every suggestion put forward by the defence. His duty is fairly and candidly to point out the main and salient features of the case from the point of view of the prosecution and of the defence. And in doing so he is entitled to take into considerations the speeches made upon both sides, by the Crown and by the accused's Counsel in considering his presentation of the evidence to the Jury. The function of these heads is for the guidance and information of the High Court and it is for the Judges on appeal to construe the heads of charges as prepared by the Judge and see if from such heads the Judge has fairly and properly directed the Jury on points of law and whether he has fairly and properly reviewed the evidence for the prosecution and the defence. The Heads of charge should record in an intelligible form and with sufficient fairness the points of law and the directions given by the Judge to the Jury and the record should present with accuracy the substance of the charge by the Judge to the Jury. In considering the

language used one must not peruse the heads of charge as they were in an indictment. The method of expression and its form may be unsatisfactory but if in substance from the frame of the Heads of charge what were the directions given to the Jury by the Judge and they were right and proper, then there can be no ground of complaint even though the phraseology and form adopted be open to question. What one has to see and consider from the words used is whether the directions given are fair and right. Mere informality in expression or in form would not be sufficient to invalidate a conviction. The High Court is to construe the charge as best it can and must bring its reasons and common sense upon the consideration of the record and if it is satisfied from a close inspection and examination of the record set forth by the Judge that he properly directed the Jury in points of law, it must decline to interfere with the verdict, 1 Pat. L.J. 317=17 Cr. L.J. 353 at 355=35 Ind. Cas. 637; following 34 C. 698; 38 C. 281; 12 A.L.J. 149=14 Cr. L.J. 638=21 Ind. Cas. 686. Where the case was tried partly by Jury and partly with aid of Assessors a reference to the heads of charge to the Jury is not a sufficient compliance with the requirements of this section, but a judgment containing the particulars specified in this section, however brief, should be written with regard to the charge tried with aid of Assessors, *Ratansal* 426. It is very difficult to lay down any hard and fast rule as to what amount of judgment a Judge should write in any particular case and particularly where he and the Jury are in fact performing two separate functions at the same time. A mere reference to the charge to the Jury on Assessor charges without complying with the provisions of this section as to a judgment is defective, 27 Cr. L.J. 1164=97 Ind. Cas. 748 following *Ratansal* 426; see also *Cr. A. No. 647 of 1924*; *R. T. No. 17 of 1925 (M. H. C.)*. It is neither convenient nor commendable for a Judge to embody his summing up to Assessors in his judgment, but his doing so does not render the judgment illegal or invalid, 9 C.L.J. 55=10 Cr. L.J. 325=3 Ind. Cas. 625.

Sub section (6).—The sub-section is new and it makes it clear that judgments in security proceeding should conform to the provisions of the section. See 35 C. 138 in this connection.

368. (1) When any person is sentenced

Sentence of death.

to death, the sentence shall direct that he be hanged by the neck till he is dead.

(2) No sentence of transportation shall

Sentence of transportation.

specify the place to which the person sentenced is to be transported.

Sentence of death.—See notes at p. 56-57. In some of the States in the United States of America execution is known as electrocution. The condemned person is put on the electric chair and death by electric shock takes place instantaneously. Sentence of death passed by Sessions Judges are subject to confirmation by the High Court to which the proceedings are referred (S. 374) Ss. 375 to 379 lay down the procedure to be followed by the High Court and Ss. 381 and 382 declare how sentences of death when confirmed by the High Court are to be executed. A Bill has been introduced in the Legislative Assembly to do away with death sentences.

Sentence of transportation.—To abolish this form of punishment a Bill has been introduced in the Legislature Assembly as far back as 1921 but the Bill has not yet become law till now. The Governor-General in Council is empowered to specify places in British India in which persons sentenced to transportation are to be confined and the Local Government is to make arrangements under the Prisoners' Act for the removal of such convicts.

369. Save as otherwise provided by this Code or by any other

Court not to alter judgment.

law for the time being in force, or, in the case of a High Court established by a Royal Charter, by the Letters Patent of such High Court, no Court when

it has signed its judgment, shall alter or review the same, except to correct a clerical error.

Amendment.—The opening words of the section in *italics* are new. "The proposal to repeal the words 'other than the High Court' was intended to remove the possibility of reading S. 803 as if it gave the High Courts unlimited powers of altering or reviewing their judgments. But there are cases other than those referred to in Ss. 393 and 481 of the Code in which a review of judgment is possible. We would refer to S. 434 and also to clause 26 of the Letters Patent of the Presidency High Courts. The Indian Legislature has power to amend the Letters Patent of the High Courts and the amendment introduced by clause 27 might be interpreted as an intention to amend the Letters Patent in this respect. We have therefore redrafted the amendment so as to provide that no Court shall alter or review its judgment save as provided by or under any law for the time being in force or in the case of a High Court, by its Letters Patent." *Rep. Sel. Committee.*

Scope of the section.—The Code has been amended a number of times and the Legislature has not chosen to give power of review to any Court in a Criminal case, 46 M. 382 at 403. In criminal matters the High Court has no power to review or alter its judgment, once completed and passed; (1912) M.W.N. 932; 33 A. 134; 46 C. 60; 14 C. 42 (F.B.); 19 B. 732; 33 A. 134; 7 A. 672; 20 Cr. L.J. 447=51 Ind. Cas. 271; 46 M. 382; 47 M. 423 at 430; 10 B. 176 (F.B.); 50 M.L.J. 51=23 L.W. 56=27 Cr. L.J. 184=91 Ind. Cas. 1000; 25 Cr. L.J. 370; 10 Cr. L.J. 514=3 Ind. Cas. 330; 14 Cr. L.J. 603=21 Ind. Cas. 477; 9 Cr. L.J. 305=1 Ind. Cas. 506, even though the original order was passed without hearing the petitioner, 23 M.L.J. 371=1912 M.W.N. 932=12 M.L.T. 350=13 Cr. L.J. 710=16 Ind. Cas. 518. Where a case is disposed of for default of appearance or where an order is passed to the prejudice of an accused person and by mistake or inadvertence no opportunity has been given to him to be heard in his defence such an order is not one to which the Full Bench ruling in 14 C. 42 is applicable, 46 C. 60 at 63; 47 M. 423 at 431; 50 M.L.J. 51=23 L.W. 56=27 Cr. L.J. 184=91 Ind. Cas. 1000. Where a case had been decided previously by the High Court on a reference by the Sessions Judge without hearing Counsel who had entered appearance, a second application for revision impugning the Magistrate's order on the same grounds as was put forward by the Sessions Judge will not be entertained by the High Court. No review lies under the Code although it cannot be said that a Judge cannot review the judgment or order in any case. It is contrary to all propriety that a revision or a review application should be as if could be heard by a Judge different from the Judge who heard the first application, 25 A.L.J. 1010=29 Cr. L.J. 83=103 Ind. Cas. 680. But where the High Court returned a reference made to it by the Sessions Judge without finally disposing of the case, a different Bench duly constituted had jurisdiction to hear and determine finally the case, the question whether the High Court could interfere *suo motu* and pass final orders was left open, 53 M.L.J. 633=1927 M.W.N. 835; similarly where the High Court passed a substantive term of imprisonment altering an order under S. 502 (1A), *infra*, releasing the accused on probation of good conduct by the trial court, without notice to the accused had been served and consequently there was no appearance for the accused, the High Court held it had power to vacate the order and re-hear the case after due notice to the accused, 28 Cr. L.J. 831=104 Ind. Cas. 447; see also 47 M. 423. But so long as the order is *not signed* it can be altered, 33 C. 828; 46 M. 382. So also if the judgment is *not sealed* as required it is not final, and it is open to the Judge who passed the order to alter it, 33 A. 134, *following* 21 A. 177 and 27 A. 92; 50 M.L.J. 51=23 L.W. 56. The proper course for the High Court in the case of an erroneous decision when once it has signed its judgment is to report the case to the Local Government under S. 401, *infra*; see *R.T. No. 40 of 1905 (M.H.C.)* where the learned Judges after confirming the conviction and sentence of death passed on the accused entertained serious doubts as to the propriety of the conviction the next day and holding that the High Court had no power to review the judgment already pronounced in open Court made a recommendation to Government under S. 401, *infra*, for a free pardon. But it was held in 46 C. 60 that when a case is disposed of merely for default of appearance or where an order is passed by mistake or by inadvertence without hearing the accused in his defence and to his prejudice the order of the High Court in such a case may be reviewed. See 37 M. 428, 10 C.L.J. 80=10 Cr. L.J. 287=3 Ind. Cas. 393; neither this section nor S. 439, *infra*, empowers the High Court to review the judgment of one or more of its Judges in a criminal appeal or revision, 46 M. 382.

Judgment.—The word "Judgment" is not defined in the Code. In the absence of any definition to indicate anything to the contrary it must be taken to mean and refer to the judicial act of the Court in finally disposing of the case and must, therefore, indicate only the order of the Court when it is read out and signed by the Judge and cannot be meant to refer to the formal order on the judgment to be subsequently drawn up and issued merely as a clerical act by the ministerial officers of the Court, 50 M.L.J. 51 at 53=23 L.W. 56=(1926) M.W.N. 147=27 Cr. L.J. 184=91 Ind. Cas. 1000; 26 Cr. L.J. 543=85 Ind. Cas. 383. An order of dismissal under S. 203 or S. 253, *supra*, is not a judgment. It is sufficiently clear from Ss. 366 and 367, *supra*, that it is intended to indicate the final order in a trial terminating in either the conviction or acquittal of the accused, 31 M. 543; 29 M. 126 (F.B.); 29 C. 726; 28 C. 652 (F.B.); 45 M. 352 at 402; 46 C. 60; 30 Cr. L.J. 749=117 Ind. Cas. 243. A judgment is a decision which decides a case finally so far as the Court trying the case is concerned, but the order of discharge is not a final order, 9 Bom. L.R. 250; 27 C.W.N. 651. An order under S. 421, *infra*, summarily rejecting an appeal is a judgment, 19 B. 732. The irregularity of disposing of two matters by one judgment or to record the evidence as two matters together is only an irregularity cured by S. 537, *infra*, 56 C. 400 at 408.

Save as otherwise provided by this code.—See S. 395 and S. 484, *infra*. S. 395 refers to whipping which cannot be carried out, in which case the sentence can be revised. S. 484 contemplates remitting sentences and discharging the accused punished for contempt, on his tendering an apology.

By Letters Patent of such Court.—It has been now made clear that the High Court's power to review is governed by its Letters Patent. In criminal matters, clause (25), of the Letters Patent confers full power to review a case decided in the exercise of its ordinary original criminal jurisdiction on a point of law and such power of review cannot apply to a case decided in the exercise of its appellate or revisional criminal jurisdiction, 30 Cr. L.J. 749=117 Ind. Cas. 243. The exception contained in this section is with reference to cases decided by a Judge of the High Court presiding over the Sessions when points are reserved for consideration by the Full Bench or on the certificate of the Advocate General, 45 M. 382 at 401.

Shall alter or review its judgment.—The term 'Judgment' is not defined in the Code. What is contemplated by the term 'Judgment' in this section is only a decision on the merits. In 21 C. 121 it was held that a judgment means the expression of the opinion of the Judge or Magistrate arrived at after due consideration of the evidence and the arguments. In 46 C. 60 it was held that where a case is disposed of merely for default of appearance or an order is passed to the prejudice of the accused and by mistake or inadvertence no opportunity was given to him to be heard, the High Court may review the same. A dismissal for default of appearance is not a judgment within the meaning of this section and as such is open to review by the High Court which can set aside the dismissal and restore the case to file, 30 Cr. L.J. 749=117 Ind. Cas. 243, see also 47 M. 428. An order under S. 421, *infra*, is a judgment and being final, it cannot be reviewed, 19 B. 732. So also orders passed in miscellaneous proceedings cannot be altered or reviewed, 19 Cr. L.J. 225=43 Ind. Cas. 817; 35 C. 350; 21 C.W.N. 344=18 Cr. L.J. 555=39 Ind. Cas. 700; 16 Cr. L.J. 584=30 Ind. Cas. 136; 22 B. 949. A Magistrate has no jurisdiction to review a final order passed by him under S. 145, *supra*, 35 C. 350. Nor can a District Magistrate review his previous order refusing further inquiry into a case of discharge under S. 436, *infra*, 13 Cr. L.J. 301=14 Ind. Cas. 765. Alteration or review of judgment is not allowed by a Magistrate after it is signed and delivered even where the error is patent on the face of the judgment. The only course left open to him is to make a reference to the High Court under S. 438, *infra*, through the Sessions Court; 6 Bom. L.R. 360; 22 B. 949; 10 C.W.N. 1062. Omission to proceed with a charge under S. 75, I.P.O., cannot be reviewed after passing sentence on the main charge having regard to the provisions of this section, 42 B. 202. Where a Judge added a note to his judgment throwing doubts on the conclusions arrived at by him in the judgment, it was held that the procedure adopted was most unwarranted, 2 A. 33 but where a Judge on appeal set aside the conviction but failed to order a retrial, it was held that he was not precluded from making an order of retrial subsequently, 3 M. 48. An

accidental omission to pass an order as to restoration of property under S. 520, *infra*, can be corrected under this section, 24 Cr. L.J. 159=71 Ind. Cas. 511; making of an order as to costs when the original order passed did not contain any provision as to costs is not an alteration of the previous order, 57 C. 574.

370. Instead of recording a judgment in manner hereinbefore provided, a Presidency Magistrate shall record the following particulars:—

Presidency Magistrate's judgment.

- (a) the serial number of the case ;
- (b) the date of the commission of the offence ;
- (c) the name of the complainant (if any) ;
- (d) the name of the accused person, and (except in the case of an European British subject) his parentage and residence ;
- (e) the offence complained of or proved ;
- (f) the plea of the accused and his examination (if any) ;
- (g) the final order ;
- (h) the date of such order ; and
- (i) in all cases in which the Magistrate inflicts imprisonment, or fine exceeding two hundred rupees, or both, a brief statement of the reasons for the conviction.

Scope of the section.—This section deals with judgments of Presidency Magistrates. A Presidency Magistrate should record the statement of the accused under S. 312 and this section. Clause (f) of this section says that the plea of the accused and his examination, if any, are to be recorded. It is the duty of the Magistrate to record the substance of the examination and the plea of the accused, 27 Cr. L.J. 110=91 Ind. Cas. 512. This section does not however require that a Presidency Magistrate should write a judgment. All it requires is that he should record certain particulars and in the case of a conviction and sentence of imprisonment or fine exceeding rupees two hundred, a brief statement of the reasons for the conviction. He need not comply with the provisions of S 367, *supra*, 30 C.W.N. 931=27 Cr. L.J. 1131=87 Ind. Cas. 551. This section itself does not say how the particulars are to be recorded, but there are two other sections in the Code from which light has to be gathered on this matter viz. Ss 362 and 364, *supra*. The last words of S 364 (1) namely 'or in the case of a trial by a Presidency Magistrate' were inserted in the Amending Act of 1923, thus making the other sub-sections of that section inapplicable to a record made by a Presidency Magistrate of an examination of an accused person in the course of a trial held by him. The same Amending Act introduced two sub-sections in S. 362, *supra*, namely, sub-sections (2A) and (4). Sub-section (4) of S. 362 dispensed with the recording of evidence and the framing of a charge in non-appealable cases in trials by Presidency Magistrates but said nothing about the record of examination of the accused. Sub-section (2 A) to S. 362 expressly provided for a memorandum of the substance of the examination of an accused being kept by the Presidency Magistrate signed by him in appealable cases only. The result is that non-appealable cases are now left severely alone confined to the protection that this section by its own terms would afford. It is idle to imagine that the Legislature while expressly taking away the necessity to record the evidence and to frame a charge as it has done by enacting sub-section (4) of S 362, *supra*, in non-appealable cases thought of a record in full or of the substance of the examination of the accused in such cases. The result is that while the column provided for the purpose in the form prescribed in this section must be filled up no hard and fast rule was contemplated as to how that should be done. The entry in column

(f) of the word "denies" was held sufficient compliance with law, 33 C.W.N. 543=49 C.L.J. 221=30 Cr. L.J. 526=115 Ind. Cas. 604. It requires that in cases where a Presidency Magistrate records a conviction he shall record a brief statement of the reasons which induced the Magistrate to believe the evidence for the prosecution. A judgment to the effect "I convict the accused, I believe evidence of the complainant and his witnesses" does not satisfy the requirements of this section, 17 Bom. L.R. 890=7 Cr. L. Rev. 2=16 Cr. L.J. 771=31 Ind. Cas. 371. It is not sufficient for him to record "*that the offence is proved*", 27 C. 461. The Magistrate should record his reasons for the conviction in such a manner that the High Court in revision may judge whether there were sufficient materials before the Magistrate to support a conviction, and failure to do so is a grave irregularity, which in most cases would be sufficient for interference, 46 M. 253 but where all the record before the trial Court, is available before the High Court in revision, omission to record reasons will not be a substantial failure of justice, *ibid.*, at 255. The law does not demand a full and complete statement of reasons, 31 C. 583; 27 C. 461; 13 C. 272; 6 C. 579 and in petty cases of fine, the decision may be recorded shortly, 14 C. 174. Although the section requires only a brief statement of the reasons for conviction instead of a judgment, this must be done, in such a way that the High Court in revision may be in a position to judge whether there were sufficient materials before the lower Court to support the conviction, 8 C.W.N. 587; see also 46 M. 253; 23 Cr. L.J. 602=63 Ind. Cas. 826; 21 Cr. L.J. 656=57 Ind. Cas. 674; 17 Bom. L.R. 890=16 Cr. L.J. 771=31 Ind. Cas. 371; 27 C. 461; 13 C. 272; and the omission to record some of the particulars required by this section is only an irregularity, 27 Cr. L.J. 1131=97 Ind. Cas. 651. Under S. 441, *infra*, a Presidency Magistrate when submitting the records of any proceedings called for by the High Court in the exercise of its revisional jurisdiction may submit with the records a statement setting forth the grounds of his decision, practically a new judgment setting forth any facts which he thinks material after perusing the grounds set forth in the memorandum of revision filed in the High Court, and the High Court is bound to consider such statement before setting aside the decision or order sought to be revised.

Previous conviction.—When enhanced punishment is awarded on account of previous convictions it should be set forth in the Calendar, when the previous convictions were charged and proved or confessed, *Rule 172, Mad. Cr. Rules of Pr.* This should be set out justifying the sentence imposed, 8 C.W.N. 587.

The provisions of the section do not apply to cases under Workmen's Breach of Contract Act, XIII of 1859, 27 C. 131; 4 C.W.N. 253; 20 M. 235; 4 M. 234; 11 A. 252; 16 B. 368; 6 Bom. L.R. 255.

371. (1) On the application of the accused a copy of the judgment, or, when he so desires, a translation in his own language, if practicable, or in the language of the Court, shall be given to him without delay. Such copy shall, in any case other than a summons-case, be given free of cost.

Copy of judgment, etc., to be given to accused on application.

(2) In trials by jury in a Court of Session, a copy of the heads of the charge to the jury shall, on the application of the accused, be given to him without delay and free of cost.

(3) When the accused is sentenced to death by a Sessions Judge, such Judge shall further inform him of the period within which, if he wishes to appeal, his appeal should be preferred.

Case of person sentenced to death.

This section and B. 548, *infra*, are distinct. This section refers to a copy of the judgment in the language of the accused the grant of which is compulsory as the accused is entitled to have a copy in his own language. See B. 548, *infra*, which enacts, that copies of proceedings ought to be furnished to the persons affected thereby, Court-fee payable on a copy or translation of judgment in a case other than a summons case a copy of the heads of charge to the Jury, and a copy or translation of the judgment in a summons-case, when the accused is in jail is remitted in the exercise of the powers conferred by B. 35 of the Court Fees Act by the Governor-General in Council. See *Rule 276(c) and (d) of Mad. Cr. Rules of Pr.* Similarly a copy of the charge framed under B. 210, *supra*, is exempted.

Sub-section (3).—Limitation for appeals to the High Court in cases of persons sentenced to death is 7 days under Sch. II, Art. 150 of the Limitation Act, IX of 1908. But in practice this is of very little importance, for in *Referred trials* the High Court is bound to go into the whole evidence to satisfy itself whether the conviction and sentence could be sustained and it makes no difference whether the accused has preferred an appeal or not.

372. The original judgment shall be filed with the record of proceedings, and, where the original is recorded in a different language from that of the Court and the accused so requires, a translation thereof into the language of the Court shall be added to such record.

Judgment when to be translated.

Court of Session to send copy of finding and sentence to District Magistrate.

373. In cases tried by the Court of Session, the Court shall forward a copy of its finding and sentence (if any) to the District Magistrate within the local limits of whose jurisdiction the trial was held.

The concluding words of the section are important. If there is more than one District Magistrate in any Sessions division consisting of two or more districts as contemplated by B. 7, *supra*, a copy of the finding and sentence should be sent only to the District Magistrate within the local limits of whose jurisdiction the trial was held.

CHAPTER XXVII.

OF THE SUBMISSION OF SENTENCES FOR CONFIRMATION.

374. When the Court of Session passes sentence of death, the proceedings shall be submitted to the High Court and the sentence shall not be executed unless it is confirmed by the High Court.

Sentence of death to be submitted by Court of Session.

Scope of the section.—The provisions of this section do not require the convictions but only sentences of death to be submitted, for confirmation by the High Court, 17 Bom. L.R. 1072 at 1074; 5 N.W.P.H.C.R. 130. The heading of the Chapter is, 'of submission of sentences for confirmation'. See also Ss. 378 and 381, *infra*. No considered case is cited in which it was held that upon argument that the evidence in support of the facts found by the Jury is laid open by the mere submission to the unrestricted judgment of the confirming Court, 17 Bom. L.R. 1072 at 1073=16 Cr. L.J. 818=31 Ind. Cas. 994; 2 C.W.N. 49; Ratanlal 710. Even in cases where the trial is by a Jury, the High Court must go into the facts before confirming the conviction, 2 C.W.N. 43 at 50; 19 W.R. (Cr.) 57; 30 C.W.N. 166=27 Cr. L.J. 378=92 Ind. Cas. 890. Where a Jury unanimously found the accused guilty of murder and the Judge accepting the verdict convicted and sentenced the accused to the extreme

penalty of law subject to the confirmation of the sentence by the High Court under this section, the High Court, on the evidence on record, held that it was utterly unsafe to accept the evidence adduced as conclusive and therefore acquitted the accused, 29 Cr. L.J. 833=111 Ind. Cas. 335. The entire case is open to the High Court under this section but that assumes that whatever has happened before the case comes for confirmation before the High Court has been done in strict accordance with the provisions of law and if the High Court finds that there has been no proper trial of the case before the Sessions Court, then the only course open to the High Court is to set aside the conviction and sentence and to direct a retrial of the case, 31 C.W.N. 881=36 C.L.J. 31=28 Cr. L.J. 732=103 Ind. Cas. 790.

Even where a sentence of death is passed on the unanimous verdict of a Jury the whole case is re-opened before the High Court both on matters of fact and on matters of law, 17 Bom. L.R. 1072; Ratanlal 710, see S. 418 (2). The High Court when dealing with the case as a Court of Reference is entitled to rely on evidence rejected by the Sessions Judge, 25 B. 168.

It is not proper for a Sessions Judge when referring a sentence of death for confirmation to recommend the prisoner for mercy. The law allows an alternative sentence and the responsibility of deciding whether there are sufficient grounds for not sentencing the prisoner to death vests upon the Sessions Judge himself, *Rule 218, Mad. Cr. Rules of Pr.*

For warrant of commitment under sentence of death and warrant of execution of a sentence of death, see Form Nos. XXXIV and XXXV of Sch. V of the Code.

375. (1) If when such proceedings are submitted, the High Court thinks that a further inquiry should be made into, or additional evidence taken upon, any point bearing upon the guilt or innocence of the convicted person, it may make such inquiry or take such evidence itself, or direct it to be made or taken by the Court of Session.

Power to direct further inquiry to be made or additional evidence to be taken.

(2) Such inquiry shall not be made nor shall such evidence be taken in the presence of jurors or assessors, and, unless the High Court otherwise directs, the presence of the convicted person may be dispensed with when the same is made or taken.

(3) When the inquiry and the evidence (if any), are not made and taken by the High Court, the result of such inquiry and the evidence shall be certified to such Court.

Under this section the High Court may itself record further evidence and the presence of the accused is not necessary, 23 M. 523, or it may admit evidence rejected by the Sessions Court, 25 B. 168, or it may order a new trial on the ground that the evidence was incomplete and further evidence was required, 6 C.W.N. 921; 19 C.W.N. 856. In 12 Cr. L.J. 412, the Chief Court of Punjab made a local inspection of the scene of crime, and admitted also further evidence in an appeal from a conviction for murder.

Power of High Court to confirm sentence or annul conviction.

376. In any case submitted under section 374, whether tried with the aid of assessors or by jury, the High Court—

(a) may confirm the sentence, or pass any other sentence warranted by law, or

(b) may annul the conviction, and convict the accused of any offence of which the sessions Court might have convicted him, or order a new trial on the same or an amended charge, or

(c) may acquit the accused person :

Provided that no order of confirmation shall be made under this section until the period allowed for preferring an appeal has expired, or, if an appeal is presented within such period, until such appeal is disposed of.

Practice.—There has been a practice long established and well recognised that when an accused appears before the Judge on a capital charge, the Judge is accustomed to request a member of the bar who practices before him to undertake the defence of the accused. That obligation has always been recognised by the profession which always have willingly undertaken the defence of the accused so charged. Where a Judge did not appoint or request any member of the profession to conduct the defence and the case was practically tried *ex parte* and the difficulties which appear in the evidence have not been cleared up in the course of the cross-examination either by the accused himself or the Judge, the High Court finding it unable to confirm the conviction on the evidence as it stood under sub-section (b) of this section ordered a new trial asking the Judge to see that some gentleman of the bar represented the accused before him, 19 C.W.N. 566=18 Cr. L.J. 431=29 Ind. Cas. 321. In any case which comes before the High Court or a Court of Session, the Court may engage a pleader to defend an accused person if the charge is such that a capital sentence is possible and the accused has not engaged a pleader and is not possessed of sufficient means to do so, *Mad. Cr. Rules of Pr. Rule 150*; the Court of Session or the High Court shall use its discretion as to the appointment of a pleader for the defence and if there are several accused and their defences are such, that it appears to be undesirable to entrust the defence of all the accused to one pleader, more pleaders may be appointed as the necessity of the case may require, *ibid Rule 152* and the pleader or pleaders so appointed shall be furnished with the necessary papers and allowed sufficient time to prepare for the defence, *ibid, Rule 153*.

The High Court may confirm or annul conviction.—Under this section the High Court is entitled to go into facts even when the conviction is by a Judge assisted by Jury although the trial was by a Jury. S. 375, *supra*, and this section go clearly to show that the High Court must deal with the case upon the facts as well as with reference to any questions of law arising in it and that its powers are not limited in the way they are in an appeal from a conviction had in a trial by Jury, 2 C.W.N. 49 at 50; 19 W.R. (Cr.) 57; 23 Cr. L.J. 33 (F.B.) =64 Ind. Cas. 657. Under this section the High Court is entitled to convict the accused when acquitting him on a charge of murder of the offence under S. 201, I.P.C., causing disappearance of the evidence of murder, provided there was evidence on record to sustain it even though the trial Court had not recorded a finding on that count, 14 Cr. L.J. 278=19 Ind. Cas. 710. See also the recent decision of the Privy Council in 6 Lah. 226 where it was held that the conviction for the lesser offence under S. 201 I.P.C. could be sustained even though there had been no express charge under S. 201 where there was evidence on record to establish the charge. In 17 Bom. L.R. 1072 at 1073=16 Cr. L.J. 818=31 Ind. Cas. 993, it is stated thus "It appears to be the practice of this Court that where a prisoner has been sentenced to death even though the conviction was had on the unanimous verdict of a Jury, the whole case is re-opened before the High Court both on matters of fact as well as on matters of law. I desire however to reserve my opinion as to the correctness of the practice to which I have alluded, should the question of its correctness ever arise for judicial decision." But it was held before the amendment that this will not apply to the case of a co-accused not sentenced to death, and an accused on whom a sentence of transportation for life is passed may be in a worse position than a co-accused sentenced to death, 2 C.W.N. 49; 11 B.L.R. 14, but now see the new sub-section (2) to S. 418, *infra*, which renders obsolete the above decisions, and enacts that in a

case tried by a Jury when any person is sentenced to death, any other person convicted with him and given a lesser sentence may appeal on a matter of fact as well as on a matter of law.

Or order a new trial.—The High Court when acting under this section may set aside the conviction and order a new trial when it is of opinion that the evidence was incomplete and further evidence was necessary, 6 C.W.N. 129.

Proviso.—It is significant that under this proviso it is only after the disposal of any appeal which could be on a matter of law where the trial is by Jury under S. 418, *infra*, that the power of confirmation or otherwise of the sentence of death can be exercised by the High Court, 17 Bom. L.R. 1072 at 1074=16 Cr. L.J. 818=31 Ind. Cas. 994

377. In every case so submitted, the confirmation of the sentence or any new sentence or order passed by the High Court, shall, when such Court consists of two or more Judges, be made, passed and signed by at least two of them.

Confirmation or new sentence to be signed by two Judges.

378. When any such case is heard before a Bench of Judges and such Judges are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge, and such Judge, after such hearing as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

Procedure in case of difference of opinion

Scope of the section.—This section lays down the procedure to be followed in cases where there arises a difference of opinion between the Judges hearing a case submitted for confirmation of sentence, when such Judges are equally divided. The case with their opinions shall be laid before a third Judge and the judgment or order shall follow the opinion of the third Judge. A deliberate opinion of one Judge in favour of acquittal upon a grave question of the weight of evidence in a case heard by a Bench of two Judges should *ipso facto* constitute in most cases sufficient reason for creating such serious doubt that the benefit of that doubt should be given to the prisoner, 1886 A.W.N. 275. This view of *Mahmood, J.* was dissented from by a Bench in the decision reported in 1887 A.W.N. 125 on the ground that *Mahmood, J.* omitted to give any weight to the fact that in such a case as he was putting the Judge who actually heard the witness give evidence and saw their demeanour at the trial and had found the guilt of the prisoner established. The case of *Ramawami Goundan* reported in 27 M. 271 is a typical case under this section. There the Sessions Judge of Coimbatore sentenced the accused to death, subject to the confirmation of the High Court. In hearing the *Referred Trial*, *Sir Subramania Ayyar, Offg. C.J.*, and *Boddam, J.* differed in their opinion, *Boddam, J.* was for setting aside the conviction, while the *Offg. C.J.* was for confirming the conviction but for commuting the sentence of death, to one of transportation for life. The case was referred to a third Judge, *Sir Dashyam Ayyangar, J.*, under the section, and that learned Judge while confirming the conviction sentenced the accused to death as he found no sufficient grounds for commuting the sentence to one of transportation for life. See for a converse case, 17 C.W.N. 1213=14 Cr. L.J. 642=21 Ind. Cas. 882, where the third Judge before whom the case was laid passed a sentence of transportation for life on the ground that one of the Judges had expressed strong dissatisfaction of the prosecution evidence and that the capital sentence was hanging over the head of the accused for six months for which he was not responsible. See also 33 C.W.N. 1226 See also 1887 A.W.N. 125. If in any case of murder under S. 302, I.P.O., one finds two learned Judges are in disagreement over the question of sentence one favouring death penalty and the other recommending that transportation for life would meet the ends of justice, that in itself is a sufficient ground for holding that death penalty should not be inflicted. This is not an inflexible rule

or that the third Judge to whom the matter is referred on the question of sentence is not required to go into the case himself or to Judge for himself whether the case is a fit one for inflicting the death penalty, 33 C.W.N. 1226 at 1234. It was proposed to amend this state of the law, especially as to what occurred in 27 M. 271. where the third Judge differing from the two learned Judges passed a sentence of death, to have the case heard before three Judges or by another Judge sitting along with the two Judges who differed, but the amendment was not accepted, and the law now remains the same as before.

After such hearing as he thinks fit.—The third Judge is not bound to hear the parties. It is left to his discretion to hear or not, but as a matter of practice the third Judge hears the case fully since a question of life and death is involved.

Judgment or order shall follow his opinion.—Under this section the third Judge is entitled to order a retrial of the accused. See 16 L.W. 418.

379. In cases submitted by the Court of Session to the High

Procedure in cases submitted to High Court for confirmation.

Court for the confirmation of a sentence of death, the proper officer of the High Court shall, without delay, after the order of confirmation or other order has been made by the High Court, send a copy of the order under the seal of the High Court, and attested with his official signature, to the Court of Session.

This section deals with the procedure to be adopted by the High Court on the confirmation of the sentence of death in cases submitted to it. The Registrar is to send without delay a copy of the High Court's order under the seal of the High Court with his signature. Sessions Judges are directed to issue a warrant in Form No XXXV of Sch V of the Code immediately on receipt of the order of confirmation and shall appoint therein as the date of execution a day not less than 21 days, not more than 23 days from the date of such receipt and the warrant shall be accompanied by a copy of the High Court's judgment, Rule 250. *Mad. Cr. Rules of Pr.*

380. Where proceedings are submitted to a Magistrate of the

Procedure in cases submitted by Magistrate not empowered to act under S. 562.

first class or Sub-divisional Magistrate as provided by section 562, such Magistrate may thereupon pass such sentence or make such order as he might have passed or made if the case had originally been heard by him, and, if he thinks further inquiry or additional evidence on any point to be necessary, he may make such inquiry or take such evidence himself or direct such inquiry or evidence to be made or taken.

This section was introduced in the Code of 1898. It deals with the procedure to be followed in cases which are submitted to a Magistrate of the first class or Sub-divisional Magistrate, by a Magistrate who is not empowered to act under S. 562, *infra*. A District Magistrate to whom a case is sent up by a second class Magistrate has no power to send back the case for passing sentence on the ground that the provisions of S. 562, *infra* were inapplicable. He is bound by this section to pass such sentence or order as he may have passed or made if the case had been originally heard by him, 7 Cr. L.J. 449=4 L.B.R. 150. When a first class Magistrate convicts the accused and passes a sentence under this section, an appeal from such a conviction lies to the Sessions Court and not to the District Magistrate, as the proceedings of the first class Magistrate amounted to a trial giving a right of appeal to the Sessions Court under S. 403, *infra*, 17 Bom. L.R. 295=7 Cr. L. Rev. 129=16 Cr.L.J. 738=31 Ind. Cas. 333.

May pass such sentence or order, etc.—The point whether a Magistrate to whom the case is sent up could pass any other order than an order for release of the accused on probation of good conduct under S. 562, *infra*, has been decided in the affirmative in 16 Cr. L.J. 535=29 Ind. Cas. 663. See 7 Cr. L.J. 449; 8 Cr. L.J. 475=4 L.B.R. 277. In the case reported in 17 Bom. L.R. 895=7 Cr. L. Rev. 129=18 Cr. L.J. 733=31 Ind. Cas. 338, the first class Magistrate to whom the case was submitted for an order under S. 562, *infra*, instead of passing the order under S. 562, *infra*, sentenced the accused to imprisonment and fine and there it was held that the conviction was legal and an appeal from such conviction lay under S. 408, *infra*, to the Sessions Court. Can he pass an order demanding security from the accused for keeping the peace? The words "*may make such order as he might have passed or made if the case had originally been tried by him*" seem to suggest that he could pass an order demanding security.

CHAPTER XXVIII.

OF EXECUTION.

381. When a sentence of death passed by a Court of Session is submitted to the High Court for confirmation, such Court of Session shall, on receiving the order of confirmation or other order of the High Court thereon, cause such order to be carried into effect by issuing a warrant or taking such other steps as may be necessary.

Execution of order passed under S. 376.

Every confirmation order of the High Court is to be communicated by the Session Judge to the Superintendent of Jail where the prisoner is confined within 24 hours of the receipt of the order by the Session Judge and the Sessions Judge issuing a warrant in Form XXXVI of Sch. V. shall appoint therein as the date execution a day not less than 21 days nor more than 28 days from the date of such receipt, the warrant shall also be accompanied by a copy of the High Court's Judgement, Rule 250. *Mad. Cr. Rules of Pr.*

In India the sentence of death is carried into effect by hanging the condemned prisoner by the neck till he is dead. See S. 368, *supra*, but in some of the States in the United States of America a prisoner is executed by passing through his body a current of electricity which causes instantaneous death. The process is known as '*putting the condemned person on the electric chair*' and execution is known as *electrocution*; see notes at pp. 56-57.

For form of warrant to be issued under this section see Sch. V, No. XXXV, *infra*, and after a commutation, Form No. XXXVI. The warrant should be addressed to the officer in charge of the Jail and in the case of several accused a separate warrant should be addressed for each prisoner see *M.H.C. Pro. dated 13th March, 1868 and 23rd November, 1868.*

Section 4 of the Prisoners Act, III of 1900 enacts that officers in charge of prisons shall forth-with after execution of the warrant return such warrant together with a certificate endorsed thereon and signed by him showing how the warrant was executed.

382. If a woman sentenced to death is found to be pregnant, the High Court shall order the execution of the sentence to be postponed, and may, if it thinks fit, commute the sentence to transportation for life.

Postponement of capital sentence on pregnant woman.

Woman sentenced to death is found to be pregnant.—When the prisoner is quick with child such a state is always held to be a bar to eventual capital punishment, 3 W.R. (Cr.) 15.

The High Court shall order, etc.—The High Court is the only judicial tribunal empowered to postpone the execution of a sentence of death passed and confirmed on a woman who is found to be pregnant, *Weir II, 431; 15 W.R. (Cr.) 66*. The High Court if it thinks fit is also empowered to commute the sentence to one of transportation for life under S. 269, *supra*. This is an instance where the High Court after signing and pronouncing judgment may alter the judgment. In England where a woman is sentenced to death, the clerk of the Court after sentence is to ask whether the woman has anything to say in stay of execution of the sentence. If she then alleges or the Court then or later on, has reason to suppose that she is pregnant, a Jury of twelve matrons should be empannelled and sworn to try whether or not she is quick with child. The Jury may be empannelled forthwith, the Judge first ordering that all the doors be shut and no one must be allowed to leave the Court. If the matrons desire, the assistance of a medical man, a medical man is requested by the Court to retire and examine the prisoner. When his examination is concluded the Jury of matrons is recalled into Court and his evidence is given in their presence and that of the prisoner. If the Jury finds that the prisoner is quick with child the Court stays execution of the capital sentence until she has been delivered of a child or it is no longer possible in the course of nature that she should be so delivered. *Arch. Cr. Pl. Ev. & Pr., p. 221, (25th Ed.)*. It is for the prisoner to plead pregnancy and unless she has so pleaded a Jury of twelve matrons need not necessarily be appointed, 2 Cox. 261.

For form of warrant as to commutation of sentence see Sch. V, Form No. XXXVI *infra*.

383. Where the accused is sentenced to transportation or imprisonment in cases other than those provided for by section 381, the Court passing the sentence shall forthwith forward a warrant to the jail in which he is, or is to be confined, and unless the accused is already confined in such jail, shall forward him to such jail, with the warrant.

Execution of sentences of transportation or imprisonment in other cases.

Section 32 of the Prisoners Act, III of 1900 empowers the Local Government to appoint places for the confinement of prisoners under sentence of transportation and removal thereto. An order sentencing an accused person to undergo imprisonment in a police lockup which is not a jail under this section is illegal, 15 Cr. L.J. 10=22 Ind. Cas. 154. Ordinarily a sentence of imprisonment ought to commence from the time the sentence is passed unless there is some lawful reason for ordering it to commence at some future time, 3 B.L.R. (Ap. Cr.) 50=12 W.R. Cr. 47; 7 C.L.R. 393; 5 Cr. L.J. 217. The exceptions are to be found in Ss. 35, 396, 397, 398 and 426, *infra*. A Magistrate is not entitled to suspend the commencement of the sentence even of a short sentence, so as to enable an accused person to prefer an appeal.

Shall forward him to such jail with the warrant—The High Court when hearing a reference under S. 307, *supra*, does not exercise its ordinary original criminal jurisdiction but only the powers of a Court of reference in a criminal matter and when it convicts and sentences the accused, it has power to send the accused outside the presidency-town with its warrant to the jail in which he is to be confined, 29 G. 286. (F.B.) Every warrant shall endorse in the language in which it is written the age, caste, place of residence, plea of the prisoner as also the opinion of the Assessors, if any. If previous conviction is proved, the back of the warrant shall also contain the offence, the sentence, and the designation of the authority who tried and convicted the accused, *Bom. H.C. Cr. C., p. 38*.

384. Every warrant for the execution of a sentence of imprisonment shall be directed to the officer in charge of the jail, or other place in which the prisoner is, or is to be, confined.

Direction of warrant for execution.

illegal and so also the recovery of the amount under such a warrant, 30 Cr. L.J. 635=116 Ind. Cas. 524. This section does not contemplate any sort of inquiry or order. It is as a matter of fact merely an action by the Court itself consequent on some previous orders, e.g., a person convicted and fined or ordered to be imprisoned in default of payment of the fine when payment of fine is refused the Court will then send the recalcitrant person to prison and then take action under this section. An order passed by a Magistrate directing a warrant to issue is merely a consequential and ancillary order and is not an order which an accused will have to attack in appeal or revision. There is no provision made in the Code for attacking such ancillary orders although there are weapons in the armoury of the Courts to prevent or punish an attempt say by the Port Trust, to illegally assess damages on an application made under the Port Trust Act which is not a judicial order but only an executive one which cannot be revised by the High Court, 25 Cr. L.J. 1263=88 Ind. Cas. 1007.

Sub-section (1)—This section prescribes that a fine, if not paid, may be recovered by attachment and sale of any moveable property belonging to the offender. Whether by the words "moveable property belonging to the offender" it was meant property belonging exclusively to the offender or whether it will include joint family property also, in which the offender has an interest, and therefore can be proceeded against under this section was left undecided in 49 B. 906. But the section is silent with regard to the power to award imprisonment in default of payment of fine in the case of an offence which is provided for in S. 64, I.P.C., 21 Cr. 979 at 980. Surplus sale proceeds in the hands of a mortgagee for payment to the mortgagor is not a debt, but any money held in trust for the mortgagor and is liable to attachment under this section and the Crown is entitled to priority over any private individual to realise the fine imposed on the mortgagor, 40 M. 767. See also 25 M. 457. The decision in 1917 M.W.N. 103=4 L.W. 613=18 Cr. L.J. 1=36 Ind. Cas. 833, which held that moveable property did not include a debt is of doubtful authority after the new amendment of the section by substituting "attachment" for "distress." Growing crops are not moveable property under this section, Weir II, 444. But now under cl. (b) the Court may issue a warrant to the Collector of the District authorising him to realise the amount by execution according to civil process by attachment and sale of the growing crops of the defaulter. No revision lies to the High Court against an order for attachment under this section, 6 Cr. L. Rev. 116.

Proviso.—Before the amendment, liability to fine did not cease even after the full term of imprisonment in default has been undergone by the offender. Because it was held that the imprisonment in default of payment of fine was intended as a punishment for non-payment and not as a satisfaction and discharge of the amount due. Now if the offender has undergone the whole of such imprisonment in default, no Court shall issue a warrant unless for special reasons to be recorded in writing, it considers it necessary to do so. See S. 70, I.P.C., which provides that a fine may be levied within six years after the passing of the sentence.

Sub section (2).—There was no provision in the Code before the amendment for the determination of claims. The remedy of the aggrieved party was only by a civil suit. Power is expressly given now for the summary determination of claims preferred by third parties in respect of property attached, in execution of a warrant and thus it provides a machinery by which inquiries can be made into claims and objections in a manner similar to claims and objections under S. 88, *supra*, 49 B. 906. The following decisions are therefore of no authority;—20 M. 88; 22 C. 935; Weir II, 445; Ratanlal 976; 1898 A.W.N. 173.

Sub-section (3).—This sub-section was newly enacted to meet the decisions in 22 C. 935; 20 M. 88; Weir II, 443, 4 Bom. L.R. 169, 1898 A.W.N. 173 holding that there was no provision in the Code for investigating and adjudicating claims preferred by third parties and the only remedy suggested was to go to a Civil Court and obtain a decision and pending, which, the Court stayed the sale of the property. To obviate these difficulties express provision is herein enacted making the provisions of the Civil Procedure Code as to execution of decrees applicable to proceedings under this section. See also S. 88 *supra*. This sub-section makes the Collector of the District a decree-holder as understood in the Civil Procedure Code, the fine to be recovered being a Crown debt, and he could execute the decree in

A separate warrant should be issued to the case of each prisoner stating the period of imprisonment, 29 G, 286 (F.B.).

Warrant with whom to be lodged. **385.** When the prisoner is to be confined in a jail, the warrant shall be lodged with the jailor.

Warrant for levy of fine. **386.** (1) Whenever an offender *has been* sentenced to pay a fine, the Court passing the sentence may *take action for the recovery of the fine in either or both of the following ways, that is to say, it may—*

(a) issue a warrant for the levy of the amount by attachment and sale of any moveable property belonging to the offender;

(b) issue a warrant to the Collector of the District authorizing him to realise the amount by execution according to civil process against the moveable or immoveable property, or both, of the defaulter:

Provided that, if the sentence directs that in default of payment of the fine the offender shall be imprisoned, and if such offender has undergone the whole of such imprisonment in default no Court shall issue such warrant unless for special reasons to be recorded in writing it considers it necessary to do so.

(2) The Local Government may make rules regulating the manner in which warrants under sub-section (1), clause (a), are to be executed, and for the summary determination of any claims made by any person other than the offender in respect of any property attached in execution of such warrant.

(3) Where the Courts issue a warrant to the Collector under sub-section (1), clause (b) such warrant shall be deemed to be a decree, and the Collector to be the decree-holder, within the meaning of the Code of Civil Procedure, 1908, and the nearest Civil Court by which any decree for a like amount could be executed shall, for the purposes of the said Code, be deemed to be the Court which passed the decree, and all the provisions of that Code as to execution of decrees shall apply accordingly:

Provided that, no such warrant shall be executed by the arrest or detention in prison of the offender.

Amendment—This section has been redrafted. The changes introduced are, a fine can now be recovered by attachment and sale of immoveable property through the Civil Court and if on failure to pay the fine the accused had undergone the whole of the imprisonment in default, no further warrant for the realisation of the fine is to be issued except for very special reasons. Provision is also made for determination of claims preferred by third parties.

Scope of the section.—This section gives a Court a right to issue a warrant for the levy of the amount by attachment and sale of any moveable property belonging to the offender, but before a distress warrant can be issued it is necessary that the Court issuing the warrant should have sentenced the offender to pay a fine. That is a condition precedent to the issue of the warrant and any warrant issued without sentencing the offender to a fine is wholly

illegal and so also the recovery of the amount under such a warrant, 30 Cr. L.J. 635=115 Ind. Cas. 524. This section does not contemplate any sort of inquiry or order. It is as a matter of fact merely an action by the Court itself consequent on some previous orders, e.g., a person convicted and fined or ordered to be imprisoned in default of payment of the fine when payment of fine is refused the Court will then send the recalcitrant person to prison and then take action under this section. An order passed by a Magistrate directing a warrant to issue is merely a consequential and ancillary order and is not an order which an accused will have to attack in appeal or revision. There is no provision made in the Code for attacking such ancillary orders although there are weapons in the armoury of the Courts to prevent or punish an attempt say by the Port Trust, to illegally assess damages on an application made under the Port Trust Act which is not a judicial order but only, an executive one which cannot be revised by the High Court, 26 Cr. L.J. 1263=83 Ind. Cas. 1007.

Sub-section (1).—This section prescribes that a fine, if not paid, may be recovered by attachment and sale of any moveable property belonging to the offender. Whether by the words "moveable property belonging to the offender" it was meant property belonging exclusively to the offender or whether it will include joint family property also, in which the offender has an interest, and therefore can be proceeded against under this section was left undecided in 49 B. 906. But the section is silent with regard to the power to award imprisonment in default of payment of fine in the case of an offence which is provided for in S. 64, I P.C., 21 C. 979 at 980. Surplus sale proceeds in the hands of a mortgagee for payment to the mortgagor is not a debt, but any money held in trust for the mortgagor and is liable to attachment under this section and the Crown is entitled to priority over any private individual to realise the fine imposed on the mortgagor, 40 M. 767. See also 25 M. 457. The decision in 1917 M.W.N. 105=4 L.W. 613=18 Cr. L.J. 1=26 Ind. Cas. 833, which held that moveable property did not include a debt is of doubtful authority after the new amendment of the section by substituting "attachment" for "distress." Growing crops are not moveable property under this section, Weir II, 445. But now under cl. (b) the Court may issue a warrant to the Collector of the District authorising him to realise the amount by execution according to civil process by attachment and sale of the growing crops of the defaulter. No revision lies to the High Court against an order for attachment under this section, 6 Cr. L. Rev. 116.

Proviso.—Before the amendment, liability to fine did not cease even after the full term of imprisonment in default has been undergone by the offender. Because it was held that the imprisonment in default of payment of fine was intended as a punishment for non-payment and not as a satisfaction and discharge of the amount due. Now if the offender has undergone the whole of such imprisonment in default, no Court shall issue a warrant unless for special reasons to be recorded in writing, it considers it necessary to do so. See S. 70, I P.C., which provides that a fine may be levied within six years after the passing of the sentence.

Sub section (2).—There was no provision in the Code before the amendment for the determination of claims. The remedy of the aggrieved party was only by a civil suit. Power is expressly given now for the summary determination of claims preferred by third parties in respect of property attached, in execution of a warrant and thus it provides a machinery by which inquiries can be made into claims and objections in a manner similar to claims and objections under S. 88, *supra*, 49 B. 906. The following decisions are therefore of no authority;—20 M. 88; 22 C. 935; Weir II, 445; Ratanlal 976; 1898 A.W.N. 173.

Sub-section (3).—This sub-section was newly enacted to meet the decisions in 22 C. 935; 20 M. 88; Weir II, 445; 4 Bom. L.R. 109; 1898 A.W.N. 173 holding that there was no provision in the Code for investigating and adjudicating claims preferred by third parties and the only remedy suggested was to go to a Civil Court and obtain a decision and pending, which, the Court stayed the sale of the property. To obviate these difficulties express provision is herein enacted making the provisions of the Civil Procedure Code as to execution of decrees applicable to proceedings under this section. See also S. 88 *supra*. This sub-section makes the Collector of the District a decree-holder as understood in the Civil Procedure Code, the fine to be recovered being a Crown debt, and he could execute the decree in

accordance with the provisions of the Civil Procedure Code as to the execution of the decrees with the restriction that the judgment-debtor, *vis.*, the offender, shall not be arrested and detained in prison in execution of the decrees. A fine cannot be recovered out of the property belonging to the offender situated in a Native State as the provisions of the Code are not applicable to places outside British India. Weir II, 444. The immovable property of an offender and

The amendment made in this section makes immovable property as well as movable property liable for sale as it is not thought reasonable that immovable property should be allowed to escape; and at the same time power is given to the Local Government to make rules regarding the execution of warrants and the determination of claims. The cases reported in 20 C. 478; 20 M. 88 and 22 C. 935 are no longer law as immovable property too could now be attached and provision is made for determining claims to such property.

387. *A warrant issued under section 386, sub-section (1), clause (a) by any Court may be executed within the local limits of the jurisdiction of such Court, and it shall authorise the attachment and sale of any such property without such limits when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found.*

Amendment.—For the word “distress” the word “attachment” has been newly substituted. For the words “such warrant” “a warrant issued under S. 386, sub-section (1) clause (a) by any Court” have been substituted.

For form of attachment warrant under this section, see Sch. V, Form No. XXXVII. The warrant cannot be executed outside British India and no property of an accused can be attached under a warrant in any foreign state as the provisions of the Code are not applicable to places outside British India, see Weir II, 444.

388. (1) When an offender has been sentenced to fine only and to imprisonment in default of payment of the fine, and the fine is not paid forthwith, the Court may—

(a) order that the fine shall be payable either in full on or before a date not more than thirty days from the date of the order, or in two or three instalments, of which the first shall be payable on or before a date not more than thirty days from the date of the order and the other or others at an interval or at intervals, as the case may be, of not more than thirty days, and

(b) suspend the execution of the sentence of imprisonment and release the offender, on the execution by the offender of a bond, with or without sureties, as the Court thinks fit, conditioned for his appearance before the Court on the date or dates on or before which payment of the fine or the instalments thereof, as the case may be, is to be made; and, if the amount of the fine or of any instalment, as the case may be, is not realised on or before the latest date on which it is payable

under the order, the Court may direct the sentence of imprisonment to be carried into execution at once.

(2) *The provisions of sub-section (1) shall be applicable also in any case in which an order for the payment of money has been made on non-recovery of which imprisonment may be awarded and the money is not paid forthwith; and if the person against whom the order has been made, on being required to enter into a bond such as is referred to in that sub-section, fails to do so, the Court may at once pass sentence of imprisonment.*

Amendment.—This section has been re-drafted and re-modelled by Act XXXVII of 1923 s. 3 to give effect to the recommendations of the Indian Jails Committee

Scope of the section.—This section authorises the Court to suspend the execution of a sentence of imprisonment, and release the accused on his executing a bond with or without sureties to appear on a date fixed when the accused is sentenced to a fine only and imprisonment in default of payment of fine. The words "the Court issues a warrant under S 386" have been omitted now, and this omission allows time to be given for payment of fine without the issue of a warrant, and the Court has now power to order the fine to be paid by two or three instalments commencing from a date not more than thirty days from the date of the order and in case of default to carry out the sentence into execution.

Sub-section (2):—This sub-section applies to all orders for payment of money by way of fine or compensation and enables the Court to pass a sentence of imprisonment if the person ordered to pay fails to do so, see 26 M. 127. At the same time this sub-section now authorises a suspension of the sentence by the Court, which sentenced the accused, thus rendering obsolete the decision in 7 Cr. L. J. 452 = 3 L.B.R. 151.

389. Every warrant for the execution of any sentence may be

Who may issue issued either by the Judge or Magistrate who
warrant. passed the sentence, or by his successor in office.

In 9 W.R. (Cr.) 50 it was held that the successor in office of the Judge or Magistrate may levy a fine imposed by his predecessor, but the Court which levies the fine must be the same as the Court which imposed it.

390. When the accused is sentenced to whipping only, the sentence shall, *subject to the provisions of section 391*, be executed at such place and time, as the Court may direct.

Execution of sentence of whipping only.

Amendment.—The words "subject to the provisions of S. 391" have been newly added by Act XII of 1923.

The Code before the amendment made no provision whereby a Magistrate imposing a sentence of whipping only can suspend its execution, nor did it provide for the detention of a person so sentenced, to allow of his appealing, nor for his re-arrest to undergo whipping if the sentence is confirmed on appeal; See 26 M. 463; 4 Bom. L.R. 929; Ratanlal 906; 1881 A.W.N. 138; 6 M.H. Cr. Appx. 39; 7 M.H. Cr. Appx. 29; 22 W.R. (Cr.) 72. Under S. 413, *infra*, as it stood before the amendment, there was no appeal from a sentence of whipping only, the words 'or of whipping only' have now been removed from the amended S. 413, *infra*, thus making a sentence of whipping appealable.

Shall be executed at such place and time as the Court may direct.—A sentence of whipping need not be executed on the very day the sentence is passed. The words 'at

(a) females ;

(b) males sentenced to death or to transportation or to penal servitude or to imprisonment for more than five years ;

(c) males whom the Court considers to be more than forty-five years of age.

The provision contained in this section that the persons mentioned therein shall not be punishable with whipping refers to the executing and not to the passing of the sentence of whipping, see 1 M. 56. A sentence of whipping made in addition to seven years' rigorous imprisonment is illegal, 21 Cr. L.J. 306-55 Ind. Cas. 466. Since no sentence of whipping can be administered by instalments, the High Court cannot enhance the sentence in revision by the addition of more stripes after the infliction has been carried out. *Ratanlal* 537. See B. 4 of Act IV of 1909 (Whipping).

Sub-section (a) and (b).—These sub-sections embody the provisions contained in the old Whipping Act, VI of 1864, S. 7, "no female shall be punished with whipping, nor shall any person sentenced to death or to transportation or to penal servitude, or to imprisonment for more than five years shall be punished with whipping.

394. (1) The punishment of whipping shall not be inflicted unless a medical officer, if present, certifies, or, if there

Whipping not to be inflicted if offender not in fit state of health

is not a medical officer present, unless it appears to the Magistrate or officer present, that the offender is in a fit state of health to undergo such punishment.

(2) If, during the execution of a sentence of whipping, a medical

Stay of execution.

officer certifies, or it appears to the Magistrate or officer present, that the offender is not in a fit state

of health to undergo the remainder of the sentence, the whipping shall be finally stopped.

There is no provision of law authorising a medical officer to give a certificate *before the infliction* of whipping that the accused is fit to undergo only a *smaller number* of stripes than that actually ordered, and such certificate cannot be held as one granted under this section. The Magistrate is not authorised in such cases by the terms of S. 395, *infra*, to sentence the offender to imprisonment or fine in lieu of so much of the sentence as was not executed. Under sub-section (1) the sentence of whipping is wholly prevented from being executed when a medical officer certifies that the offender is not in a fit state of health to undergo the punishment and in such a case the section enacts that the whipping shall not be inflicted. Under sub-section (2) the sentence of whipping is partially prevented from being executed if, during the execution of the sentence of whipping, the medical officer certifies that the offender is not in a fit state of health to undergo the remainder of the sentence. Then the procedure laid down in S. 395, *infra*, is to be followed, 31 M. 84.

395. (1) In any case in which, under section 394, a sentence of

Procedure, if punishment cannot be inflicted under section. 394

whipping is wholly or partially prevented from being executed, the offender shall be kept in custody till the Court which passed the sentence can revise it ; and the said Court may, at its discretion, either

remit such sentence or sentence the offender, in lieu of whipping, or in lieu of so much of the sentence of whipping as was not executed, to imprisonment for any term not exceeding twelve months, or to a fine

not exceeding five hundred rupees, which may be in addition to any other punishment to which he may have been sentenced for the same offence.

(2) Nothing in this section shall be deemed to authorise any Court to inflict imprisonment for a term or a fine of an amount exceeding that to which the accused is liable by law, or that which the said Court is competent to inflict.

Amendment.—This section now enables a sentence of fine to be awarded in lieu of a sentence of whipping which cannot be carried out. The decisions in *Weir II*, 439 and 11 A. 303 are no longer law. The amount of fine is not to exceed five hundred rupees.

Object of the section.—This section is designed to enable the Criminal Court which passes a sentence of whipping to revise such sentence on finding that the sentence of whipping is wholly or partially prevented from being executed by reason of the state of the offender's health; and there is nothing to show that it was the intention of the Legislature to imply that 30 stripes of whipping and one year's rigorous imprisonment are of equal degree of severity, 30 Cr. L. J. 328 at 329=114 Ind. Cas. 523.

Sub-section (1).—The only Court which can act when a sentence of whipping cannot be carried out is the Court which passed the sentence, 1889 P. R. (Cr. J.) 10 and this power is not taken away by the mere fact that there was an appeal, unless the sentence itself has been set aside by the appellate Court. By the words 'the Court which passed the sentence' it was not intended to mean the same officer who passed the sentence of whipping originally. Had it been so, the impersonal word 'Court' would not have been employed but some other words denoting the person who imposed the sentence such as Magistrate or officer. Any construction restricting the sense of the expression to the officer who originally tried and sentenced the accused would make the section un-workable. For if the officer is dead or has left the station or service, the sentence cannot be revised and as it cannot be carried out, the result is that the accused escapes the punishment altogether. It cannot be the intention of the Legislature that the revision of sentences of whipping should be left to the accident of the punishing Magistrate being still attached to the district in the same capacity at the time of revision and that a criminal so sentenced should undergo a commuted sentence or wholly escape such punishment according as the Magistrate was or was not so employed, when the time for revision comes. Such a construction would be absurd. In the absence of the Magistrate who passed the sentences, the District Magistrate is the Court which passed the sentence within this section, 1901 P. R. (Cr.) 33=3 P. L. R. Cr. J. 20. The Power under this section is to be exercised only when execution of the sentence of whipping is prevented wholly or partially from being executed under S 394, *supra*, 31 M. 84. S 369, *supra* lays down that the power of revision under this section is an exception and this power of revision is conferred only on the Court which passed the sentence. An appellate Court cannot be the Court which passed the sentence and which has jurisdiction to revise it even after an appeal from the sentence has been made and the sentence confirmed. The Court in its discretion may remit such a sentence of whipping or sentence the offender in lieu of whipping to imprisonment or fine in addition to the punishment already awarded. The imprisonment if awarded must commence immediately.

Sub-section (2).—The word 'any' used here is significant. If only the Court which originally passed the sentence is meant the word used should preferably be 'such' instead of 'any'. The last portion of this sub-section seems to postulate the possibility of the powers of the original Court, and the recovering Court being different. The new sentence is evidently limited by the powers of revising Court to the original sentence of whipping, 1901 P. R. (Cr.) 33=3 P. L. R. (Cr. J.) 20. The imprisonment awardable by a Court in lieu of whipping is limited by the powers of the Magistrate passing the sentence, that is to say, the term of imprisonment cannot exceed that which the Magistrate is competent to pass. If a Magistrate has passed the maximum sentence he could award, he cannot pass a further sentence in lieu

of whipping which could not be carried out, 21 A. 25; Weir II, 349. A term of imprisonment here means a substantive term of imprisonment and not imprisonment in default of payment of fine, 11 A. 308.

396. (1) When sentence is passed under this Code on an escaped convict, such sentence, if of death, fine or whipping, shall, subject to the provisions hereinbefore contained, take effect immediately, and, if of imprisonment, penal servitude or transportation, shall take effect according to the following rules, that is to say—

(2) If the new sentence is severer in its kind than the sentence which such convict was undergoing when he escaped, the new sentence shall take effect immediately.

(3) When the new sentence is not severer in its kind than the sentence the convict was undergoing when he escaped, the new sentence shall take effect after he has suffered imprisonment, penal servitude or transportation as the case may be, for a further period equal to that which, at the time of his escape, remained unexpired of his former sentence.

Explanation.—For the purposes of this section—

(a) a sentence of transportation or penal servitude shall be deemed severer than a sentence of imprisonment;

(b) a sentence of imprisonment with solitary confinement shall be deemed severer than a sentence of the same description of imprisonment without solitary confinement; and

(c) a sentence of rigorous imprisonment shall be deemed severer than a sentence of simple imprisonment with or without solitary confinement.

Concurrent or consecutive sentences can only be passed in cases of separate convictions at one trial. In all other cases the provisions of this and S. 397 *infra* should be followed; 13 Cr. L.J. 3—13 Ind. Cas. 109; see also notes under S. 35 at p. 63. A sentence of imprisonment passed on a life-convict for attempting to escape from lawful custody cannot be directed to commence immediately. The direction for the immediate execution of the sentence is unauthorised, Ratanlal 963. The punishment for escape from lawful custody is to be in addition to the original sentence and the Court in passing such sentence must comply with the provisions of this section, Weir I, 203 and 204.

397. When a person already undergoing a sentence of imprisonment, penal servitude or transportation, is sentenced to imprisonment, penal servitude or transportation, such imprisonment, penal servitude or transportation shall commence at the expiration of the imprisonment, penal servitude or transportation to which he has been

Sentence on offender already sentenced for another offence.

previously sentenced, *unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence :*

Provided that, if he is undergoing a sentence of imprisonment, and the sentence on such subsequent conviction is one of transportation, the Court may, in its discretion, direct that the latter sentence shall commence immediately, or at the expiration of the imprisonment to which, he has been previously sentenced :

Provided, further, that where a person who has been sentenced to imprisonment by an order under section 123 in default of furnishing security is, whilst undergoing such sentence, sentenced to imprisonment for an offence committed prior to the making of such order, the latter sentence shall commence immediately.

Amendment.—The second proviso is new. The words "unless the Court directs that the subsequent sentence shall run concurrently with such previous sentence" have been newly added. So also the second proviso.

Rule as to Concurrent Sentences.—S. 85, *supra*, provides for concurrent sentences being passed if the conviction is at the same trial for two offences (1) if the trials are separate, this section applies and the sentences must take effect consecutively, (2) under this section the first sentence will take effect first but if the second sentence is one of transportation and the first is only one of imprisonment, the Court is given a discretion to direct that the second sentence of transportation shall take effect first, (3) the Court has no power to direct a sentence of transportation should take effect concurrently with a sentence of rigorous imprisonment which the accused is undergoing.

Scope of the section.—This section as recently amended deals with the case of a suspect who has been sentenced to imprisonment in respect of an offence committed by him before the order passed under S. 123, *supra*, for his detention, and the sentence of imprisonment in such a case shall take effect immediately. It is therefore open to a suspect to take advantage of the provisions of this section and to have the sentence of imprisonment run concurrently with his detention under S. 123, *supra*, even though he has been convicted of an offence committed by him during the time allowed to him by the Magistrate to furnish security, 27 Cr. L.J. 863=96 Ind. Cas. 113.

Already undergoing Sentence of Imprisonment.—An accused under custody begins to undergo a sentence of imprisonment passed on him from the moment the sentence is pronounced and if a second sentence of imprisonment is passed on him on the same day subsequently in a separate trial, he is already undergoing a sentence of imprisonment within the meaning of this section, 23 Cr. L.J. 1310=82 Ind. Cas. 478. A person detained in the Civil Jail is not undergoing a 'sentence of imprisonment'. Where therefore he is convicted of an offence and sentenced to a term of imprisonment, such term cannot under this section be made to commence on the expiry of the period of detention in Civil Jail but must commence immediately. The object of commitment to Civil Jail was to keep him for a specified period or until he has paid up his debt whichever event occurred sooner and his detention in Criminal Jail may consequently be taken to serve the purpose of his detention in the Civil Jail, 17 Cr. L.J. 480=36 Ind. Cas. 160. When a person is ordered to suffer imprisonment in default of payment of compensation under S. 250, *supra*, a Magistrate cannot order that the sentence of imprisonment shall take effect at the expiry of the term of detention in the Civil Jail which is not a sentence of imprisonment within the meaning of this section, 3 Ran. 93.

A Court is now empowered to pass a sentence to run concurrently with any other term of imprisonment which the person convicted is already undergoing. By the second proviso it

is now made clear that a person detained in jail under B. 123, *supra*, is undergoing a sentence of imprisonment within the meaning of this section. As a general rule sentences begin to run the moment they are passed but the section enacts that if the accused is already undergoing sentence, the subsequent sentence shall commence after the expiration of the previous sentence. Before the amendment *concurrent sentences* cannot be passed unless the sentences are passed at one trial. A sentence passed with a direction that it was to run concurrently with another, passed on the previous day was held illegal by various High Courts, but the amendment clears the difficulty and empowers a Court to order a subsequent sentence to run concurrently with a previous sentence which the accused is undergoing. A doubt was also expressed whether, when legalising such illegal sentence of a Magistrate in revision, by making an order directing the sentences to run *consecutively*, the High Court was not *enhancing* the sentence passed on the accused. A person undergoing a sentence of imprisonment in a foreign territory, *viz.*, in the jail at Mysore, when convicted and sentenced by a Magistrate in British territories, it is competent to such Magistrate to order that the imprisonment is to take effect at the only time when it could take effect, *viz.*, after the expiration of the sentence in foreign territory, 20 M. 444. The new proviso was put in to meet the conflict of rulings in Allahabad, Bombay and Madras. The decisions 27 M. 525 and 31 M. 515; 1914 M.W.N. 500 = 27 Ind. Cas. 201 = 6 Cr. L. Rev. 448; 16 Cr. L.J. 137 = 1912 M.W.N. 396 = 11 M.L.T. 213 = 13 Cr. L.J. 486 = 15 Ind. Cas. 306; 37 B. 178; 13 Cr. L.J. 189 = 13 Ind. Cas. 1005 are no longer law. The views expressed in 30 A. 334 (F.B.) are now adopted by the Legislature. See also 13 C.W.N. 318; 28 Cr. L.J. 652 = 103 Ind. Cas. 108.

Saving as to sections
396 and 397.

398. (1) Nothing in section 396 or section 397 shall be held to excuse any person from any part of the punishment to which he is liable upon his former or subsequent conviction.

(2) When an award of imprisonment in default of payment of a fine is annexed to a substantive sentence of imprisonment, or to a sentence of transportation or penal servitude for an offence punishable with imprisonment, and the person undergoing the sentence is after its execution to undergo a further substantive sentence, or further substantive sentences, of imprisonment, transportation or penal servitude, effect shall not be given to the award of imprisonment in default of payment of the fine, until the person has undergone the further sentence or sentences.

399. (1) When any person under the age of fifteen years is sentenced by any Criminal Court to imprisonment for any offence, the Court may direct that such person, instead of being imprisoned in a criminal jail shall be confined in any reformatory established by the Local Government as a fit place for confinement, in which there are means of suitable discipline and of training in some branch of useful industry or which is kept by a person willing to obey such rules as the Local Government prescribes with regard to the discipline and training of persons confined therein.

(2) All persons confined under this section shall be subject to the rules so prescribed.

(3) This section shall not apply to any place in which the Reformatory Schools Act, 1897, is for the time being in force.

Scope of the section.—A youthful offender is not yet a Criminal but only 'a Criminal in the making.' An order under this section can only be passed after a youthful offender is sentenced to imprisonment, 1910 P.R. (Cr). 33. Before sending a youthful offender to a Reformatory, the Court must record a clear finding as to his age and that he is a fit person to be an inmate of a Reformatory, 3 Ran. 218. It is not everybody that is convicted of an offence that can be sent to a Reformatory, but only such boys who, there is reasonable cause for supposing, are likely again to lapse into crime, Weir I, 878. It is clearly the duty of the Magistrate to define precisely the nature of the sentence intended. The order must be self-contained and the period of detention must be fixed, so that the functionary who has to execute it should have nothing to do but to obey the direction given without making an inquiry on his own account, 24 M. 13. The shortest period of detention in Reformatory school under the Act, is 3 years; see 25 C. 333. An order for detention can only be made by the High Court, Court of Session, District Magistrate and any Magistrate specially empowered by the Local Government. If a Magistrate not so specially empowered is of opinion that a convicted person should be sent to a Reformatory school he is to submit the proceedings to the District Magistrate who will pass such order as if such offender had been originally tried by him (S. 9 of the Ref. Schools Act. All Presidency Magistrates and Magistrates of the first class are empowered to act under this section, *Rule 132. Mad. Cr. Rules, of Pr. G.O. No. 934, Jud., dated 2-7-1897.*

Is sentenced by a Court to imprisonment for an Offence.—Where no sentence of imprisonment for an offence is actually passed an order under this section cannot be passed.

Sub-section (3).—This sub-section was newly added in the Code of 1893 and is in accordance with the view expressed in 25 C. 333 and Ratanlal 915 and 929. See S. 3 of the Reformatory Schools Act, VIII of 1897. This section does not apply to places where the Reformatory Schools Act is in force. This section is in force only in Coorg and the moment the Reformatory Schools Act is extended to that Province by a notification under S. 1 (8) of the said Act, this section will cease to be in force there also.

Reformatory schools in Madras.—The two schools in Madras are the Reformatory school in Chingleput and the Borstal Institute in Tanjore. The Borstal system derives its name from the prison in the United Kingdom where special effort was first made to reclaim juvenile adult prisoners from the life of crime without prejudice or impairment of the necessary rigour of sentence of imprisonment. The object of the system is to cultivate energies both physical and mental, moral perceptions and powers of self-discipline of the prisoner. The means adopted are:—Juvenile prisoners are drilled and receive both industrial and scholastic training, the latter of an elementary character and lectures of a kind to impress them morally in the right direction. Concentration of individual attention upon a prisoner, is one important feature of the scheme. Habits of obedience, industry and good conduct are cultivated with the object of securing that the prisoner on leaving jail is given a fair chance of leading an honest and law abiding life and is able to feel that there are persons who take interest in his so doing. See Mad. Act, V, of 1926 Borstal Schools Act providing for the establishment and regulation of Borstal schools for the detention and training of adolescent offenders not less than 16 years and not more than 21 years of age. Borstal school is here defined as a corrective institution wherein adolescent offenders whilst detained under the Act are given such industrial training and other instructions and are subjected to such disciplinary and moral influence as will conduce to their reformation and the prevention of crime. The term for which an offender may be detained is not less than 2 years and not more than five years. The offender may be one convicted of any offence punishable with imprisonment or one ordered to be detained in prison failing to furnish security under S. 118 of the Cr P. C. For purposes of appeal and revision under the Code a sentence of detention under the Act shall be deemed to be a sentence of imprisonment for the same period. Power

is given by S. 15 of the Act to release the offender after expiration of 6 months from the date of committal to the school on license, if there is a reasonable probability of his not lapsing into crime and will lead a useful and industrious life on condition of his being placed under the supervision of any Government officer or a secular institution or religious society professing the same religion as the offender, and such license may also be revoked and the offender shall then return to the school. An offender detained for failing to furnish security may be released immediately on his furnishing the required security.

For rules under the Reformatory Schools Act, See.—

Madras:—G. O. No. 934 Jud. dated 2-7-1897. G.O. No. 1671 Jud., dated 15-10-1912.

Pt. S. Geo. Gaz. 1887, Pt. I. p. 580.

Calcutta:—See *Cal. Gaz.* Pt. I. p. 226, dated 1-3-1899.

N.-W. Provinces:—See *N. W. P. Gaz.* 1899, p. 544.

Bombay:—See *Bom. Gaz.* 1890, Pt. I, p. 758.

Burma:—See *Bur. Gaz.* 1897, Pt. I. p. 301.

400. When a sentence has been fully executed, the officer executing it shall return the warrant to the Court from which it issued, with an endorsement under his hand certifying the manner in which the sentence has been executed.

Return of warrant on execution of sentence.

CHAPTER XXIX.

OF SUSPENSIONS, REMISSIONS AND COMMUTATIONS OF SENTENCES.

401. (1) When any person has been sentenced to punishment for an offence, the Governor General in Council or the Local Government may at any time without conditions or upon any conditions which the person sentenced accepts, suspend the execution of his sentence or remit the whole or any part of the punishment to which he has been sentenced.

Power to suspend or remit sentences.

(2) Whenever an application is made to the Governor General in Council or the Local Government for the suspension or remission of a sentence, the Governor-General in Council or the Local Government, as the case may be, may require the presiding Judge of the Court before or by which the conviction was had or confirmed to state his opinion as to whether the application should be granted or refused, together with his reasons for such opinion, and also to forward with the statement of such opinion a certified copy of the record of the trial or of such record thereof as exists.

(3) If any condition on which a sentence has been suspended or remitted is, in the opinion of the Governor General in Council or of the Local Government, as the case may be, not fulfilled, the Governor General in Council or the Local Government may cancel the suspension or remission, and thereupon the person in whose favour the sentence has been suspended or remitted may, if at large, be arrested by any

police-officer without warrant and remanded to undergo the unexpired portion of the sentence.

(4) The condition on which a sentence is suspended or remitted under this section, may be one to be fulfilled by the person in whose favour the sentence is suspended or remitted, or one independent of his will.

(4A) The provisions of the above sub-sections shall also apply to any order passed by a Criminal Court under any section of this Code or of any other law, which restricts the liberty of any person or imposes any liability upon him or his property.

(5) Nothing herein contained shall be deemed to interfere with the right of His Majesty or of the Governor General when such right is delegated to him to grant pardons, reprieves, respites or remissions of punishment.

(5A) Where a conditional pardon is granted by His Majesty or, in virtue of any powers delegated to him, by the Governor General, any condition thereby imposed, of whatever nature, shall be deemed to have been imposed by a sentence of a competent Court under this Code and shall be enforceable accordingly.

(6) The Governor General in Council and the Local Government may, by general rules or special orders, give directions as to the suspension of sentences and the conditions on which petitions should be presented and dealt with.

"The prerogative of mercy resides in the Crown and every capital conviction, and indeed every other in which the Judge entertains any reasonable doubt as to its propriety, is submitted to the careful and humane consideration of the Secretary of State for Home Affairs if the evidence upon which the Jury have found their verdict appears to be insufficient to sustain it or fresh facts come to light which tend to establish the prisoner's innocence, a Royal pardon is granted which not only annuls the conviction but reinstates the party absolutely in all his former civil rights In this way safeguards are practically thrown round the life and liberty of the subject which are not contained in the strict letter of the law for undoubtedly there is no legal obligation either upon the Judge to act thus, or upon the Crown to rectify mistakes by a pardon," *Forsyth His Tr. by Jury*, pp. 233-234.

Amendment.—The words in italics in sub-section (2), sub sections (4A), (5) and (5A) are new.

Scope of the section.—This section authorises the Governor General in Council or a Local Government to suspend the execution or remit the whole or part of any sentence passed upon any person sentenced to punishment. The power to grant pardon rests primarily in the Sovereign and this section does not in any way touch the prerogative of the Crown. The special authority given to Government relates to persons convicted and sentenced and does not apply to such cases relating to tender of pardon under S. 337, *supra*, to a person charged along with others with crime and to whom a conditional pardon is tendered, 11 A. 79; 46 A. 236 at 241. The High Court may when dismissing an appeal forward the records to the Local Government to be dealt with under this section, 23 C. 604; 1868 W.R. (Cr.) 27; 7 A. 672; 10 B. 512. Whenever a Sessions Judge or Magistrate is of opinion that there are grounds for recommending to Government the case of an accused for exercising its prerogative under this section

for remitting or commuting any sentence passed, the recommendation shall be submitted to Government through the High Court *G.O. No. 1488, dated 25 10-09, Rule 57, Mad. Cr. Rules of Pr.* In all cases where women are convicted for the murder of their infant children a reference should be made, through the High Court to the Government with an expression by the Sessions Judge of his opinion as to the propriety or otherwise of reducing the sentence. *Rule 252, Mad. Cr. Rules of Pr.* The report of the Sessions Judge when his opinion is called for by Government should be forwarded through the High Court, *Rule 253, Mad. Cr. Rules of Pr.*

Sub-section (2).—The addition newly made to this sub-section empowers a Local Government to call for the record of the trial along with the presiding Judge's opinion when considering an application for the suspension or remission of a sentence. When the plea of insanity set up by an accused to a charge of murder was found by the Court not established, the Court having regard to the diseased condition of the accused's mind and the absolutely motiveless nature of the offence, sent up the record to the Local Government with a recommendation that the case be dealt with under this section as under the strict provisions of law, the High Court had no alternative but to uphold the conviction and sentence, 6 M.L.T. 101, at 106; 23 C. 604. See also 8 Lah. 684, following 46 A. 243 and 23 C. 604.

Sub-section (3)—Compare S. 227, I.P.C., which deals with violation of the condition of remission of punishment and punishment for such violations.

Sub-section (4A).—This sub-section is new. The word 'law' has been substituted for the word 'Act' to make it clear that this section applies to the case of persons convicted by Courts constituted by regulations and ordinances. It empowers the Government to apply the provisions of this section to any order passed by a criminal Court under any section of the Code or under any other law restricting the liberty of any person or imposing any liability upon him or his property. The language employed here is very wide, and applies to all orders passed, say under Chapters VIII, XI, XLII, etc. A person undergoing imprisonment for failure to furnish security can now be dealt with under this section as the language of this sub-section clearly applies to such a case. Orders under S. 565, *infra*, requiring a convicted person when released to notify residence may also come under this sub-section as such orders are undoubtedly of a penal nature.

Reprieve.—A reprieve is the withdrawal of the sentence for an interval of time whereby the execution of it is suspended. It may be granted by the King or by the Court empowered to award the execution. A reprieve is granted by the Crown at its mere discretion whenever substantial justice requires it, such as when the prisoner is a pregnant woman under capital sentence or when the prisoner becomes insane after judgment is pronounced against him *Arch. Cr. Pl. Ev. and Pr.*, p. 220 (25th Ed.). A 'reprieve' is the suspension of the execution of a criminal sentence, 4 *Stephen's Com.*

Respite.—The term 'respite' means delay or forbearance. It is usually applied to postponement of a judgment or sentence of the Court until a future date. This may be done when an appeal is pending or a case is stated for the Court of Crown Cases Reserved or where the Court having regard to the nature of the offence or antecedents or mental or physical condition of the convict desires to defer sentence. It is usual to put the offender under recognizance to come up for judgment when called upon, *Arch., Ibid.*, p. 240.

Sub-section (5A).—This section is new, and enacts that any condition imposed when granting a conditional pardon shall be deemed to have been imposed by a sentence of a competent Court under this Code, and shall be enforceable accordingly.

Sub-section (6).—This sub-section was introduced in the Code of 1899. This sub-section enables the Governor General in Council and the various Local Governments to make rules for suspension of sentences in emergent cases. After the famous *Silapuri case* (*Oudh Talukdars' case*) special rules are framed now for applications to the Governor General in Council and for suspension of sentence when a Local Government refuses to interfere. The sentence, especially one of death, is not to be carried out till final orders of the Governor General in Council are passed, even though a Local Government has thought fit not to

interfere. The new rules provide, that, where a capital sentence has been passed on a Local Government's appeal under S. 417, *infra*, after acquittal by the Sessions Court or after an enhancement of sentence, the petition for mercy must in all cases be submitted to the Governor-General and the execution of the sentence of death must be suspended until the Governor-General's order on the petition is received.

402. (1) The Governor General in Council, or the Local Government, may, without the consent of the person sentenced, commute any one of the following sentences for any other mentioned after it :—

Power to commute punishment.

death, transportation, penal servitude, rigorous imprisonment for a term not exceeding that to which he might have been sentenced, simple imprisonment for a like term, *fine*.

(2) *Nothing in this section shall affect the provisions of section 54 or section 55 of the Indian Penal Code.*

Amendment—Sub-section (2) is new and it removes the doubt expressed as to the consistency of this section with S. 55, Indian Penal Code.

Sub-section (2).—S. 54, I.P.C., says that a sentence of death may be commuted for any other punishment provided by that Code and S. 55, I.P.C. says that a sentence of transportation may be commuted for imprisonment of either description for a term not exceeding fourteen years. There was some uncertainty as to whether the provisions of this section or S. 55, I.P.C., was to prevail in the case of transportation for life as to the scale of imprisonment and this uncertainty is now removed by the amendment.

CHAPTER XXX.

OF PREVIOUS ACQUITTALS OR CONVICTIONS.

403. (1) A person who has once been tried by a Court of competent jurisdiction for an offence and convicted or acquitted of such offence shall, while such conviction or acquittal remains in force, not be liable to be tried again for the same offence, nor on the same facts for any other offence for which a different charge from the one made against him might have been made under section 236, or for which he might have been convicted under section 237.

Person once convicted or acquitted not to be tried for same offence.

(2) A person acquitted or convicted of any offence may be afterwards tried for any distinct offence for which a separate charge might have been made against him on the former trial under section 235, sub-section (1).

(3) A person convicted of any offence constituted by any act causing consequences which, together with such act, constituted a different offence from that of which he was convicted, may be afterwards tried for such last mentioned offence, if the consequences had not

paying regard to what had happened in the earlier proceedings, 53 C. 606 where 37 C. 680; 41 C. 754 and 36 A. 168 are *followed*. This section embodies the general rule which affirms the validity of pleas of *autrefois acquit* and *autrefois convict*, subject only to the exceptions specified in it. When a person has been tried and convicted or acquitted for an offence arising out of a particular set of facts, he cannot, while such conviction or acquittal remains in force, be again tried in respect of any offence based on the same facts, unless the case can be brought under one or other of the specific exceptions to the rule provided by this section, see 30 C.W.N. 384. A withdrawal after a charge is framed which results in an acquittal under S. 494, *infra*, can be pleaded as a bar under this section, 14 Cr. L.J. 135=18 Ind. Cas. 897. This section deals with the maxim that no man ought to be tried twice upon the same facts, which means that a person cannot be tried a second time for an offence which is involved in the offence with which he was previously charged, 23 C. 171; 45 C. 727; 29 Bom L.R. 1478=28 Cr. L.J. 1032=106 Ind. Cas. 216; 21 Cr. L.J. 164=54 Ind. Cas. 772. The true test is not so much whether the facts are the same in both the trials as whether the acquittal on the first charge necessarily involves an acquittal on the second charge, 43 C. 78 at 83. This section has nothing to do with pleading, being in terms a limitation to the jurisdiction of the Court, and is not to be construed with reference to the English law of criminal pleading. Ss. 271 and 272, *supra*, contain all that is necessary as to pleading without reference to English rules, 41 C. 1072 at 1084. It protects, an accused against a subsequent trial for the same offence on the same facts, and any other offence for which a different charge from the one made against him "might have been made" but was not made, and not when such a different charge was made at the previous trial and the Jury disagreed with it, 41 C. 1072. This section does not direct that a person shall be acquitted, but says that he shall not be tried again. When a man is put on trial and he produces an order of acquittal passed by a Court which on the face of it is a Court of competent jurisdiction, in respect of the offence charged, the Court before which such order is produced is not entitled to impeach the competency of the Court which passed the order, on the ground that the Presiding Officer may perhaps have laboured under the disqualification prescribed by S. 556, *infra*, see 37 B. 658. Until such an order is set aside by some competent Court, the man acquitted is entitled to plead it under this section in connection with any other proceeding that may be taken against him, 8 A.L.J. 1129=12 Cr. L.J. 575=12 Ind. Cas. 839. It would be interesting to consider whether the doctrine that an order of acquittal was obtained by fraud would be applicable to render null and void an acquittal within the meaning of this section without any further proceedings being taken to set aside the acquittal, 22 A.L.J. 820 at 822. See in this connection 38 M. 1028. The mode in which these pleas are pleaded in England is regulated by 14-15 Vict. Ch. 100 S. 23. They may be pleaded orally. The *onus* of proving these pleas lies on the defendant and it is enough for him to produce a copy of the record, *Ros. Cr. Ev. & Pr. p. 169*. The *onus* of proving the plea of *autrefois acquit* is on the accused who pleads it, 1 L.W. 847; 1839 A.W.N. 8. To plead successfully '*autrefois acquit*' it is necessary to prove that the prisoner could have been convicted on the first indictment of the offence charged in the second, *Ros. Cr. Ev. & Pr. p. 171*. An accused person is entitled at any stage of the trial to plead *autrefois acquit* and substantiate his plea if he can, 29 Cr. L.J. 760=110 Ind. Cas. 792. But when the trial is by a Court without jurisdiction, the trial is void under S. 530, *infra*, and the acquittal cannot be pleaded in bar to a subsequent trial, and it is unnecessary that such an acquittal should be set aside by a superior Court before the accused could be retried, 8 B. 307. Similarly a Court may be incompetent to try a case for want of sanction, and a dismissal or discharge by the Court under such circumstance is no bar to a subsequent proceeding with the necessary sanction, 24 M. 337; 22 B. 711. The composition of an offence is effected with a person not entitled to compound under S. 315, *supra*, and the accused is acquitted, such acquittal cannot be pleaded as a bar to a trial on the same facts as there was no acquittal in the eye of law, 51 B. 512. When a village magistrate who is not a recognized tribunal under the Code dismisses a complaint for default of appearance, it is doubtful whether such dismissal amounts to an acquittal which will attract the provisions of this section as to *autrefois acquit*. The point was left undecided in 53 M.L.J. 102=23 Cr. L.J. 807=101 Ind. Cas. 831. When a conviction had by a Magistrate who had no jurisdiction to try, is set aside

by the appellate Court, this section does not bar a fresh trial by a competent Court, 29 C. 412; 31 A. 317; 9 A. 134 (F. B.). The history of Legislation shows a distinction between what is called the common law plea of *autrefois acquit* reproduced in this section and statutory acquittals enacted in Ss. 247 and 345, *supra*. To plead a statutory acquittal the accused need not have been tried and acquitted, 40 M. 976, see 30 Cr. L. J. 906=118 Ind. Cas. 223. The principle underlying this section has been extended to cases not strictly falling within the letter of the section, 49 C. L. J. 378 at 382 *relying* on 49 C. 924; 7 C. W. N. 493; 5 C. W. N. 72. See 33 C. W. N. 948 where on a trial and conviction under the Railways Act with a heavy sentence passed on account of the assault committed, a subsequent trial for hurt was held not warranted.

Convicted or acquitted of such offence.—When an accused is convicted there is not much difficulty in the application of this section and there cannot be much room for doubt whether an order amounts to a conviction or not. Sub-section (3) deals with convictions alone, whereas sub-sections (1), (2) and (4) deal with convictions as well as acquittals. Whether the omission is deliberate or due to an oversight it is not easy to say. But it is not by any means easy to say whether an order amounts to an acquittal or not, within the meaning of this section. The explanation to the section enumerates what are not acquittals for the purposes of this section. A conviction may be had in accordance with the provisions of Ss. 243, 245, (2), 258, (2), 271 (2), 305 (1) 306, 307, 309 (2), 423, 480 and 485, *infra*, discharge under S. 253 or S. 203, *supra*, is not an acquittal, 31 M. 543; 29 M. 126 (F. B.); 29 C. 726; 16 C. W. N. 983; 17 A. L. J. 867; 10 B. 131; nor is an order under S. 209, *supra*, an acquittal, 4 Bom. L. R. 779 at 785. An order purporting to be an acquittal, when the act done does not amount to an offence under any law, is not an acquittal, 24 M. 660. When there is no proper complaint before a Magistrate as required by law (say under S. 199, *supra*) and the Magistrate acquits the accused, it was held that there was no acquittal within the meaning of this section, the Magistrate having no complaint which he could take cognizance of, 31 A. 317. A verdict of acquittal is no doubt immune from challenge but it is only when the accused is 'tried' and acquitted the immunity arises, 53 C. L. J. 110 at 113=30 C. W. N. 382=27 Cr. L. J. 751=95 Ind. Cas. 79. An order under S. 247, *supra*, is an acquittal, 34 M. 253; 40 M. 976, *dissenting* from 40 M. 977 (foot-note); 26 M. L. J. 160; 4 C. W. N. 346. So also an order passed by a Magistrate who re-commenced an inquiry or trial after his predecessor had framed a charge under S. 350 in a warrant-case, 38 M. 585. See also Ss. 240, 245 (1), 248, 258 (1) 289, 305 (1) 306 to 309 (2), 333, 423, 494 (6), 495 (2) as to acquittals under the Code.

Sub-section (1) once been tried.—The word 'tried' used herein does not necessarily import a decision of the case on the merits, but only refers to the nature of the proceedings that were had; or in other words, mean that the proceedings in which the acquittal was passed were in the nature of a trial. As pointed out in 34 M. 253, that the non-mention of S. 247 in the explanation to this section is suggestive of this interpretation and a contrary view would make S. 257 *supra* illusory. 33 C. W. N. 260=49 C. L. J. 119 at 121 *following* 40 M. 976 and 7 C. W. N. 711. The word 'tried' does not necessarily mean tried on the merits. Composition of an offence under S. 345, *supra*, or withdrawal of the complaint by a public prosecutor under S. 494, *infra*, would result in an acquittal of the accused 53 B. 695 at 695-97. The word "tried" therefore does not necessarily import a decision of the case on the merits so far at least as proceedings under S. 247, *supra*, are concerned and any other construction would render the provisions of the latter section nugatory. Where an accused a motor driver is tried and convicted for rash and reckless driving under S. 5 of the Motor Vehicles Act, he cannot subsequently be tried for the offence of rash and negligent driving on a public road as to endanger human life under S. 279, I.P.C. although the offences are punishable under different Acts but his conviction for rash driving cannot protect him for the consequences of his rash driving *vis.* for causing grievous hurt under S. 338, I.P.C., for there was not only an act of rash driving, but also a subsequent act, knocking a man down during such rash driving causing grievous hurt to him. 29 Cr. L. J. 271=107 Ind. Cas. 687. Where an accused was tried and convicted under the Cal. Police Act, S. 63 of having assaulted the Captain of a ship while drunk and disorderly on board the ship, he cannot subsequently be tried under

S. 103 (iv) of the Indian Merchant Shipping Act on the same facts, even though the conviction under the Police Act is illegal and cannot stand, 31 C.W.N. 195=28 Cr. L.J. 233=99 Ind. Cas. 1033. See 40 M. 976; 30 C.W.N. 382=43 C.L.J. 110; 34 M. 253; 4 C.W.N. 346; 26 M.L.J. 160. This sub-section is a special statement of the Common law rule that no one may be punished twice for the same offence, *i.e.*, for the same acts or omissions irrespective of the exact terms of the charge; the test for similarity is whether or not the evidence to obtain a legal conviction on the first charge is in substance the same as that necessary to sustain the second charge. The words "nor on the same facts, for any other offence" have special reference to Ss. 236 and 237, *supra*, and contemplate a case where the facts only justified a conviction for one offence although other offences may have been charged; the words "might have been charged" indicate that this sub-section is no extension of the Common Law Rule and mean "ought lawfully have been charged under those sections," 30 Cr. L.J. 806=117 Ind. Cas. 625. The non-mention of S. 247 *supra*, in the explanation to this section would also show that S. 247 *supra* was not intended in any way to limit the effect of an order of acquittal under S. 217 *supra*. There is no difference in the case of an acquittal under S. 247, *supra*, whether the acquittal was before process was issued to the accused, or whether it was after the issue of process to the accused (say a summons case) and he appears or fails to appear. In either case the accused is entitled to the full benefit of an acquittal, 34 M. 253; Weir II, 337. When an accused person was duly served and appeared before the Court the 'trial' had begun and the great weight of authority is in favour of the view that the word 'tried' does not necessarily import any decision of the case on the merits. The trial had really commenced if not from the moment the summons was issued and served, certainly when the accused appeared in Court when the case was called on for hearing. Had it been intended to omit an acquittal under S. 247, *supra*, from the scope of this section certainly one would have expected to find mention of the fact in the explanation to this section, 28 Cr. L.J. 183=99 Ind. Cas. 855 where 34 M. 253; 45 A. 58; 4 C.W.N. 346 and 40 M. 976 are referred to. When the accused has pleaded to a formal charge, the Magistrate is bound to acquit or convict, and his order merely dismissing the case will amount to an acquittal, 5 C.L.R. 359. But there cannot be a bar to a second trial when the previous proceedings did not amount to a trial. The principle of *autrefois acquit* can have no application as there is no trial terminating in an acquittal when an accused is discharged under S. 203, or S. 253, *supra*. The Legislature has indicated in the Code the extent to which it intended that the doctrine of *autrefois acquit* should be applied in this country, and it is not open to Courts by interpretation to extend its application, 31 M. 543 at 545; 29 M. 126 (F.B.); 29 C. 726; 10 B. 131. An order of acquittal passed when the offence was compounded by the parties without the Court inquiring into the authority of the complainant, is a valid acquittal by a Court of competent jurisdiction and until that order is set aside, the accused could not be further prosecuted for that offence, 22 A.L.J. 820. A plea of *autrefois acquit* or *convict* could be satisfied only by the production of a regular record, that is, the judgment following a verdict, 29 M. 126 at 139 (F.B.).

By a Court of competent Jurisdiction.—The language of this section is very wide. 'Jurisdiction' means legal authority to judge. It may mean local jurisdiction of a Court or the legal authority of a Court to do certain things. It may mean the power of administering justice according to the means, which the law has provided and subject to the limitation imposed by that law upon judicial authority. There may be a lack of jurisdiction according to the nature of the offence as prescribed by column 8, Sch. II, *infra*. A Court which has jurisdiction to deal generally with the offence and with the offender may not be competent to deal with a particular case for want of local jurisdiction according to Ss. 177 to 181 and 189, *supra*, or on account of nonfulfilment of some essential condition such as the absence of the necessary complaint of Court under Ss. 195 and 476. Competency of jurisdiction would include competency to try for reasons other than jurisdiction over the offender and the offence, 53 B. 69 at 72 where 28 C. 324 at 329; 7 A. 315 at 350; 35 M. 309; 22 B. 711; 40 B. 97; 37 A. 107; 5 Pat. 452 at 459 are referred to. The expression "Court of competent jurisdiction" does not merely refer to the character and status of the tribunal to try the offence but also refers to want of jurisdiction on other grounds, *e.g.*, for want of a

complaint of Court under S. 195, *supra*, 5 Pat. 452, where 38 M. 308; 39 A. 293; 19 Cr. L. J. 796=46 Ind. Cas. 716, are referred to. Generally before further proceedings are taken, the fact of the incompetency of the Court which purported to convict or acquit the accused should be declared first by some superior Court. In exceptional cases, say cases which require previous sanction for institution of proceedings the incompetency of the Court is apparent. When a person put on his trial, produces an order of acquittal passed by a Court which on the face of it is a Court of competent jurisdiction in respect of the offence charged, the Court is not entitled to impeach the competency of the Court which passed the previous order holding that the presiding Judge may have been disqualified to try under S. 556, *infra*. Until such order is set aside by a competent Court, the person acquitted is entitled to plead it under this section as a bar to his trial, 8 A.L.J. 1129=12 Cr. L.J. 575=12 Ind. Cas. 839. If the order of acquittal was by a Court [departmental punishment being of no avail, Ratanlal 318] which on the face of it was a Court of competent jurisdiction in that it had both territorial jurisdiction and the jurisdiction under the second schedule of the Code in respect of the offence charged, the competency of that Court cannot be questioned on any technical ground of personal disqualification to try under S. 556, *infra*. The phrase "has once been tried by a Court of competent jurisdiction" in this sub section is not one which limits the application of the provision to reasons affecting the nature or the ordinary powers of the tribunal. It is wide enough to cover the case where a first trial was *ab initio* void for want of a complaint, 19 Cr. L.J. 796=46 Ind. Cas. 716; 39 A. 393. Where an accused tried and acquitted of an offence referred to in S. 195 (1) (a) *supra*, on the ground that the Court which tried him was not a Court of competent jurisdiction in the absence of a complaint in writing of the public servant concerned or his superior, the accused when tried subsequently on the strength of a complaint in writing by the public servant concerned cannot raise the plea of *autrefois acquit* under this section, 27 Cr. L.J. 1105=97 Ind. Cas. 317. The acquittal or conviction of an accused must be by a Court of competent jurisdiction. Otherwise such order is of no avail under this section, 29 C. 412; 30 Cr. L.J. 763=117 Ind. Cas. 267, following 7 M. 557. Where an offence is tried by a Court without jurisdiction the proceedings are void under S. 530, *infra* and the accused if acquitted, is liable to be tried again, under this section, 8 B. 307, followed in 43 C.L.J. 110. It is not necessary that such an acquittal should be reversed before a re-trial can be had, 18 C.W.N. 1214=15 Cr. L.J. 726=26 Ind. Cas. 174. There can be no acquittal unless the Court which tried the accused had jurisdiction, 3 M. 48. If the offence is tried in the first instance without the Court having jurisdiction the proceedings are void under S. 530, *infra*, and the offender can be charged again under this section. But if the Court had jurisdiction there can be no re-trial unless the acquittal is set aside by the High Court on the application of the Local Government, 10 B. 181; 5 Pat. 452 where 39 A. 293 and 19 Cr. L.J. 796=46 Ind. Cas. 716 followed, and 36 M. 308 not followed. If the trial be by a Court of competent jurisdiction for an offence and the accused has been convicted of such offence, so long as the conviction remains in force, he is not liable to be tried again for the same offence. A Village Headman under the Burma Village Act convicted the accused under S. 294, I.P.O. but the Magistrate, holding that the Village Headman is not a Court, mentioned in S. 6, *supra*, overlooking the express words "Courts constituted under any law other than the Code" overruled the objection under this section, and again tried and convicted the accused, it was held by the High Court that the trial held by the Magistrate was barred and the conviction and sentence were set aside, 1 Ran 449.

While such conviction or acquittal remains in force.—The word 'conviction' is sometimes used in the Code to denote the verdict of a Jury and at other times in its more strict legal sense to denote the sentence of the Court, 49 C.L.J. 332 at 438; 29 M. 126 (F.B.) at 139; the word acquittal means in common parlance the verdict of the Jury finding the accused not guilty but it is only the formal judgment of the Court that in legal intendment satisfies the word "acquittal." According to Webster the latter term means 'setting free' or deliverance from the charge of an offence by verdict of a Jury or a sentence of Court, 29 M. 126 at 139 (F.B.). So long as the conviction or acquittal is by a Court of competent jurisdiction it does not matter whether the judgment of conviction or acquittal is correct or proper as a matter of fact. It must only remain in force. The Court before which a

judgment of acquittal or conviction is produced is not entitled to impeach its validity or competency of the Court which passed the judgment, 8 A.L.J. 1129 at 1133=12 Cr. L.J. 575=12 Ind. Cas. 839. So long as the judgment or order convicting or acquitting the accused has not been set aside, the accused cannot be tried again and the plea of *autrefois convict* or *autrefois acquit*, could be urged to bar the trial, 7 W.R. (Cr.) 2. So long as the order remains in force it operates as a bar to further proceedings under this section. The fact that the appellate Court did not expressly order a fresh trial is not material and could not bar a fresh trial, 29 C. 412, and when a retrial is so ordered unless its scope is restricted by the appellate Court, it must be taken to be one on all the charges originally framed, 22 C. 377; 40 C. 693.

Not liable to be tried again for the same offence, etc.—This section does not direct that a person shall be acquitted but only says that he shall not be tried again. So an order of acquittal cannot be passed under this section on the ground that the accused had been previously acquitted, 9 Cr. L.J. 578=2 Ind. Cas. 357, and therefore no consequential relief also can be granted on such an acquittal of the accused, 7 Cr. L.J. 490. To bar a second trial, the previous conviction or acquittal must have been for the same offence. It would be no answer in a trial for one offence to say that the accused had been acquitted of another, in a trial in which evidence was given respecting two offences and which, if believed, would have sustained the conviction of the prisoner for both, 7 W.R. (Cr.) 15. An illegal conviction had under S. 21 of the Forest Act will not bar a second trial under the Penal Code for such other offence as the accused may have been proved to have committed, *Weir I*, 759. A Court before which a second trial is commenced has nothing to do with the evidence recorded in the previous trial except for the purpose of ascertaining whether the offence is the same, 7 W.R. (Cr.) 15. Theft and mischief committed by cutting the branches of a tree are not distinct offences. When the complaint was for theft and mischief, and the accused was tried for mischief, and acquitted, this sub-section barred a subsequent trial for the theft and sub-section (2) had no application to the case, 8 M. 296. An acquittal on a charge under S. 352, I.P.C., operates as a bar to a subsequent trial for an offence under S. 323, I.P.C., 7 B.L.R. (Appx.) 25. An acquittal of the accused on a charge under S. 211, I.P.C., is a bar to the trial on the same facts under S. 182, I.P.C., 35 M. 308, but an acquittal on a charge of S. 182, I.P.C., is no bar to a subsequent trial for an offence under S. 211, I.P.C., as a person could not be charged in the alternative under S. 236, *supra*, of offences under S. 182 and S. 211, I.P.C., and the offences are entirely distinct, 11 Cr. L.J. 420=6 Ind. Cas. 944. By distinct offence is meant that the offence must be one entirely unconnected with the one previously charged, 6 Ran. 386. This section imposes a bar on the jurisdiction of the Court, and the defence can be set up at any time before verdict, 41 C. 1072. See also 49 C. 924. An acquittal on a charge of mischief committed by cutting the spathes of some palmyra trees under S. 427, I.P.C., is a bar to a subsequent trial for rioting under S. 147, I.P.C., on the same facts, that there was an unlawful assembly animated with the common object of committing mischief. The two transactions were so closely overlapping that it was open to the prosecution to have framed an alternative charge of mischief and rioting under S. 236, *supra*, and the case fell under sub-section (1) of this section, 19 L.W. 31. An acquittal of the offence of forgery and abetment thereof bars a subsequent trial for offences under the Registration Act on the same facts, 1 Ran. 299, but it was held in, 28 Cr. L.J. 903=105 Ind. Cas. 236, *distinguishing* 1 Ran. 299, that the acquittal of a person of cheating by false personation will not bar a subsequent trial for false personation in registering the deed an offence under S. 82 (c) of the Registration Act as the offence of cheating was complete the moment the document was executed and the offence under the Registration Act is an entirely distinct offence and Ss. 236 and 237 *supra*, could not apply to the case. An acquittal of the accused for an offence under the Forest Act is no bar to his subsequent trial for theft and dishonest retention of stolen goods under the I.P.C., 6 Ran. 386, but an acquittal on a charge of criminal trespass bars a second trial on the same facts for an offence under S. 291, I.P.C., 29 Cr. L.J. 282=107 Ind. Cas. 768. Similarly an acquittal on a charge of cheating bars a subsequent charge for the same offence on different evidence, 28 Cr. L.J. 235=99 Ind. Cas. 1033 where 28 A. 313 is

referred to. An acquittal on a charge under S. 297, I.P.C., wounding the religious feeling of a community by cutting down trees from a grave yard bars a subsequent charge of theft of trees from the grave yard on the same facts even though the act done may have had two distinct results, 8 Lah. 52. An acquittal on a charge under S. 160, I.P.C., bars a subsequent trial on the same facts of an offence under S. 61, (c) of the Bom. Dist. Police Act, 1820. The test is whether the evidence in both cases is the same and subsequent trial is on the same basis of facts falling under Ss. 236 and 237, *supra*, 29 Bom. L.R. 1478 following 45 G. 727 and 1 Bom. L.R. 15 and *distinguishing*, 48 A. 496 and 37 C. 604. See 31 Bom. L.R. 922 where 29 Bom. L.R. 1478 is *distinguished*, See also 30 Cr. L.J. 951 at 956=118 Ind. Cas. 650 where 8 Lah. 52; 45 G. 727; 29 Cr. L.J. 3=106 Ind. Cas. 339; 29 Bom. L.R. 1478; 29 Cr. L.J. 282=107 Ind. Cas. 766 and 12 Cr. L.J. 224=10 Ind. Cas. 163 are *referred to*. An acquittal on a charge under S. 193, I.P.C., bars a second trial under Ss. 455, 471 and 120 B I.P.C., as the facts were inseparable from that on which the previous acquittal proceeded 31 C.W.N. 384. When a person who was tried and convicted for misappropriating certain sums of money during a certain period was again put on his trial in respect of certain other sums alleged to have been misappropriated during the same period, it was held that the charge in the previous trial should be taken to include all the items misappropriated by the accused in the same transaction during that period and that the subsequent trial was barred by this section. The Legislature apparently intended, where there is a trial for misappropriation of a gross sum there should be only one trial for such an offence committed within the period covered by the defalcation, 17 Cr. L.J. 30=32 Ind. Cas. 159. If a person commits criminal breach of trust or misappropriation of different sums of money, he commits so many offences but it is undesirable that he should be tried as many times when he could have been tried for all of them in one trial, 49 C.L.J. 373 at 383. Where facts are not the same in the two trials recourse could not be had to sub-section (1) of this section, 40 B. 97 at 104. Possession of counterfeit coin under S. 243, I.P.C., is a distinct offence from uttering counterfeit coin under S. 240, I.P.C. A previous conviction under S. 243, I.P.C., in regard to one set of coins is no bar to a subsequent trial under S. 240, I.P.C., in regard to a second set of coins even though the second set had originally been part of the same stock as the first set of coins, 31 C. 1007. Where on a charge of theft against A, B and C, A and B were tried and acquitted by a competent Magistrate and subsequently C was put on his trial for an offence under S. 411, I.P.C., on discovery of property in his house, it was held that the acquittal of A and B was no bar to the trial of C as there were additional facts before the Court subsequent to the acquittal of A and B supporting the charge under S. 411, I.P.C., 40 C.W.N. 1031. But a conviction under S. 411, I.P.C., will bar a subsequent trial under S. 414, I.P.C., 28 A. 313. Acquittal of criminal breach of trust with regard to one item will not bar a second trial with regard to another item during the same period. In a charge of cheating, all the evidence of deception must be disclosed at the first trial. The complainant cannot be permitted to institute a series of trials each based on a different evidence. Where the accused was tried for cheating and thereby inducing delivery of property and he was acquitted, he cannot again be tried on the ground that at the first trial he fraudulently withheld a deposit. The mere fact that the complainant is prepared to adduce fresh evidence will not make it a different offence not operating as a bar to a second trial, 25 L.W. 220=23 Cr. L.J. 235=99 Ind. Cas. 1035, 12 Bom. L.R. 226=11 Cr. L.J. 337=5 Ind. Cas. 970. The acquittal of an accused on a charge under S. 400, I.P.C., cannot operate under this section as a bar to his being prosecuted again on a charge under S. 395, I.P.C., for committing only one of the dacoities in respect of which evidence was given at the previous trial. This section bars a separate trial on the same basis of facts, only in cases falling under S. 236 and S. 237, *supra*, 1 Bom. L.R. 15. Acquittal under Ss. 825 and 147, I.P.C., is no bar to a subsequent trial under S. 204, I.P.C., 27 Cr. L.J. 615=94 Ind. Cas. 359, following 42 A. 128; 24 M. 136. Where A was charged under S. 411, I.P.C., with regard to some articles of stolen property and acquitted, he cannot be subsequently tried for other articles in his possession unless those articles were recovered at different times, 50 C. 594 where 15 A. 317 and 15 C. 511 are *followed*. See 27 Cr. L.J. 1256=98 Ind. Cas. 104. The acquittal of some out of several persons charged will not bar the subsequent trial of other persons implicated in the same transaction when arrested and put on.

their trial, 37 C. 680. Where a former conviction or acquittal is set up as a bar to subsequent trial, the Court before which the second trial is held has nothing to do with the evidence given on the former trial except for the purpose of ascertaining whether the offence which forms the subject of the first trial is the same as that which forms the subject of the second charge. If the offence is the same the conviction or acquittal is a bar to a second trial whether the second Court considers the former conviction or acquittal was warranted by the evidence given at the first trial or not. If the offence is not the same, the former conviction or acquittal is no bar to the trial upon the second charge notwithstanding the evidence given is the same in the two cases, 7 W.R. Cr. 15. Acquittal under S. 498, I.P.O., of an accused who was alleged to have enticed away a married woman with two of her minor children is a bar to the trial of the accused for the offence of kidnapping the two minor children, kidnapping not being a continuing offence and there could be no abetment of kidnapping after the minors were once taken away from lawful guardianship, 12 Cr. L.J. 94 = 9 Ind. Cas. 511. Where an accused was charged with kidnapping from lawful guardianship in general terms without stating from whose guardianship the kidnapping took place, an acquittal had on such a charge of the offence of kidnapping from the guardianship of a particular person may be pleaded as a bar to a trial on a charge of kidnapping from lawful guardianship of another person, 24 M. 284. The trial of an accused person for offences under Ss. 341 and 352, I.P.C., does not bar the trial for an offence under S. 504, I.P.C., in connection with the same transaction, 7 Cr. L. Rev. 238. When two distinct and separate offences such as affray and hurt are committed the case does not fall within this clause and the conviction for affray is no bar to a subsequent trial for causing hurt. Such a case does not fall under sub-section (2) of S. 235, *supra*, and the matter is clear from the illustrations to that section, 47 A. 284, followed in 31 Bom. L.R. 922 holding that a conviction for affray under S. 160 I.P.C., on a police charge would be no bar to a prosecution on the complaint of the injured person for rioting and hurt under Ss. 147 and 323 I. P.C. Where a charge has been framed for murder, culpable homicide and abetment thereof and the Jury returned a verdict of "not guilty" on the first charge and they had to be discharged being not unanimous on the remaining charges, the acquittal for murder could not be pleaded as a bar to the trial of the other offences, as there was an express charge and this section could not therefore protect the accused, 41 C. 1072.

Sub-section (2).—The acquittal of an accused of the offence of abetment of forgery S. 467 and S. 109, I.P.C. will not bar a subsequent trial under S. 82 (a) of the Indian Registration Act with respect to the same document, 37 A. 107, but see 1 Ran. 229, which took a different view. When an accused who was tried for abetment of forgery and acquitted was again put on his trial for using as genuine a forged document, it was held that sub-section (1) of this section did not apply to the case inasmuch as the case was not one contemplated by S. 235, *supra*, and that the case fell directly under this sub-section as the series of acts beginning with forgery and ending with the user in the Civil Court to support the claim must be regarded as so connected together as to form the same transaction, or carrying through of a single predetermined plan, so that under S. 235 (1) it would have been competent to try the accused for both the offences in the same trial, 40 B. 87; 30 C.W.N. 432. Under this section, the provisions of S. 235 (1), *supra*, are not made applicable to those different offences committed in one series of acts, 29 Cr. L.J. 271 = 107 Ind. Cas. 687. Where an accused was acquitted on a charge under S. 182, I.P.C., on the ground that the person informed was not a public servant, it was held that a subsequent trial under S. 500, I.P.C., at the instance of the Sub-Inspector against whom false information was given, was permitted by this sub-section, 37 C. 604; see also 48 C. 382 and 48 C. 389, 23 C. 174 and 1 Bom. L.R. 15. For what are distinct offences, see notes under Ss. 35 and 233 at pages 65, 491 and 492. A person previously convicted of theft of a quantity of opium can again be tried for illicit possession of the same opium under S. 9 of the Opium Act, because this sub-section permits a separate trial for a distinct offence of which a charge might have been made under S. 235 (1), *supra*, as having been committed in the course of the same transaction, 48 A. 496. The acquittal of an accused of an offence under S. 324, I.P.C., will not operate as a bar to his prosecution for an offence under S. 10 (e) of the Indian Arms Act *viz.*, 'going armed' under this

sub-section as the latter offence is a distinct offence from that under S. 324, I. P. O., coming within S. 235 (1), *supra*, 53 B. 604 following 40 B. 97 and 23 C. 174.

Sub-section (3).—In this sub-section, unlike the others, conviction alone is referred to and no mention is made of an acquittal. It is difficult to say whether the omission is deliberate or due to oversight. A conviction for causing simple hurt is no bar to the subsequent trial of the accused for culpable homicide if in consequence of the injury caused by the accused, the injured person dies. But if the accused is acquitted of causing hurt on the ground that he merely caused some slight injury in the exercise of the right of private defence and it was subsequently found on a closer examination of the injured person that the so-called slight injury was of a serious nature which affected a vital part, and in consequence of which the injured person died, *quære* whether the accused could plead the acquittal as a bar to his subsequent trial for culpable homicide in view of the omission of the word "acquittal" in this sub-section. It is submitted that such a result is not contemplated by the Legislature. If a person is tried and acquitted of a charge of simple hurt under S. 323, I.P.O., by reason of the parties having compounded the case, there is no legal bar for a subsequent trial of the same person under S. 304, I.P.O. on its being found that death had resulted from the hurt, 2 Cr. L. Rev. 366; 43 M.L.J. 490=(1925) M.W.N. 553=22 L.W. 203. But see 16 Cr. L.J. 267=23 Ind. Cas. 135, where it was held that the mere fact that subsequent to a conviction further facts came to light which showed the commission of a major offence, will not render an accused liable to be tried again for the graver offence. Where A is convicted of causing hurt to B and as a matter of fact B dies before the trial which fact was not known to the Court when convicting A of hurt, A cannot again be tried of culpable homicide under this sub-section although he may be tried under sub-section (4) of this section, 14 Cr. L.J. 133=18 Ind. Cas. 887; 1901 P.R. (Cr.J) 4.

Sub-section (4).—This sub-section is a further explanation and limitation of the general Common Law rule that no one may be punished twice over for the same offence. 30 Cr. L.J. 806 at 808=117 Ind. Cas. 623. It restricts the right given by sub-section (1). This sub-section lays down that a person acquitted of any offence constituted by any acts may, notwithstanding such acquittal, be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged. This sub-section involves in itself that part of the Common Law rule according to which an accused cannot rely upon the pleas unless the previous acquittal or conviction was by a competent tribunal. But a series of acts may constitute more than one offence and the sub-section says that the person acquitted or convicted of an offence may nevertheless be subsequently tried for any other offence constituted by the same acts if the Court which tried the first offence was not competent to try the subsequent offence. So the Common Law rule has no application if the first Court was not competent to try. The words 'not competent to try the offence' mean that in order to obtain the advantage of the Common Law rule the accused on the second occasion must show that the former Court was in a position had it so chosen to try and acquit or convict the accused of the offence subsequently charged. The words 'competent to try' are equivalent to 'in a legal position to have tried and acquitted or convicted'. The words refer narrowly to the legal position of the Court at the time of the former trial in relation to the particular offence committed and not broadly to the jurisdiction of the Court, 30 Cr. L.J. 806 at 808-809=117 Ind. Cas. 623; following 37 A. 107; 17 Bom. L.R. 678 & dissenting from 36 M. 308; this decision expressly held that the Madras decisions were wrongly decided. The Madras view is that "words not competent to try" in this sub-section mean, had no jurisdiction to try. 24 M. 541; 35 M. 308; 43 M.L.J. 490=22 L.W. 203=(1925) M.W.N. 553=26 Cr. L.J. 1037=83 Ind. Cas. 31. This sub-section refers to the character and status of the tribunal when it refers to the competency to try the offence and this is made clear by illustrations (f) and (g) to this section, 36 M. 323 but see 52 B. 257 which dissented from 36 M. 308. See also 30 Cr. L.J. 806=117 Ind. Cas. 623 which also dissented from 36 M. 308. Where a Magistrate split up the charge of dacoity into its component parts of rioting, using force and misappropriation of property, etc., and convicted

the accused and on appeal the Sessions Judge reversed the conviction being of opinion that the offence, if any, was one of dacoity but refused to order the commitment of the accused for dacoity as the evidence was so incredible it was held that the Judgment of the Sessions Judge was no bar to the entertainment of a fresh complaint relying on this sub-section and illustration (g) to this section 7 M. 557. When on a trial of the accused under Ss. 366, 368 and 376 I.P.O. the accused was acquitted on the ground that the case was one of adultery and subsequently the husband preferred a complaint under S. 498, I.P.O., it was held that the sub-section is no bar as the Court which tried and acquitted was not competent to try the accused under S. 498, for want of a complaint by the husband under S. 199, *supra*, 17 Bom. L.R. 678=16 Cr. L.J. 657=30 Ind. Cas. 641. Where an accused was acquitted under S. 248, *supra*, twice of an offence under S. 178, I.P.O., on the withdrawal of the complaint on the ground that the offence disclosed was one under S. 174, I.P.O., and there was no proper complaint of that offence, it was held that on a third complaint on the same facts by a proper person this subsection cannot be pleaded as a bar to the trial, 52 B. 257 following 22 B. 711; 40 B. 97 and not following 36 M. 308. Similarly absence of sanction or complaint of Court under the present Code which necessitated the acquittal of the accused is no bar to a subsequent trial with the necessary sanction or complaint of Court, as the acquittal was not by a Court competent to try the offence without sanction or complaint of Court, 30 C.W.N. 332, where 22 B. 711; 3 M. 43; 37 A. 107; 40 B. 97; 37 A. 283; 52 B. 257 are followed and 36 M. 308 not followed. See also 53 B. 69 at 72. Similarly an acquittal by a second class Magistrate for an offence under S. 406, I.P.C., is no bar to a subsequent trial by a first class Magistrate under S. 409, 18 Cr. L.J. 643=40 Ind. Cas. 291, followed in 48. M.L.J. 490=26 Cr. L.J. 1037=88 Ind. Cas. 31. An acquittal of under S. 409, I.P.C., of breach of trust of a sum of money, committed between two dates, does not bar, under this section, a subsequent trial of criminal breach of trust on an intermediate date, of a separate sum which was not included in the amount forming the subject of the first trial by reason of the facts relating to the misappropriation of the latter sum not being known to the prosecutor at the time of the previous charge, 50 C. 632 following 12 Bom. L.R. 226=11 Cr. L.J. 337=8 Ind. Cas. 970, and dissenting from 17 Cr. L.J. 39=32 Ind. Cas. 158. There is a divergence of judicial opinion as to whether a trial in respect of a gross sum of money in respect of which breach of trust is alleged to have been committed between two specified dates, a second trial in respect of an offence alleged to have been committed on an intermediate date but not included in the gross sum specified in the first trial is permissible or not. In 17 Cr. L.J. 30=32 Ind. Cas. 158, the Madras High Court held that under the circumstances the charge in the first trial should be taken to have included all the items covered by the period and in 50 C. 632, a single Judge took also the same view but in 12 Bom. L.R. 526 and also the majority opinion 50 C. 632 took a different view. It was pointed out in 50 C. 632 that it would make a considerable difference if it were shown that the defalcations which formed the subject in the second trial was within the knowledge of the prosecution and so could and might have been included in the charge in the first trial, 49 C.L.J. 373 at 381. Acquittal of an accused under S. 426, I.P.O., on the ground of absence of the complainant is a bar under this section to his being put on his trial on the same facts for theft or an application to the District Magistrate to set aside the order under S. 247, *supra*, 37 C.L.J. 253=23 Cr. L.J. 149=76 Ind. Cas. 293. When a person was charged and acquitted of an offence of abetting and aiding, cheating under the Penal Code in connection with registration of a document, the acquittal is no bar to the trial for an offence under S. 82 of the Registration Act, 37 A. 107. See also 28 Cr. L.J. 908=105 Ind. Cas. 236 where 1 Ran. 299 which took a different view is distinguished. Where several accused were tried by a first class Magistrate who acquitted some and convicted the rest and on appeal by the convicted persons, the Sessions Court directed the acquitted accused to be committed on the same facts for murder, it was held that the commitment was legal and this section did not bar such a commitment, 13 Cr. L.J. 742=17 Ind. Cas. 54. Where a person was first tried for offences under S. 465 read with S. 109, I.P.C., with regard to an attestation of a voting paper at a Municipal election and acquitted of the offence charged, he can be tried again for an offence charged under S. 171 F, I.P.C., of intentionally abetting false personation at the election which the Court when it tried the accused under Ss. 465 and 109, I.P.C., could not try for want of the necessary sanction of the Local Government at the date of the first trial and such sanction

non-competency of the Court to try the offence coming under sub-section (4). 36 M. 308 but in 32 B. 237 it was held dissenting from the view that illustrations cannot justifiably be held to control the wide words of the section '*not competent to try*' and the mere fact that illustrations are confined to instances where the first tribunal has not the necessary powers to try a particular offence they do not show that the words '*competent to try*' are confined to cases of that kind. If the words mean '*had no Jurisdiction to try*', then they are sufficient to cover a case where the Court cannot take cognizance of a case because the provision of S. 195, *supra*, and that goes to the root of jurisdiction. See also 30 Cr. L.J. 806=117 Ind. Cas. 625.

PART VII.

OF APPEAL, REFERENCE AND REVISION.

CHAPTER XXXI.

OF APPEALS.

Appeal.—The term "Appeal" is not defined in the Code. It means a complaint to a superior Court of an injustice done by an inferior Court. The party complaining is called the appellant and the other party the respondent. *Wharton's Law Lexicon* explains the term thus: "The removal of a cause from an inferior to a superior Court for the purpose of testing the soundness of the decision of an inferior Court." See 22 M. 68 at 80; 12 Cr. L.J. 43=9 Ind. Cas. 261. An appeal is not a second trial but a continuation of the trial already held, 37 M. 119. All jurisdiction starts from the first Court and remains constant throughout the subsequent stages of the proceeding, 12 Cr. L.J. 443=11 Ind. Cas. 788. A Criminal appeal differs from a Civil one in that, in the former where questions of fact are in issue, the sound rule is to consider whether the conviction is right, whereas in the latter case the Court must be convinced before reversing a finding of fact by the lower Court that the finding is wrong, 11 C.L.R. 25 at 29-30; 23 C. 347; 20 C. 353. The general tendency of the Amending Act of 1923 has been to enlarge rather than to curtail the right of appeal in favour of accused persons. By that Act several orders which were not formerly appealable have been made so. The right of appeal to a higher Court has been conferred by S. 406 *infra*. An order refusing to accept or rejecting a surety has been made appealable by S. 406 A *infra*; the immunities enjoyed by certain sentences passed under Ss. 413 and 414 have now been taken away, special right of appeal has been created in certain cases under Ss. 415A and 418 (2) *infra* and it is also interesting to note that in the matter of refusal to accept or of rejecting sureties offered in compliance with an order under S. 562 (1) *infra*, the provisions as to right of appeal, have been made appealable by S. 562 (4) *infra*. An appeal also lies on behalf of a convicted person against whom an order under S. 562 (1) *infra*, has been passed under Ss. 407 and 408, *infra*, even though it is not expressly mentioned there, 52 C. 483. An appeal is only a creature of Statute and where it is given it becomes a matter of right as distinguished from a revision which is purely discretionary. When an appeal lies and no appeal is filed, no proceedings by way of revision can be entertained, S. 439 (5), *infra*. Rules of limitation govern appeals. See Arts. 150, 154, 155, 157 of the 2nd Schedule and S. 5 of the Limitation Act IX of 1908. This Chapter is not exhaustive. There are other orders under the Code, *viz.*, those under Ss. 260, 466, 514, 515 *infra*, which are made specially appealable.

404. No appeal shall lie from any judgment or order of a Criminal Court except as provided for by this Code or by any other law for the time being in force.

Unless otherwise provided, no appeal to lie.

The power of superintendence of superior Courts is entirely distinct from the jurisdiction to hear appeals. If the inferior Court after hearing the parties comes to an erroneous decision either on law or fact on a matter within its jurisdiction, the Court having power of Superintendence never interferes. The only mode of questioning the propriety of such a

practice no doubt but the practice is uniform and only in special circumstances can it be departed from. The mere fact that a division Bench of the High Court issued an *ex parte* order admitting an appeal or revision after the expiry of 60 days will not preclude the Bench hearing the case from going into the question of limitation at the final hearing, 54 C. 394 where 50 C. 423 is *distinguished*. An appeal presented long after the period of limitation was treated as a revision and decided on the merits in 2 A. 336. Presentation of an appeal by a prisoner in jail to the officer in charge of the jail is for the purposes of the Limitation Act equivalent to presentation to the Court, 9 M. 258. So also time taken in forwarding an application for a copy of judgment by the prisoner and in transmitting the same to him must be excluded, 9 M. 258. Where one of several accused was acquitted on appeal, an appeal presented by the other accused after such acquittal was entertained and dealt on the merits, 1871 P. R. (Cr.) 7; as to mode of computation of the period of limitation, see S. 12 of the Limitation Act, IX of 1903.

Appeals to the Privy Council.—His Majesty the King is supreme over all persons and Courts within His Dominions and a right of appeal in all cases to the King in Council exists from the High Courts of each separate Colony, Province, State or Possession whether it be a Court of error or not, except so far as the prerogative in this behalf has been expressly surrendered. Criminal proceedings are in practice reviewed only if it is shown that by a disregard of the forms of legal process or by some violation of natural justice or otherwise substantial and grave injustice has been done. The Judicial Committee do not as a rule advise His Majesty to grant appeals in criminal cases except where questions of general and great importance likely to occur often are raised, and where the due and orderly administration of the law is shown to be interrupted or diverted into a new course, which might create a precedent for the future and where there are no other means of preventing these consequences. Such appeals lie either by the right of grant in pursuance of leave obtained by the appellant from, or by reason of special leave granted by the Judicial Committee, 39 C.L.J. 1. It is well settled that the unwritten principles of the constitution of the Empire restrain the Judicial Committee from being used in general as a Court of review in criminal cases. But while the Sovereign in Council does not interfere merely on the question whether the Court below has come to a proper conclusion as to the guilt or innocence, such interference ought to take place where there has been a disregard of the proper forms of legal process grievous and not merely or a technical character or a violation of principle in such a fashion as amounts to a denial of justice. 39 C.L.J. 1 at p. 11 quoting from 44 Ind. Apps. 137. As a rule the administration of criminal law including the forms of procedure, trial and punishment for crime is left to the local jurisdiction and appeals to His Majesty in Council from Colonies are extremely rare. The inherent jurisdiction of the King in Council to receive appeals in criminal matters as well as in civil cases exists for the purpose of ensuring the proper administration of justice and to preserve the due course of procedure but this prerogative is very cautiously exercised. It is the usual rule of the Privy Council to quote the *dicta* of Lord Halebury in *Reel v. Queen*, 10 A. C. at p. 677 when leave to appeal in criminal cases is applied for, namely, "no leave will be granted in criminal cases except where some clear departure from the requirements of justice is alleged to have taken place." In *ex parte Macrea*, 1893 A.C. 346 the Privy Council again pointed out that although leave to appeal may be granted in exceptional cases yet a mere mis-direction to the Jury by the Judge where no miscarriage of justice had actually resulted therefrom will not afford ground for special leave to appeal. See also (1892) A.C. 422; (1897) A.C. 719; 12 A.C. 459 (*Dillet's case*) affirmed in all later decisions such as 36 M. 591 (P.C.); 41 C. 568 and 1023 (P.C.) and 5 Ran. 53 (P.C.) In criminal cases the Privy Council does not lightly interfere. In *Dillet's case* Lord Watson laid down the law thus "such appeals are of rare occurrence because the rule has been repeatedly laid down and has been invariably followed that Her Majesty will not review or interfere with the course of Criminal proceedings unless it be shown that a disregard of the forms of legal process or some violation of the principles of the natural justice, otherwise substantial and grave injustice has been done," reaffirmed in 15 Cr. L.J. 303 (P.C.) = 23 Ind. Cas. 657 and 41 C. 1023 (P.C.) The Privy Council will not grant leave to appeal in a criminal matter unless in the particular case there

is something which deprived the accused the substance of a fair trial and the protection of the law or which in general tends to divert the due and orderly administration of the law into an evil precedent in future, 18 C.W.N. 705 (P.C.)=15 Cr. L.J. 326=23 Ind. Cas. 678=1 L.W. 999. It is now well established that the Judicial Committee of the Privy Council only recommends to His Majesty to exercise his jurisdiction in appeals in criminal cases upon very restricted grounds, 5 Ran. 83 (P.C.) See 32 C.W.N. 11, for a critical note as to interference by Privy Council in Criminal cases.

"The responsibility for the administration of criminal justice in India, this Board will neither accept nor share unless there has been some violation of the principles of justice or some disregard of legal principles. This Board will not consider appeals brought from criminal Jurisdiction in the provinces of India. They cannot but regret that those who are connected with the legal profession in India should have so completely disregarded those injunctions that their Lordships have so often laid down. It is a grievous thing to think of the distress and anxiety which must be caused to the relations and friends of the condemned man, by holding out to them vain hopes that the penalty which had been inflicted can be mitigated or reversed by this Board except in the special circumstances to which I have referred"—*per Lord Buckmaster* in 22 L.W. 57 at 58 (P.C.). The Judicial Committee of the Privy Council is not a Court of criminal appeal. When there has been evidence before the Court below upon which it has come to a conclusion their Lordships will not disturb that conclusion. They will only interfere in such cases as are referred to in the well known case of *In re Dillet*, where there has been a gross miscarriage of Justice or a gross abuse of the forms of legal process, 30 C.W.N. 557 (P.C.)=42 C.L.J. 67=49 M.L.J. 331=(1925) M.W.N. 418=27 Cr. L.J. 223=92 Ind. Cas. 212. The Privy Council is not a court of criminal appeal, and it would be contrary to its constitutional duty to assume that position. A Court of appeal can go into facts and deal with the case on the merits. The functions of the Privy Council are limited by the law laid down in *Dillet's* case to something much more narrow, namely, if what has been done has been grossly contrary to the forms of justice or violates fundamental principles, then and then only it has power to interfere, 41 C. 563 (P.C.). The jurisdiction which the Privy Council exercises in criminal matters involves a general consideration of the evidence and circumstances of each particular case in order to place the irregularity complained of, if substantiated in proper relation to the whole matter, 18 C.W.N. 75 (P.C.)=15 Cr. L.J. 326=23 Ind. Cas. 678=1 L.W. 999. So pending leave to appeal against a capital sentence, the Privy Council has no power to stay the sentence, 42 C. 739. The adequacy or otherwise of a charge to the Jury by a Judge, though it may furnish proper ground of appeal to a Court of criminal appeal does not amount to "a disregard of the forms of process or violation of the principles of natural Justice" to warrant the Privy Council in entertaining an application for special leave to appeal to His Majesty in Council by a convicted person, 30 C.W.N. 557=43 M.L.J. 831 (P.C.)=43 C.L.J. 47. The Letters Patent, of the various High Courts provide for an appeal from certain Judgments in cases tried by the High Court in the exercise of its ordinary original criminal jurisdiction, and in cases where any point of law has been reserved for the opinion of the said High Court, but it is necessary that the High Court should certify that the case is a fit one for an appeal to the Privy Council. See in this connection the observation of the Judicial committee in the case in 52 C. 197 at 221. Special leave to appeal may be granted by the Privy Council when there is a question of jurisdiction of general importance, 7 M.I.A. 72; where there is a grave error of procedure touching jurisdiction, 25 M. 61, where by some disregard of the forms of legal process or by some violation of the principles of natural justice or otherwise, some substantial and grave injustice has been done, 36 M. 501 L.R. 12 A.C. 459; 26 C.L.J. 13; 33 C.L.J. 125 (P.C.) and 222; (1914) A.C. 599; 18 C.W.N. 705 (P.C.)=15 Cr. L.J. 326=23 Ind. Cas. 678. When a sentence passed was found not to be authorised by law, i.e., a sentence of transportation for 14 years when only a transportation for 10 years is permissible under the law, it was held that there was substantial injustice, requiring the interference of the judicial committee of the Privy Council, 44 M. 297 (P.C.).

Power to entertain appeals by the Privy Council arises not from the relation of the Privy Council to the Court below, as a Court of criminal appeal but as the Privy Council advising.

the Sovereign with regard to the exercise of the prerogative which is that remnant power of the Crown which remains to the Crown to interfere with tribunals of justice which does not exist in England at all. It has passed away in the historic development of the constitution. It used to exist and it does exist to some extent in the case of Crown Colonies because they are managed directly by the Crown through Ministers, but when one comes to self-governing dominions it is doubtful whether even the principle of *Dillet's case* could be applied to the constitution of Canada and Australia. India is not yet in that stage but it has been publicly said that India is recognised by the Imperial Government as being on the way to be a self-governing dominion and so even with regard to India it is with the utmost care, that we should pronounce any proposition that that disappearing fragment of the prerogative remains. Unless it can be proved that there was no proper trial at all, that the forms of all judicial procedure were disregarded, not merely according to local ordinances but according to the varying character which is common to all, the Privy Council cannot interfere. If there was anything very gross it might come under the same category, but even then the Crown has to be extraordinarily cautious in asserting the survivor even of that very restricted prerogative which existed 50 years ago but which may not exist now. The Privy Council is not a Court of Criminal Appeal and cannot take cognizance of a mere mistake. It is not a case in which justice has been set at naught and therefore the Privy Council, has no jurisdiction. It is not right for either Counsel or Privy Council agents to encourage the bringing of such petitions like this. It is waste of time of the Judicial Committee and after the repeated intimations given by their Lordships it is hardly respectable to the tribunal, 49 B. 435 (P C) at 457-58.

Appeals from Aden.—Appeals from Aden lie to the High Court of Bombay and are regulated by Act II of 1864 as now amended by Act XXI H of 1927—Appeals from the Resident and from Additional Sessions Judge where an appeal is provided by the Code, lie to the High Court of Bombay but no appeal will lie against a sentence of imprisonment not exceeding six months only or a fine not exceeding Rs. 500 only. An appeal from acquittal may be made as provided by the Code, and it shall be in the discretion of the Resident to reserve, for the opinion of the High Court any point of law arising in any criminal proceedings pending before him.

Court of criminal appeal in England.—Court of appeal was constituted under the Criminal Appeal Act, 1907, 7 Edw 7 C 23. The Lord Chief Justice of England is the President and all the Judges of the King's Bench Division are Judges of the Court. A person convicted may appeal on a question of law or with the leave of the Court on a question of fact or on any other ground which appears to the Court to be sufficient or against his sentence only. A habitual criminal convicted of an offence may appeal without leave of Court but a person convicted at petty Sessions or at Assizes as an incorrigible rogue may appeal with leave, against his sentence. The Act does not apply to convictions of a Peer or Peers for an offence not triable at the Assizes and nothing in the Act affects the prerogative of mercy, but the Secretary of State may refer to the Court any point raised in a petition to him concerning convictions or sentences other than a sentence of death. Where the questions raised relate to the whole case of a convict, the case is considered as if it were an appeal but if only a particular point raised in a case is before the Court, it may be determined by the Court in private—a procedure adopted on very few occasions. A convicted person must apply to the Court within 10 days of his conviction or sentence but the Court has power to extend the time in all cases except in convictions involving a death sentence. An appellant is entitled to be present at the hearing if he wishes, unless the question involved is one of law only. A single Judge of the Court is empowered to grant or refuse leave but if an application is refused, the appellant has the right to have his application heard by the full Court. The Court of Criminal Appeal duly constituted to hear appeals must consist of not lower than three Judges and may consist of a larger number of the Chief Justice so directs but always of uneven number. The Chief Justice always sits if possible, and presides over the Court which sits in London. During the pendency of an appeal, the sentence is suspended so that in appeals that have no merit the appellant will have to serve five or six weeks longer in jail than if he had not appealed. This serves as a check to the lodging of frivolous appeals by a

convicted person. The Court has power to enhance the sentence in an appeal against the sentence in exceptional cases and the Court has always expressly warned the appellant of the risk of enhancement thus giving the appellant an opportunity to abandon the appeal. The Court has no power to enhance sentence in an appeal from a conviction although it is clearly of opinion that the sentence passed at the trial was inadequate but such a power is given in frivolous appeals in Scotland by a new amendment in 1926. The powers of the Court of Criminal Appeal has been summarised thus by Darling J. "They had no power to re-hear a case. They could interfere if it was proved that a wrong judgment had been given on a point of law; or, if the verdict of the Jury appeared in all the circumstances unreasonable in point of fact. They could interfere if on a general view of the case in law, and fact, it appeared to them that there had been a miscarriage of justice."

405. Any person whose application under section 89 for the delivery of property or the proceeds of the sale thereof has been rejected by any Court may appeal to the Court to which appeals ordinarily lie from the sentences of the former Court.

Appeal from order rejecting application for restoration of attached property

Appeals ordinarily lie.—Compare sub-section (3) of S. 195, *supra* and see notes at page 357. Ordinarily lie, *i.e.*, in the majority of cases, 23 M.L.J. 436; 27 M. 124; 11 B. 438; 26 M. 636 (F.B.); 39 C. 774; 22 C. 437.

406. Any person who has been ordered under section 118 to give security for keeping the peace or for good behaviour may appeal against such order.—

Appeal from order requiring security for keeping the peace or for good behaviour.

- (a) if made by a Presidency Magistrate, to the High Court;
- (b) if made by any other Magistrate, to the Court of Session:

Provided that the Local Government may, by notification in the local official Gazette, direct that in any district specified in the notification appeals from such orders made by a Magistrate other than the District Magistrate or a Presidency Magistrate shall lie to the District Magistrate and not to the Court of Session:

Provided, further, that nothing in this section shall apply to persons the proceedings against whom are laid before a Sessions Judge in accordance with the provisions of sub-section (2) or sub-section (3A) of section 123.

Amendment.—This section has been re-drafted. Appeal is provided in cases of security for keeping the peace also; appeal lies to the High Court from a Presidency Magistrate's order and to the Sessions Court from other Magistrates' order. Power is also given to Local Government by notification to direct that such appeals shall lie to the District Magistrate and not to the Sessions Court.

Scope of the section.—Before the new amendment, there was a right of appeal only from an order directing security for good behaviour but now a right of appeal is also given in proceedings to keep the peace under S. 107, *supra*. The appeal lies to the Sessions Court if made by Magistrates other than Presidency Magistrates, in which the appeal lies to the High Court, but under the proviso the Local Government may notify that appeals from

Magistrates may lie to the District Magistrate and not to the Court of Session. Although the person bound over under S. 107 *supra*, is not convicted of any offence the appellate Court when hearing an appeal under this section from such an order, is competent to order a retrial as the order for retrial in such a case is an incidental order within S. 423, *infra*, 43 A. 501. The High Court has power to revise the order of the District Magistrate or Sessions Judge on appeal and under Ss. 124, and 125, *supra*, the District Magistrate himself may release the person imprisoned for failure to give security or cancel the bond already taken. The order of a Sessions Judge under this section discharging a person from whom security was taken under S. 118, *supra*, is not an original or appellate order of acquittal under S. 417 *infra*, and the local Government has no right of appeal against such an order, but may move the High Court in revision, 27 Cr. L.J. 626=94 Ind. Cas. 402, *following* 21 A. 107; 24 A. 143; 36 A. 147.

Appeal.—Before the amendment no appeal lay under this section when a District Magistrate or Presidency Magistrate ordered security for keeping the peace or to be of good behaviour. But now an appeal lies to the High Court in the case of a Presidency Magistrate, and to the Sessions Court in the case of a District Magistrate. If security order is confirmed in appeal by the Sessions Court, the further remedy is to move the High Court in revision to have the order set aside under S. 439, *infra*. If the person from whom security is demanded fails to furnish the security and is imprisoned, S. 124, *supra*, makes provision for releasing such a person if it could be done without hazard to the community. This power is vested in the Chief Presidency Magistrate and not in a Presidency Magistrate. Similarly under S. 125, *supra*, a Chief Presidency Magistrate or District Magistrate may cancel any bond taken by the order of any Court in his district not superior to his own. The High Court will not ordinarily interfere on the merits with orders under security sections and where no appeal has been preferred against such orders, the High Court will refuse to exercise its revisional jurisdiction, 13 Cr. L.J. 9=13 Ind. Cas. 102; 16 Cr. L.J. 252=28 Ind. Cas. 108; 6 A.L.J. 437=9 Cr. L.J. 528=2 Ind. Cas. 223.

Provisos —The two provisos are new. The first proviso is important. The Local Government may by notification direct that appeals from Magistrates other than the District Magistrate shall be to the District Magistrate and not to the Sessions Court. Even in such a case the party aggrieved may move the High Court to revise the order after the appeal was decided by the District Magistrate. So the decisions in 25 C.W.N. 383 and 27 A. 623 are no longer law. The second proviso makes it clear that this section does not apply to cases laid before the Sessions Judge under S. 123 *supra*. When a Sessions Judge deals with a case under S. 123, *supra*, the order passed by him, whatever it may be, becomes the order in the case and there is no longer an order by a Magistrate made under S. 118, *supra*, which can be subject of an appeal to the District Magistrate under this section, 35 B. 271 at 274. The only course open is to move the High Court to revise the order of the Sessions Judge.

406A. *Any person aggrieved by an order refusing to accept or rejecting a surety under section 122 may appeal against such order.—*

- (a) *if made by a Presidency Magistrate, to the High Court;*
- (b) *if made by the District Magistrate, to the Court of Session; or*
- (c) *if made by a Magistrate other than the District Magistrate, to the District Magistrate.*

Amendment.—The Select Committee remarked on this new section thus "we note that there has been considerable criticism on this clause which provides for the appeal against an order refusing to accept a surety. But we think that if no appeal is provided most cases are bound to be taken up in revisions. We do not agree that all appeals under Ss. 406 and 406A

should lie to the Sessions Judge." This section is new and provides for appeals from orders refusing to accept or rejecting a surety under S. 122, *supra*. See S. 432 (5) *infra*, which enacts that where an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed. See 16 Cr. L.J. 232=23 Ind. Cas. 108.

407. (1) Any person convicted on a trial held by any Magistrate of the second or third class, or any person sentenced under section 349 or in respect of whom an order has been made or a sentence has been passed under section 380 by a Sub-divisional Magistrate of the second class, may appeal to the District Magistrate.

Appeal from sentence of Magistrate of the second or third class.

(2) The District Magistrate may direct that any appeal under this section, or any class of such appeals, shall be heard by any Magistrate of the first class subordinate to him and empowered by the Local Government to hear such appeals, and thereupon such appeal or class of appeals may be presented to such Subordinate Magistrate, or, if already presented to the District Magistrate, may be transferred to such Subordinate Magistrate. The District Magistrate may withdraw from such Magistrate any appeal or class of appeals so presented or transferred.

Transfer of appeals to first class Magistrate.

Amendment.—An appeal is provided for under this section against any sentence or order passed under S. 380, *supra*, by the addition of the words "in respect of whom an order has been made or a sentence has been passed under S. 380," in sub-section (1).

Scope of the Section.—This section deals with appeals by persons convicted on trials held by Magistrates of the second and third classes and from a sub-divisional Magistrate of the 2nd class and also against an order (which is not a sentence) passed by a sub-divisional Magistrate of the second class passed under S. 380, *supra*. An order under S. 562 (1) *infra*, may be passed by a Sub-divisional Magistrate acting under the provisions of S. 380, *infra*, according to the proviso to S. 562, *infra*. Such an order would be clearly appealable under this section, 52 C. 463 at 467.

Convicted on a trial—The word "offence" in S. 4 (1) (a), *supra*, includes an act in respect of which a complaint may be made under S. 20 of the Cattle trespass Act and a person against whom an order under S. 22 of the said Act is made is a person convicted on a trial, "See 46 B. 58; 27 C. 992; 34 C. 926; 44 B. 42 in this connection. When such trial is by a second or third class Magistrate an appeal under this section lay against that conviction, 29 M. 517 at 518. This section applies only to the case of a conviction and the power of the Appellate Court is confined to the hearing of an appeal presented against such conviction, 34 A. 244.

By any Magistrate of the second or third class—An appeal lies under this section from a conviction by a Bench invested with second or third class powers, 9 M. 36, but not from a conviction by a Bench invested with first class powers, 9 C. 96. The question whether an appeal lies to the District Magistrate or not depends upon the power of the Magistrate at the commencement of the trial. If a second class Magistrate before the conclusion of the trial is appointed a Magistrate of the first class, the appeal still lay to the District Magistrate, 8 Cr. L.J. 48. But a Bench of the Patna High Court in 26 Cr. L.J. 915 = 88 Ind. Cas. 978 (2) has held distinguishing 8 Cr. L.J. 48 that the appeal lay to the

Convicted on a trial.—See notes under the previous section. An appeal lies under this section from an order awarding compensation under S. 22 of the Cattle-trespass Act. The compensation so awarded is not a fine and consequently the restrictive provisions of S. 413, *infra*, do not apply, 46 B. 58. See also in this connection 44 B. 42; 34 C. 926; 27 C. 992.

Any Magistrate of the first class.—Where a second class Magistrate takes cognizance of a case but during the course of the trial is invested with powers of a Magistrate of the first class and a substantial part of the trial was held by him as a Magistrate of the first class, it would be straining the language of the section to hold that the case does not fall within this section, 29 Bom. L.R. 432=28 Cr. L.J. 474=101 Ind. Cas. 602 and the appeal in such a case lies to the Sessions Court and not to the District Magistrate, 8 Lah. 203. The moment a second class Magistrate is invested with first class powers, he becomes a first class Magistrate and any conviction by him in cases taken up by him as a second class Magistrate would be a conviction by a first class Magistrate and an appeal from such conviction lay to the Sessions Court, [1925] Pat. 472=25 Cr. L.J. 914=86 Ind. Cas. 978 followed recently in 51 M. 257 and 8 Lah. 203. When a Magistrate of the first class sentenced an accused to one day's imprisonment and a fine of rupees fifty and on appeal the Sessions Judge declined to entertain the appeal on the ground that in fact the accused was neither sent to jail nor actually imprisoned, it was held by the High Court that an appeal did lie to the Sessions Court as there was a combination of sentences under S. 413, *infra*, and it was immaterial whether the accused actually suffered imprisonment in jail or not, 33 A. 510. Where a second class Magistrate sends up a case under S. 349, *supra*, to a first class Magistrate, such Magistrate should be deemed to be not a Magistrate exercising powers under S. 30, *supra*, and when he sentences to a period of five years, an appeal lies to the Sessions Court and not to the High Court, 6 Cr. L.J. 289. When a second class Magistrate sends up a case to a first class Magistrate, being of opinion that the provisions of S. 562, *infra*, is applicable to the case of the accused but the first class Magistrate convicts and sentences the accused to a term of imprisonment an appeal lies to the Sessions Court against the conviction, 17 Bom. L.R. 895=16 Cr. L.J. 738=31 Ind. Cas. 338=7 Cr. L. Rev. 128. See also 29 C.W.N. 151.

Proviso (b)—The words "of all or any of the accused sentenced at such trial" have been newly added in order to make it clear that in a trial in which more persons than one are convicted and in which by reason of the sentence passed, an appeal lay in the case of some of the accused to the Sessions Court and of others to the High Court, the appeal of all the accused shall lie to the High Court. This is in accordance with the decision in, 23 Cr. L.J. 595=68 Ind. Cas. 819; 11 Bom. L.R. 544=10 Cr. L.J. 250=3 Ind. Cas. 171; 35 A. 154; 17 M. L.J. 248; 13 A.L.J. 272=16 Cr. L.J. 333=28 Ind. Cas. 737; 38 A. 395; 11 A.L.J. 111=14 Cr. L.J. 119=18 Ind. Cas. 679; 1901 P.R. (Cr. J.) 15. The decision in 40 M. 591 is no longer law. Where the total term of imprisonment awarded by an Assistant Sessions Judge or a Magistrate empowered under S. 30, *supra*, does not exceed four year's imprisonment in the aggregate, the appeal from such conviction lies to the Sessions Court, 28 Cr. L.J. 672=103 Ind. Cas. 208. A Sessions Judge to whom a jail appeal was sent by mistake from the conviction and sentence of five years by a Magistrate specially empowered under S. 30, *supra*, dismissed the appeal summarily. Such dismissal is a nullity, under S. 530 (r), *infra*, and the accused still had a right of appeal to the High Court under this section, 2 Ran. 386. Under this proviso when an accused has been sentenced to more than four years, all the other accused convicted at the same trial have to appeal to the High Court even though they have received smaller sentences and this is so even if the accused who has been sentenced to more than four years does not choose to appeal, 24 A.L.J. 151=27 Cr. L.J. 173=91 Ind. Cas. 959 where 37 A. 471 is followed.

Proviso (c).—This was added in the Code of 1898. Appeals from convictions under S. 121A, I.P.C., by Magistrates, lie direct to the High Court. A person was convicted under S. 121A and sentenced to two years' rigorous imprisonment and also convicted under S. 163, I.P.C. and sentenced to one year's rigorous imprisonment. Under S. 35 (3), *supra*, if a person is convicted of several offences at one trial, the aggregate sentences are to be deemed as one

Convicted on a trial.—See notes under the previous section. An appeal lies under this section from an order awarding compensation under S. 22 of the Cattle-trespass Act. The compensation so awarded is not a fine and consequently the restrictive provisions of S. 413, *infra*, do not apply, 46 B. 58. See also in this connection 44 B. 42; 34 C. 926; 27 C. 992.

Any Magistrate of the first class.—Where a second class Magistrate takes cognizance of a case but during the course of the trial is invested with powers of a Magistrate of the first class and a substantial part of the trial was held by him as a Magistrate of the first class, it would be straining the language of the section to hold that the case does not fall within this section, 29 Bom. L.R. 432=28 Cr. L.J. 474=101 Ind. Cas. 602 and the appeal in such a case lies to the Sessions Court and not to the District Magistrate, 8 Lah. 203. The moment a second class Magistrate is invested with first class powers, he becomes a first class Magistrate and any conviction by him in cases taken up by him as a second class Magistrate would be a conviction by a first class Magistrate and an appeal from such conviction lay to the Sessions Court, [1925] Pat. 472=26 Cr. L.J. 914=86 Ind. Cas. 978 followed recently in 51 M. 237 and 8 Lah. 203. When a Magistrate of the first class sentenced an accused to one day's imprisonment and a fine of rupees fifty and on appeal the Sessions Judge declined to entertain the appeal on the ground that in fact the accused was neither sent to jail nor actually imprisoned, it was held by the High Court that an appeal did lie to the Sessions Court as there was a combination of sentences under S. 413, *infra*, and it was immaterial whether the accused actually suffered imprisonment in jail or not, 33 A. 510. Where a second class Magistrate sends up a case under S. 349, *supra*, to a first class Magistrate, such Magistrate should be deemed to be not a Magistrate exercising powers under S. 30, *supra*, and when he sentences to a period of five years, an appeal lies to the Sessions Court and not to the High Court, 6 Cr. L. J. 289. When a second class Magistrate sends up a case to a first class Magistrate, being of opinion that the provisions of S. 562, *infra*, is applicable to the case of the accused but the first class Magistrate convicts and sentences the accused to a term of imprisonment an appeal lies to the Sessions Court against the conviction, 17 Bom. L.R. 893=16 Cr. L. J. 738=31 Ind. Cas. 338=7 Cr. L. Rev. 129. See also 29 C.W.N. 151.

Proviso (b).—The words "of all or any of the accused sentenced at such trial" have been newly added in order to make it clear that in a trial in which more persons than one are convicted and in which by reason of the sentence passed, an appeal lay in the case of some of the accused to the Sessions Court and of others to the High Court, the appeal of all the accused shall lie to the High Court. This is in accordance with the decision in, 23 Cr. L.J. 593=68 Ind. Cas. 819; 11 Bom. L.R. 544=10 Cr. L.J. 250=3 Ind. Cas. 171; 35 A. 154; 17 M. L. J. 248; 13 A.L.J. 272=16 Cr. L. J. 333=28 Ind. Cas. 737; 38 A. 395; 11 A.L.J. 111=14 Cr. L.J. 119=18 Ind. Cas. 679; 1901 P.R. (Cr. J.) 15. The decision in 40 M. 591 is no longer law. Where the total term of imprisonment awarded by an Assistant Sessions Judge or a Magistrate empowered under S. 30, *supra*, does not exceed four years imprisonment in the aggregate, the appeal from such conviction lies to the Sessions Court, 28 Cr. L.J. 672=103 Ind. Cas. 208. A Sessions Judge to whom a jail appeal was sent by mistake from the conviction and sentence of five years by a Magistrate specially empowered under S. 30, *supra*, dismissed the appeal summarily. Such dismissal is a nullity, under S. 530 (r), *infra*, and the accused still had a right of appeal to the High Court under this section, 2 Ran. 386. Under this proviso when an accused has been sentenced to more than four years, all the other accused convicted at the same trial have to appeal to the High Court even though they have received smaller sentences and this is so even if the accused who has been sentenced to more than four years does not choose to appeal, 21 A.L.J. 151=27 Cr. L.J. 175=51 Ind. Cas. 939 where 37 A. 471 is followed.

Proviso (c).—This was added in the Code of 1898. Appeals from convictions under S. 124A, I.P.C., by Magistrates, lie direct to the High Court. A person was convicted under S. 124A and sentenced to two years' rigorous imprisonment and also convicted under S. 153, I.P.C. and sentenced to one year's rigorous imprisonment. Under S. 25 (3), *supra*, if a person is convicted of several offences at one trial, the aggregate sentences are to be deemed as one

sentence for purposes of appeal and this proviso enacts that a person convicted under S. 121A, I.P.C., has an appeal direct to the High Court. It is a reasonable inference that appeal against the single sentence of three years under both the sections lies to the High Court. But as the appeal originally filed against the conviction under S. 123A, I.P.C., to the Sessions Court was called up to the High Court under S. 526, *infra*, and unified, the point was not decided, 35 C. 214 at 219.

May appeal to the Court of Session—Where there are two Sessions divisions in the same district and the Magistrate who convicts the accused had his headquarters in one of the Sessions divisions but had jurisdiction throughout the whole district, it was held that all appeals from convictions should be preferred to the Sessions Court within whose division the headquarters of the Magistrate was situate irrespective of the division in which the offence was committed, 30 M. 126, but the decision was distinguished in 23 M.L.J. 670=12 M.L.T. 831=13 Cr. L.J. 850=17 Ind. Cas. 788. This section makes the sentences of Magistrate appealable under S. 402 read with R. 9, *supra*.

409. An appeal to the Court of Session or Sessions Judge shall

Appeals to Court of Session how heard. be heard by the Sessions Judge or by an Additional Sessions Judge :

Provided that an Additional Sessions Judge shall hear only such appeals as the Local Government may, by general or special order, direct or as the Sessions Judge of the division may make over to him.

Amendment—The proviso is newly added and restricts the power of the Additional Sessions Judge to hear appeals. Assistant Sessions Judges have no power at all to hear appeals. A Sessions Judge has no power to transfer an appeal filed in his Court to an Assistant Sessions Judge as S. 193 (3) speaks of a 'case' which will not include an appeal, 37A 288 where 9 B. 164 and 23 A. 43 are referred to. There is a distinction made in the Code between case and appeal. For example in S. 526, *infra*, the expression 'case or appeal' occurs four times and this expression is again repeated in S. 527, *infra*. See notes at p. 344 *supra*. It was held in 14 Cr. L.J. 195=19 Ind. Cas. 193, that an appeal from an order filing a complaint of Court under Ss. 195 and 476, *infra*, can be heard by an Additional Sessions Judge.

410. Any person convicted on a trial held

Appeal from sentence of Court of Session. by a Sessions Judge, or an Additional Sessions Judge, may appeal to the High Court.

Convicted on a trial may appeal—The conviction contemplated by this section may be either under the Indian Penal Code or under a special or local law 41 C. 694. The words "convicted on a trial" are important. If a Sessions Judge when hearing an appeal requires the trial Court to take additional evidence and disposes of the appeal after the additional evidence is taken and submitted to it, there will not be a further appeal to the High Court in such a case, 27 C. 372; 6 B.L.R. 483=15 W.R. (Cr.) 33. See notes under S. 407, *supra*. An order of a Sessions Judge under S. 123 (3) *supra* cannot be appealed against. An appeal lies to the High Court against an order of a Sessions Judge imposing a fine upon a witness under S. 228, I.P.C., for insult, 4 M.H.C.R. 146. This section gives a convicted person a right of appeal. This right is in contra-distinction with the indulgence to be heard or not when a Court exercises its powers of revision, 1891 A.W.N. 43.

411. Any person convicted on a trial held by a Presidency

Appeal from sentence of Presidency Magistrate.

Magistrate may appeal to the High Court, if the Magistrate has sentenced him to imprisonment for a term exceeding six months or to fine exceeding two hundred rupees.

This section relates to appeals from convictions by Presidency Magistrates.

Imprisonment exceeding six months or fine exceeding two hundred rupees.—It is to be noted that this section is not referred to in S. 415, *infra*, so that the principle of combination of sentences may apply to sentences passed by Presidency Magistrates also. The result is that no appeal lies from a sentence of six months' imprisonment and a fine of rupees two hundred or a further period of three months' simple imprisonment passed by a Presidency Magistrate, 2 M. 30, 16 C. 799; 20 B. 143; 33 C. 1036; 10 Cr. L.J. 255=3 Ind. Cas. 285. Where the accused is convicted of two offences and sentenced to six months' imprisonment for each offence, the sentences to run concurrently, there is no appeal under this section as there is only a single sentence of six months. The intention to be gathered from this section is that a person who is to suffer by being imprisoned for more than a certain period shall have the privilege of an appeal, 17 C. L.J. 392=13 Cr. L.J. 787=17 Ind. Cas. 531. See also S. 35 (3) *supra*.

412. Notwithstanding anything hereinbefore contained, where

No appeal in certain cases when accused pleads guilty.

an accused person has pleaded guilty and has been convicted by a Court of Session or any Presidency Magistrate or Magistrate of the first class on such plea, there shall be no appeal except as to the extent or legality of the sentence.

Scope of the section.—This section provides that there is no right of appeal in certain cases where the accused pleads guilty as the plea of guilty is a waiver of the right of appeal, 5 B. 85; 1917 P.R. (Cr. J.) 20. There should be a real plea of guilty properly made by the accused, 22 B. 759. But when the plea of guilty is based on a mistake of law, it shall not be accepted and it is incumbent on the Magistrate to try the accused on the merits, 31 C. L.J. 122; 11 W.R. (Cr.) 83.

Or Magistrate of the first class.—These words were added in the Code of 1899 to meet the decision in 22 B. 759.

No appeal except as to the extent or legality of sentence.—No appeal will lie on the ground that the conviction was illegal. But the provisions of this section will not preclude an accused person who pleads guilty to the charge from contending in revision that his conviction is illegal and such a plea as to the illegality of the conviction was allowed to be raised by the Bombay High Court in 27 Cr. L.J. 1148=97 Ind. Cas. 668. Exception is made only as regards the extent and legality of the sentence, 22 B. 759 at 760. The intention of the Legislature would appear to be to treat the plea of guilty as a waiver of the right of appeal except as to the extent and legality of the sentence itself, 5 B. 85; 31 C. L.J. 122. See explanation to S. 418, *infra*, which says that severity of sentence shall be deemed to be a matter of law. Limited admission of appeals is not permitted except as provided by this and S. 418, *infra*. In all other cases, if the appeal is admitted, the appellant is of right entitled to have the whole case dealt with by the Court of appeal, Ratnaiah 826. The appellant cannot be restricted to any selected ground out of those specified in his appeal petition. A restrictive order for admission is not clearly contemplated by S. 422, *infra* and must be deemed *ultra vires*, 41 C. 406 at 410 following 15 C.W.N. 921 at 922; 4 Pat. 254; 13 Bom. L.R. 550=12 Cr. L.J. 431=11 Ind. Cas. 615.

413. Notwithstanding anything hereinbefore contained, there

No appeal in petty cases.

shall be no appeal by a convicted person in cases in which a Court of Session passes a sentence of imprisonment not exceeding one month only, or in which a Court of Session or District Magistrate or other Magistrate of first class passes a sentence of fine not exceeding fifty rupees only.

vis., the accused being deprived of the privilege of an appeal no longer exists as pointed out in 30 C.L.J. 859—118 Ind. Cas. 312.

Tried summarily.—This section precludes appeals in certain cases tried summarily by a Magistrate empowered to act under S. 260, but S. 260, *supra*. Itself refers only to Magistrates of the first-class or a Bench having the powers of a Magistrate of the first class. When an accused is convicted by a Bench invested with second or third class powers an appeal lies under S. 407, *supra*, 9 M. 36. An order passed under S. 562, *infra*, in a summary trial is not a sentence within this section and is therefore appealable. See notes under S. 562 *infra* under heading 'appeal and revision'. The section does not say in what cases there shall be an appeal, 36 A 828.

Magistrate empowered to act under S. 260.—The Magistrates empowered under S. 260 *supra* are the District Magistrate, any Magistrate of the first class specially empowered and a Bench of Magistrates invested with first-class powers and specially empowered, and they may try summarily certain offences specified in the section.

Fine not exceeding two hundred rupees only.—Before the amendment when a first-class Magistrate tried a case summarily, and sentenced an accused to three months' imprisonment with evidence recorded in full, there was no right of appeal. There is an appeal now provided for, when the accused is sentenced to imprisonment, but in cases where a fine only is imposed then the fine must exceed rupees two hundred to make it appealable.

415. An appeal may be brought against any sentence referred to in section 413 or section 414 by which any two or more of the punishments therein mentioned are combined, but no sentence which would not otherwise be liable to appeal shall be appealable merely on the ground that the person convicted is ordered to find security to keep the peace.

Proviso to Sections
413 and 414.

Explanation.—A sentence of imprisonment in default of payment of fine is not a sentence by which two or more punishments are combined within the meaning of this section.

This section is a proviso to Ss. 413, and, 414, *supra* but it makes no mention of S. 411, *supra*. So the conviction and sentences permitted by this section do not apply to sentence passed by Presidency Magistrates. A sentence of six months, and a fine of rupees two hundred, in default of payment to three months further imprisonment, passed by a Presidency Magistrate does not make the sentence appealable though such combination is expressly permitted in cases of sentences passed by Provincial Magistrates. A sentence of fine and one day's imprisonment by a Provincial Magistrate is a combination of sentences for the purpose of this section even though the accused is not actually sent to jail, 33 A. 510. It has been held that confiscation of property with other punishments is not a combination to make the sentence appealable, 3 C. 336. An order under S. 106, *supra*, to find security to keep the peace does not make the sentence appealable if it is not otherwise appealable. So also a sentence of imprisonment in default of payment of fine, cannot be combined with a substantive term of imprisonment, to make the sentence appealable. Where in a trial held, non-appealable sentences are passed on conviction on all the accused except one against whom an order under S. 562 (1) has been made, the order under S. 562 (1) being appealable, by operation of this section, the right of appeal is conferred on all the accused jointly tried, even though they were awarded non-appealable sentences, 52 C. 463.

415A. Notwithstanding anything contained in this Chapter, when more persons than one are convicted in one trial, and an appealable judgment or order has been passed in respect of any of such persons, all or any of the persons convicted at such trial shall have a right of appeal.

Special right of
appeal in certain cases.

allowed to remain on record, 23 Cr. L.J. 1245=82 Ind. Cas. 173. In an appeal from an acquittal of a specific offence the accused cannot be convicted on appeal of an offence entirely different from that charged against him, 12 Cr. L.J. 73=9 Ind. Cas. 436, following 19 B. 51 at 68. In an appeal under this section the High Court is a Court of appeal on facts as well as the law, 9 C.L.J. 378=10 Cr. L.J. 499=4 Ind. Cas. 124. No appeal lies at the instance of the Local Government under this section against an order of a Sessions Judge setting aside an order demanding security for good behaviour. There cannot be the least doubt that the terms 'acquittal' and 'conviction' are no where applied to an order under S. 118 *supra* and they are wholly inapplicable, 26 A.L.J. 99=106 Ind. Cas. 684 where 1891 A.W.N. 127; 13 C.W.N. 420; 9 C. 978 are referred to. See also 26 A.L.J. 519; 1 Luck. 231. Similarly when a public prosecutor withdraws the prosecution, no appeal lies under this section 18 M.L.J. (Sh. N.) 57, (Cr. A. No. 439 of 1908).

Local Government may direct the public prosecutor to present an appeal to the High Court.—The right of preferring an appeal against acquittal is peculiar to India alone, of all His Majesty's Dominions. The power of appealing is given only to the Local Government, and should be exercised very sparingly, 21 Bom. L.R. 1054=21 Cr. L.J. 17=54 Ind. Cas. 161; 26 Bom. L.R. 613. A private party cannot appeal or invoke the aid of the High Court under this section, 7 M. 213 and the reasons for this are to safeguard the liberty of the subject from the vindictiveness of a private prosecution by insisting that the authority who should decide whether an appeal should be filed be the highest authority in each Province, viz., the Local Government, 17 Cr. L.J. 91 (2)=32 Ind. Cas. 683 (2). The High Court has no authority to entertain an appeal against acquittal except upon an appeal by the Local Government concerned, 19 W.R. (Cr.) 53; 6 C.L.R. 245; 1 A. 139 (F.B.); 14 M. 363. The right conferred on the Local Government is in the widest terms and without any limitation, 38 M. 1028 at 1034; 2 C. 273. The discretion to exercise the power appertains to Government and is not subject to the control of the High Court, 21 Bom. L.R. 1054 and the High Court will not interfere on the mere reference of the District Magistrate when the Government has a distinct right of appeal under this section, 38 M. 1021. See 56 C. 924 following 44 C. 703; 24 A. 336; 25 A. 128. Though the statutory right of appeal from convictions and acquittals is on the same footing, the Legislature, was not wholly oblivious of the considerations which on the whole differentiate the respective positions of the appellants in the two classes of cases in the matter of their adjudication. Had this not been so, there is no reason for appeals from acquittals being made cognizable by the High Court only, while appeals from convictions lie to the lower grades of Courts. This provision must be due to the special nature of the remedy by appeals from acquittals and the importance of their being decided by the highest Court of the Province, 1 Cr. L.J. 781=1904 P.R. (Cr. J.) 7=1904 P.L.R. (Cr. J.) 97. This section lays down that the Local Government may direct the Public Prosecutor to present an appeal to the High Court. The direction may be given to a Public Prosecutor defined in S. 4 (1) (i) *supra*, in a letter whereby he is appointed as such, but it does not follow that the mere fact that a person has been appointed to present an appeal to the High Court from an order of acquittal involves his appointment as Public Prosecutor for the purpose of the case. In a case of this description where the liberty of the subject is involved, the statute must be strictly construed and full compliance with the provisions is required. The Legal Remembrancer of Bengal is a Public Prosecutor within the meaning of this section, 46 C. 544; 18 C.W.N. 279=19 C.L.J. 519 at 521. But an appeal preferred by the Deputy Legal Remembrancer of Bengal on behalf of the Government of Behar and Orissa under this section was held incompetent and was dismissed on that ground, 18 C.W.N. 279=18 C.L.J. 519. By specially giving a right of appeal, against an acquittal to the Local Government, the Legislature has indicated that private complainants have not the right and the High Court will not interfere in cases of acquittals, in revision, as such a course would practically mean giving the private party a right of appeal, 7 C. 347; see 14 M. 213. The High Court declined to hear Counsel who appeared to support a revision at the instance of a private party. See 42 C. 612, where all the decisions

Government under this section to appeal to the High Court on the ground that a Sessions Judge illegally refused to add a new charge, 15 B. 414 see also 25 M. 1. When a case is withdrawn by the Public Prosecutor in the Sessions Court acting under S. 494, *infra*, no doubt there is an acquittal, if a charge has been framed, but the Government has no right of appeal from such an acquittal, 18 M.L.J. (sh. n.) 57. See the new S. 449 (2) which provides for an appeal from order of acquittal passed by the High Court in the exercise of its original criminal jurisdiction under Chapter XXXIII, *infra*, by the Local Government as in this section. The order of a Sessions Judge under S. 406, *supra*, discharging a person under security under S. 118 is not an original or appellate order of acquittal within this section and the Local Government has no right of appeal against such an order but may move the High Court in revision, and it is open to the High Court to set aside the order and direct the person proceeded against to furnish security, 1 Luck. 231, *following* 21 A. 107; 24 A. 143; 36 A. 147. Where the magistrate made a discharge under S. 119 *supra*, it is now clear on the language of S. 436 *infra* that no further inquiry can be ordered. See notes under S. 110 at p. 155-156 and at p. 170-171.

Limitation for appeals.—Under this section, the time allowed for appeal is six months from the date of the judgment appealed against under Art. 157, Sch. II of the Limitation Act IX of 1908. But the appeal should be preferred as expeditiously as possible, 5 A. 253 at 255; 2 C. 436 (F.B.). S. 5 of the Indian Limitation Act applies to appeals under this section and for sufficient cause the delay may be excused. But where there is unexplained delay in taking steps to have an appeal filed, the discretion allowed under S. 5 of the Limitation Act will not be exercised by the High Court, Weir II, 462; Weir I, 791.

As to arrest of accused in appeal from acquittal, see S. 427 *infra*. In capital cases it is undesirable that the prisoner's fate should be discussed while he remains at large, 9 A. 528 (F.B.). As to powers of the High Court in appeals against the acquittal, see S. 423 (1) (a) *infra* and notes thereunder pages at 762-763.

418. (1) An appeal may lie on a matter of fact as well as a matter of law except where the trial was by jury, in which case the appeal shall lie on a matter of law only.

Appeal on what matters admissible.

(2) *Notwithstanding anything contained in sub-section (1) or in section 423, sub-section (2), when, in the case of a trial by jury, any person is sentenced to death, any other person convicted in the same trial with the person so sentenced may appeal on a matter of fact as well as a matter of law.*

Explanation.—The alleged severity of a sentence shall, for the purposes of this section be deemed to be a matter of law.

Amendment.—Sub-section (2) is new; it provides that when in the case of a trial by Jury, one person is sentenced to death and another to a lesser punishment, the accused sentenced to a lesser punishment may appeal on a matter of fact as well as on a matter of law. This is intended to remove the anomaly which existed, that the High Court acting under S. 374 *supra* could consider the facts of the case as regards the former accused but on an appeal from the other accused could only interfere on a point of law.

Object of the section.—This section applies to appeals against acquittals as well as convictions, see 10 C. 1029. The object of the section in Jury trials is to prevent the High Court from going into the evidence and deciding the question whether the conviction is right. In such a case the High Court will be substituting its own decision for the verdict of the Jury, who have an opportunity of watching the demeanour of the witnesses and weighing their evidence, 21 C. 935. But this section does not control the powers of the High Court to go into facts in a case referred to it under S. 307, *supra*, 9 A. 420. An appellate Court should

require the Court to decide in order to do justice in the case, 26 M. 1 at 13. See also 25 C. 711. The petition of appeal should state distinctly in what respect the law has been contravened, 1 W.R. (Cr.) 21. Admissibility of evidence is a point of law, 2 B. 61. Admission of inadmissible evidence, and placing it before the Jury is a point of law, 27 B. 625 at 632; 11 Cr. L.J. 13. Misdirection to the Jury is a question of law, 25 C. 230; 21 C. 953; 15 C.W.N. 433; 27 B. 626. Non-direction on a point of prime importance telling in favour of the accused is a point of law, 27 B. 643 at 651. Conviction based on no evidence is a point of law, 15 W.R. (Cr.) 46; 16 W.R. (Cr.) 19 and the explanation to the section makes the alleged severity of sentence, a point of law. For instances of other points of law see notes under S. 297 at p. 603.

Sub-section (2) is new and the decisions in 2 C.W.N. 49; 11 B.L.R. 14=19 W.R. (Cr.) 57 are no longer law. The anomaly which existed in the law that under S. 374 and S. 376 *supra*, the Court can go into the question of fact in a case where that sentence is awarded, while in the case of an accused who was jointly tried and sentenced only to a lesser sentence, the Court is not empowered to go into the facts if the case had been tried by a Jury, has been removed by this new sub-section by allowing a right of appeal on facts also to a person jointly tried and convicted but sentenced to a lesser punishment.

419. Every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader, and every such petition shall (unless the Court to which it is presented otherwise directs) be accompanied by a copy of the judgment or order appealed against, and, in cases tried by a jury, a copy of the heads of the charge recorded under section 367.

Scope and object of the section.—This section prescribes the form of the petition of appeal which is to be presented to the appellate Court so as to give to the appellate Court jurisdiction to deal with the matter in the same way as a complaint gives jurisdiction to the Court of first instance. This section is applicable to all appeals presented under S. 420, *infra*, which deals with the mode of presentation of such appeals, 1891 A.W.N. 48. An appeal petition need not be verified, 12 M. 431. Every appeal petition should state distinctly in what respect the law has been contravened and it is not for the Court to hunt through the records and find out any illegality that may have arisen. It is for the appellant to point out wherein there has been a departure from the law, 1 W.R. (Cr.) 21. A petition containing scandalous allegations against the convicting Magistrate need not be entertained, but must be returned for expunging the offending portions of it, 15 B. 438. For a proper presentation of an appeal no *calafat* need be filed, but a memo of appearance is sufficient, 43 M.L.J. 683; [1926] Pat. 123=27 Cr. L.J. 666=94 Ind. Cas. 714. The object of requiring a copy of the judgment to be produced with the memorandum of appeal is presumably to place the Court in a position to judge the correctness of the grounds set forth in the memorandum of appeal and a discretion is given to the Court to dispense with the production of a copy at the time of filing the appeal and also at any subsequent stage, 30 Cr. L.J. 235=114 Ind. Cas. 61.

Appeal may be presented by appellant or his pleader.—As regards presentation of appeal no special method is prescribed by the Code and therefore the question is one of administrative convenience alone, so long as there is an actual presentation to an officer of the Court, such as a Bench Clerk or one of the Judges, there is a valid presentation, 32 M. 527 (F.B.) at 529. The word "presented" evidently means that such petition should be delivered to the proper officer of the Court either by the appellant or his pleader. *Weir II*, 470 or a pleader's clerk, 20 M. 87, *Weir II*, 469 and 470; 6 B. 14; 21 M. 114, or by the Public Prosecutor, 32 M. 527, but it cannot be presented through post, 15 M. 137; *Weir II*, 467; *Katanlal* 469. It is not a due presentation of an appeal when the petition is deposited in a box kept for the convenience of the parties within the precincts of the Court, 19 M. 334. A petition signed by a pleader duly authorised may be actually presented to the Court by the

the case, 26 M. 1 at 14. See also 25 C. 711. Admissibility in what respect the law has been contravened, evidence is a point of law, 2 B. 61. Admission of facts before the Jury is a point of law, 27 B. 626 at 632; Jury is a question of law, 25 C. 230; 21 C. 955; 15 C.W.N. Section on a point of prime importance telling in favour of the law, 27 B. 644 at 651. Conviction based on no evidence is a point of law, 16 W.R. (Cr.) 19 and the explanation to the section makes the alleged facts a point of law. For instances of other points of law see notes under 38.

Section (2) is new and the decisions in 2 C.W.N. 49; 11 B.L.R. 14=19 W.R. (Cr.) per law. The anomaly which existed in the law that under S 374 and S. 376 the Court can go into the question of fact in a case where that sentence is awarded, in case of an accused who was jointly tried and sentenced only to a lesser sentence, is not empowered to go into the facts if the case had been tried by a Jury. has been removed by this new sub-section by allowing a right of appeal on facts also to a person found guilty and convicted but sentenced to a lesser punishment.

419. Every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader, and every such petition shall (unless the Court to which it is presented otherwise directs) be accompanied by a copy of the judgment or order appealed against, and, in cases tried by a jury, a copy of the heads of the charge recorded under section 367.

Scope and object of the section.—This section prescribes the form of the petition of appeal which is to be presented to the appellate Court so as to give to the appellate Court jurisdiction to deal with the matter in the same way as a complaint gives jurisdiction to the Court of first instance. This section is applicable to all appeals presented under S 420, *infra*, which deals with the mode of presentation of such appeals, 1881 A.W.N. 48. An appeal petition need not be verified, 12 M. 331. Every appeal petition should state distinctly in what respect the law has been contravened and it is not for the Court to hunt through the records and find out any illegality that may have arisen. It is for the appellant to point out wherein there has been a departure from the law. 1 W.R. (Cr.) 21. A petition containing frivolous allegations against the convicting Magistrate need not be entertained, but must be returned for expunging the offending portions of it, 15 B. 483. For a proper presentation of an appeal no vakalat need be filed, but a memo of appearance is sufficient, 45 M.L.J. 683; [1926] Pat. 125=27 Cr. L.J. 668=93 Ind. Cas. 714. The object of requiring a copy of the judgment to be produced with the memorandum of appeal is presumably to place the Court in a position to judge the correctness of the grounds set forth in the memorandum of appeal and a discretion is given to the Court to dispense with the production of a copy at the time of filing the appeal and also at any subsequent stage, 30 Cr. L.J. 235=114 Ind. Cas. 61.

Appeal may be presented by appellant or his pleader.—As regards presentation of appeal no special method is prescribed by the Code and therefore the question is one of administrative convenience alone, so long as there is an actual presentation to an officer of the Court, such as a Bench Clerk or one of the Judges, there is a valid presentation, 39 M. 527 (F.B.) at 529. The word "presented" evidently means that such petition should be delivered to the proper officer of the Court either by the appellant or his pleader. Weir II, 470 or a pleader's clerk, 20 M. 67; Weir II, 469 and 470, 6 B. 14; 21 M. 114, or by the Public Prosecutor, 39 M. 527, but it cannot be presented through post, 19 M. 137; Weir II, 467; Ratanlal 459. It is not a due presentation of an appeal when the petition is deposited in a box kept for the convenience of the parties within the precincts of the Court, 19 M. 334. A petition signed by a pleader duly authorised may be actually presented to the Court by the

appellant, the order of the appellate Court amounts to an illegality. There might be for instance a case where the appeal petition itself showed that there was no possible ground for any extension of the period prescribed by law and therefore there would be no use in giving an opportunity for the pleader to be heard. Ordinarily if an appellant is represented by a pleader, he should be given an opportunity of being heard before the appeal is dismissed. Thus it has been held that, in giving judicial powers to affect prejudicially the rights of person or property, a statute is understood as silently implying, when it does not expressly provide the condition or qualification, that the power is to be exercised in accordance with the fundamental rules of judicial procedure such as that which requires, that before its exercise, the person sought to be prejudicially affected shall have an opportunity of defending himself. In every case where the Court dismisses an appeal as time-barred, without hearing the pleader, then there would be an illegality but where there are reasonable grounds for excusing the delay in the presentation of the appeal the appellate Court should, under the proviso to the section, give an opportunity to the pleader to be heard before dismissing the appeal as time-barred, 29 Bom L.R. 701=23 Cr. L.J. 833=103 Ind. Cas. 109. There is nothing in this section to prevent the Court from hearing the appellant's pleader at the time when he presents the appeal, if he desires that course but if he does not desire to be heard at once then the Court must appoint a future date of hearing of which notice is to be given to the appellant or his pleader so that he may be heard on that date. It is not an absolute rule under this section that the appellant or his pleader must be heard after the records are sent for by the Court. There might be a case where the pleader is fully heard before the records are sent for and the records are merely called for in order that this Court might be satisfied on some points raised and in such a case there would be no illegality in dismissing the appeal without hearing the pleader again after the records are received, 29 Bom L.R. 439=23 Cr. L.J. 467=101 Ind. Cas. 593. A criminal appeal presented cannot be dismissed for default of appearance; the appellate Court is bound to go through the record and decide the appeal on the merits, 46 M. 382; 50 B. 673; 6 Pat. 16; 15 A.L.J. 327=17 Cr. L.J. 333=35 Ind. Cas. 637; 13 A. 171; 27 C.W.N. 947; 50 C. 972; 12 C.W.N. 1235; 24 Cr. L.J. 475=72 Ind. Cas. 891; 9 Cr. L.J. 553=2 Ind. Cas. 247.

No sufficient grounds for interfering.—The appellant is bound to show that there is sufficient ground for interfering with the conviction. He is not in the same position before the appellate Court as he was before the trial Court, 5 A. 386. See also 17 C. 435; 23 C. 347. If the Court finds no sufficient grounds for interference, it may dismiss the appeal summarily.

May dismiss the appeal summarily.—This power of Court to dismiss the appeal summarily under this sub-section is quite different from a dismissal of a criminal appeal under B. 423, *infra*, in which case the appeal is disposed of after a trial on the merits. A criminal appeal cannot be dismissed for default without being considered on the merits, 27 C.W.N. 947; 46 M. 382, and other decision cited above. An appeal ought not to be summarily dismissed merely because the appellate Court thinks the matter is a mere trifle, Ratanlal, 978, although it may be summarily dismissed if there is no sufficient ground for interference, 12 Cr. L.J. 481=12 Ind. Cas. 89; 12 C.W.N. 233; Ratanlal 593 and 739. It is settled law that a Court of appeal dismissing summarily an appeal is not bound to write a judgment as defined in B. 367, *supra*, but it is advisable that it should give reasons for rejecting the appeal in view of the possibility of its order being challenged by an application for revision by the High Court, 36 A. 496; 39 A. 393; 17 A. 241; 32 C. 178; 25 Cr. L.J. 1237=82 Ind. Cas. 165; 26 Cr. L.J. 4=83 Ind. Cas. 484; 11 Cr. L.J. 631=8 Ind. Cas. 379; 18 Cr. L.J. 993=42 Ind. Cas. 721; 30 Cr. L.J. 791=117 Ind. Cas. 279 but see 50 C. L.J. 283, which holds that no reasons need be recorded. The word "*summarily*" ordinarily means in an informal manner and without delay of formal proceedings, and an appellate Court is entitled to reject an appeal without recording a formal judgment or giving reasons for such rejection, 20 B. 540; 21 C. 92; 22 C. 241; Weir. II, 473; 27 Cr. L.J. 23=91 Ind. Cas. 55. A Court disposing of an appeal under this section should either expressly state that it has dealt with the appeal under this section or the judgment should notice, though but concisely what objections were urged and how they were disposed of, 32 C. 178. An order summarily dismissing an appeal is final and

require the Court to decide in order to do justice in the case, 26 M. 1 at 14. See also 25 C. 711. The petition of appeal should state distinctly in what respect the law has been contravened, 1 W.R. (Cr.) 21. Admissibility of evidence is a point of law, 2 B. 61. Admission of inadmissible evidence, and placing it before the Jury is a point of law, 27 B. 626 at 632; 11 Cr. L.J. 13. Misdirection to the Jury is a question of law, 25 C. 230; 21 C. 953; 15 C.W.N. 434; 27 B. 626. Non-direction on a point of prime importance telling in favour of the accused is a point of law, 27 B. 644 at 651. Conviction based on no evidence is a point of law, 15 W.R. (Cr.) 46; 16 W.R. (Cr.) 19 and the explanation to the section makes the alleged severity of sentence, a point of law. For instances of other points of law see notes under S. 297 at p. 563.

Sub-section (2) is new and the decisions in 2 C.W.N. 49; 11 B.L.R. 14=19 W.R. (Cr.) 57 are no longer law. The anomaly which existed in the law that under S 374 and S. 376 *supra*, the Court can go into the question of fact in a case where that sentence is awarded, while in the case of an accused who was jointly tried and sentenced only to a lesser sentence, the Court is not empowered to go into the facts if the case had been tried by a Jury, has been removed by this new sub-section by allowing a right of appeal on facts also to a person jointly tried and convicted but sentenced to a lesser punishment.

419. Every appeal shall be made in the form of a petition in writing presented by the appellant or his pleader, and every such petition shall (unless the Court to which it is presented otherwise directs) be accompanied by a copy of the judgment or order appealed against, and, in cases tried by a jury, a copy of the heads of the charge recorded under section 367.

Scope and object of the section.—This section prescribes the form of the petition of appeal which is to be presented to the appellate Court so as to give to the appellate Court jurisdiction to deal with the matter in the same way as a complaint gives jurisdiction to the Court of first instance. This section is applicable to jail appeals presented under S 420, *infra*, which deals with the mode of presentation of such appeals, 1891 A.W.N. 43. An appeal petition need not be verified, 12 M. 431. Every appeal petition should state distinctly in what respect the law has been contravened and it is not for the Court to hunt through the records and find out any illegality that may have arisen. It is for the appellant to point out wherein there has been a departure from the law, 1 W.R. (Cr.) 21. A petition containing scandalous allegations against the convicting Magistrate need not be entertained, but must be returned for expunging the offending portions of it, 15 B. 488. For a proper presentation of an appeal no *valalat* need be filed, but a memo of appearance is sufficient, 43 M.L.J. 683; [1926] Pat. 125=27 Cr. L.J. 666=94 Ind. Cas. 714. The object of requiring a copy of the judgment to be produced with the memorandum of appeal is presumably to place the Court in a position to judge the correctness of the grounds set forth in the memorandum of appeal and a discretion is given to the Court to dispense with the production of a copy at the time of filing the appeal and also at any subsequent stage, 30 Cr. L.J. 235=114 Ind. Cas. 61.

Appeal may be presented by appellant or his pleader.—As regards presentation of appeal no special method is prescribed by the Code and therefore the question is one of administrative convenience alone, so long as there is an actual presentation to an officer of the Court, such as a Bench Clerk or one of the Judges, there is a valid presentation, 39 M. 527 (F.B.) at 529. The word "presented" evidently means that such petition should be delivered to the proper officer of the Court either by the appellant or his pleader, Weir II, 470 or a pleader's clerk, 20 M. 87, Weir II, 469 and 470; 6 B. 14; 21 M. 114, or by the Public Prosecutor, 39 M. 527, but it cannot be presented through post, 15 M. 137; Weir II, 467; Ratanlal 459. It is not a due presentation of an appeal when the petition is deposited in a box kept for the convenience of the parties within the precincts of the Court, 19 M. 334. A petition signed by a pleader duly authorised may be actually presented to the Court by the

appellant, the order of the appellate Court amounts to an illegality. There might be for instance a case where the appeal petition itself showed that there was no possible ground for any extension of the period prescribed by law and therefore there would be no use in giving an opportunity for the pleader to be heard. Ordinarily if an appellant is represented by a pleader, he should be given an opportunity of being heard before the appeal is dismissed. Thus it has been held that, in giving judicial powers to affect prejudicially the rights of person or property, a statute is understood as silently implying, when it does not expressly provide the condition or qualification, that the power is to be exercised in accordance with the fundamental rules of judicial procedure such as that which requires, that before its exercise, the person sought to be prejudicially affected shall have an opportunity of defending himself. In every case where the Court dismisses an appeal as time-barred, without hearing the pleader, then there would be an illegality but where there are reasonable grounds for excusing the delay in the presentation of the appeal the appellate Court should, under the proviso to the section, give an opportunity to the pleader to be heard before dismissing the appeal as time-barred, 29 Bom. L.R. 701=23 Cr. L.J. 853=103 Ind. Cas. 102. There is nothing in this section to prevent the Court from hearing the appellant's pleader at the time when he presents the appeal, if he desires that course but if he does not desire to be heard at once then the Court must appoint a future date of hearing of which notice is to be given to the appellant or his pleader so that he may be heard on that date. It is not an absolute rule under this section that the appellant or his pleader must be heard after the records are sent for by the Court. There might be a case where the pleader is fully heard before the records are sent for and the records are merely called for in order that this Court might be satisfied on some points raised and in such a case there would be no illegality in dismissing the appeal without hearing the pleader again after the records are received, 29 Bom. L.R. 438=23 Cr. L.J. 467=101 Ind. Cas. 595. A criminal appeal presented cannot be dismissed for default of appearance; the appellate Court is bound to go through the record and decide the appeal on the merits, 46 M. 382; 50 B. 673; 6 Pat. 16; 14 A.L.J. 327=17 Cr. L.J. 353=35 Ind. Cas. 637; 13 A. 171; 27 C.W.N. 947; 50 C. 972; 12 C.W.N. 1213; 24 Cr. L.J. 475=72 Ind. Cas. 891; 9 Cr. L.J. 553=2 Ind. Cas. 247.

No sufficient grounds for interfering.—The appellant is bound to show that there is sufficient ground for interfering with the conviction. He is not in the same position before the appellate Court as he was before the trial Court, 5 A. 386. See also 17 C. 483; 23 C. 347. If the Court finds no sufficient grounds for interference, it may dismiss the appeal summarily.

May dismiss the appeal summarily—This power of Court to dismiss the appeal summarily under this sub-section is quite different from a dismissal of a criminal appeal under S. 423, *infra*, in which case the appeal is disposed of after a trial on the merits. A criminal appeal cannot be dismissed for default without being considered on the merits, 27 C.W.N. 947; 46 M. 392, and other decision cited above. An appeal ought not to be summarily dismissed merely because the appellate Court thinks the matter is a mere trifle, Ratanlal, 978, although it may be summarily dismissed if there is no sufficient ground for interference, 12 Cr. L.J. 481=12 Ind. Cas. 89; 12 C.W.N. 248; Ratanlal 593 and 739. It is settled law that a Court of appeal dismissing summarily an appeal is not bound to write a judgment as defined in S. 367, *supra*, but it is advisable that it should give reasons for rejecting the appeal in view of the possibility of its order being challenged by an application for revision by the High Court, 36 A. 496; 38 A. 393; 17 A. 241; 32 C. 178; 25 Cr. L.J. 1237=82 Ind. Cas. 165; 26 Cr. L.J. 4=83 Ind. Cas. 484; 11 Cr. L.J. 631=8 Ind. Cas. 379; 18 Cr. L.J. 993=42 Ind. Cas. 721; 30 Cr. L.J. 791=117 Ind. Cas. 279 but see 50 C. L.J. 285, which holds that no reasons need be recorded. The word "*summarily*" ordinarily means in an informal manner and without delay of formal proceedings, and an appellate Court is entitled to reject an appeal without recording a formal judgment or giving reasons for such rejection, 20 B. 540; 21 C. 92; 22 C. 241; Weir. II, 473, 27 Cr. L.J. 23=91 Ind. Cas. 55. A Court disposing of an appeal under this section should either expressly state that it has dealt with the appeal under this section or the judgment should notice, though but concisely what objections were urged and how they were disposed of, 32 C. 178. An order summarily dismissing an appeal is final and

his appeal in person or through his pleader, cannot apply, and the law does not require notice to be given to an appellant actually in prison, under this section which would be useless. If an appellant has a pleader or is able to appear in person, he may be able to give further arguments. But if he is in jail and cannot afford a pleader, then issuing a notice to him is not necessary because he cannot give any further information to the Court and therefore the practice of the Court in summarily dismissing such appeals when occasion arises is a correct procedure. Facilities should be given to prisoners in jail by the officer-in-charge of the jail to enable them to prepare their appeal petitions. 13 W.R. (Cr.) 69; 1 B.H.C.R. (Cr. Ca.) 16. S. 11 of the Criminal Appeal Act (7 Edw. 7 C. 23), enacts that an appellant notwithstanding that he is in custody shall be entitled to be present, if he desires it, on the hearing of his appeal except where the appeal is on some ground involving a question of law alone, but, in that case and on application for leave to appeal, and on any other proceedings incidental to an appeal, shall not be entitled to be present except where rules provide that he shall appear, or where the Court gives leave to be present. When a prisoner under sentence of death appeals from jail he is not entitled to appear in person to argue his appeal in the High Court. Ordinarily jail appeals are heard *ex parte* where the Crown retains Counsel to argue a *referred trial* on behalf of the accused under sentence of death, but the accused refuses to instruct him stating he does not wish to be represented by Counsel in the High Court, still it is the duty of Counsel to appear and conduct the case on behalf of the accused 28 Cr. L.J. 679=103 Ind. Cas. 407.

May present petition of appeal.—This section deals with the mode of presentation of an appeal when the accused is in jail. The petition must comply with the provisions of the previous section. For the purposes of limitation a presentation of an appeal, to the officer in charge of the jail is equivalent to a presentation to the Court, 9 M. 258.

Forward petition to appellate Court.—The Appellate Court is bound to give notice to the appellant in jail and to give him an opportunity to show cause. The accused in jail may be sent for from the jail to explain any difficulty in his case under appeal. The Appellate Court cannot dismiss an appeal without perusing the records of the case, 13 A. 171 (F.B.) But see 27 Cr. L.J. 833=86 Ind. Cas. 389. No appeal forwarded from jail under this section shall be summarily rejected until 7 days have elapsed after its receipt by the appellate Court. In forwarding a jail appeal, the officer in charge of the jail shall invariably certify that the appellant has been informed that if he intends to appoint a pleader, an appearance shall be entered within 7 days from the date on which his petition may reach the appellate Court but the appellate Court need not wait for 7 days if the appellant had appeared and had been heard in person or by pleader within that period, G.O. No. 1448 Jud. dated 26-10-1909. *Mad Cr. Rules of Pr. Rule 59.*

- 421.** (1) On receiving the petition and copy under section 419 or section 420, the Appellate Court shall peruse the same, and, if it considers that there is no sufficient ground for interfering, it may dismiss the appeal summarily :

Summary dismissal
of appeal.

Provided that no appeal presented under this section 419 shall be dismissed unless the appellant or his pleader has had a reasonable opportunity of being heard in support of the same.

(2) Before dismissing an appeal under this section, the Court may call for the record of the case, but shall not be bound to do so.

Scope of the section—This section contemplates an appeal that can properly be put upon the file of the appellate Court and it cannot therefore be said that in every appeal where the appellate Court dismisses it as time barred without hearing the pleader for the

appellant, the order of the appellate Court amounts to an illegality. There might be for instance a case where the appeal petition itself showed that there was no possible ground for any extension of the period prescribed by law and therefore there would be no use in giving an opportunity for the pleader to be heard. Ordinarily if an appellant is represented by a pleader, he should be given an opportunity of being heard before the appeal is dismissed. Thus it has been held that, in giving judicial powers to affect prejudicially the rights of person or property, a statute is understood as silently implying, when it does not expressly provide the condition or qualification, that the power is to be exercised in accordance with the fundamental rules of judicial procedure such as that which requires, that before its exercise, the person sought to be prejudicially affected shall have an opportunity of defending himself. In every case where the Court dismisses an appeal as time-barred, without hearing the pleader, then there would be an illegality but where there are reasonable grounds for excusing the delay in the presentation of the appeal the appellate Court should, under the *proviso* to the section, give an opportunity to the pleader to be heard before dismissing the appeal as time-barred, 29 Bom L.R. 701—23 Cr L.J. 633—103 Ind. Cas. 109. There is nothing in this section to prevent the Court from hearing the appellant's pleader at the time when he presents the appeal, if he desires that course but if he does not desire to be heard at once then the Court must appoint a future date of hearing of which notice is to be given to the appellant or his pleader so that he may be heard on that date. It is not an absolute rule under this section that the appellant or his pleader must be heard after the records are sent for by the Court. There might be a case where the pleader is fully heard before the records are sent for and the records are merely called for in order that this Court might be satisfied on some points raised and in such a case there would be no illegality in dismissing the appeal without hearing the pleader again after the records are received, 29 Bom L.R. 459—23 Cr L.J. 467—101 Ind. Cas. 595. A criminal appeal presented cannot be dismissed for default of appearance; the appellate Court is bound to go through the record and decide the appeal on the merits, 46 M. 382; 50 B. 673; 6 Pat. 16, 14 A.L.J. 327—17 Cr L.J. 353—33 Ind. Cas. 637; 13 A. 171; 27 C.W.N. 947; 50 C. 972; 12 C.W.N. 1243; 24 Cr L.J. 475—72 Ind. Cas. 891; 9 Cr. L.J. 553—2 Ind. Cas. 247.

No sufficient grounds for interfering.—The appellant is bound to show that there is sufficient ground for interfering with the conviction. He is not in the same position before the appellate Court as he was before the trial Court, 5 A. 386. See also 17 C. 483; 23 C. 347. *If the Court finds no sufficient grounds for interference, it may dismiss the appeal summarily.*

May dismiss the appeal summarily.—This power of Court to dismiss the appeal summarily under this sub-section is quite different from a dismissal of a criminal appeal under S. 423, *infra*, in which case the appeal is disposed of after a trial on the merits. A criminal appeal cannot be dismissed for default without being considered on the merits, 27 C.W.N. 947; 46 M. 382, and other decision cited above. An appeal ought not to be summarily dismissed merely because the appellate Court thinks the matter is a mere trifle, Ratanlal, 978, although it may be summarily dismissed if there is no sufficient ground for interference, 12 Cr. L.J. 481—12 Ind. Cas. 89; 12 C.W.N. 248; Ratanlal 593 and 739. It is settled law that a Court of appeal dismissing summarily an appeal is not bound to write a judgment as defined in S. 367, *supra*, but it is advisable that it should give reasons for rejecting the appeal in view of the possibility of its order being challenged by an application for revision by the High Court, 36 A. 496; 38 A. 393; 17 A. 241; 32 C. 178; 25 Cr. L.J. 1237—82 Ind. Cas. 165; 26 Cr. L.J. 4—83 Ind. Cas. 484; 11 Cr. L.J. 631—8 Ind. Cas. 379; 18 Cr. L.J. 993—42 Ind. Cas. 721; 30 Cr. L.J. 791—117 Ind. Cas. 279 but see 50 C. L.J. 285, which holds that no reasons need be recorded. The word "*summarily*" ordinarily means in an informal manner and without delay of formal proceedings, and an appellate Court is entitled to reject an appeal without recording a formal judgment or giving reasons for such rejection, 20 B. 540; 21 C. 92; 22 C. 241; Weir. II, 473; 27 Cr. L.J. 23—91 Ind. Cas. 53. A Court disposing of an appeal under this section should either expressly state that it has dealt with the appeal under this section or the judgment should notice, though but concisely what objections were urged and how they were disposed of, 32 C. 178. An order summarily dismissing an appeal is final and

cannot be reviewed, 4 B. 101; 19 B. 732. Where a petition of appeal submitted through the Superintendent of the jail in which the appellant was confined was considered and rejected by a Judge of the High Court under this section, it is not open to the appellant thereafter to present through Counsel a fresh appeal petition, 44 A. 759 where 19 B. 732 and 17 Cr. L.J. 453=36 Ind. Cas. 133 is followed. When the appellate Court does not proceed under this section by summarily rejecting the appeal it is bound to act in accordance with the provisions of Ss. 422 and 423, *infra*, 15 Cr. L.J. 667=23 Ind. Cas. 993. A pleader presenting a criminal appeal cannot be said to be guilty of professional misconduct merely because he is not prepared to argue the appeal at the time of presentation of the appeal, 48 M. 385. An order summarily dismissing an appeal under this section virtually amounts to an order affirming the findings of both fact and law recorded by the lower Court and there is no reason to discriminate between an order of summary dismissal under this section and one made under S. 424, *infra* after hearing on the merits so far as its liability to attack in revision for purposes of S. 439 (6) is concerned, 29 Cr. L.J. 936=111 Ind. Cas. 856.

No appeal shall be dismissed unless reasonable opportunity of being heard is had—This proviso does not mention anything about jail appeals coming under S. 420, *supra*, and therefore no notice and opportunity of being heard is to be given in such appeals. There is no such omission in S. 422, *infra* or in S. 443, (1) *infra*. But as a matter of practice, jail appeals are posted for dismissal before the Court, and the name of the appellant is called out, when he is actually in jail in most cases, before dismissing the appeal summarily. See 27 Cr. L.J. 933=96 Ind. Cas. 389. This section lays down that the appellant or his pleader shall have a reasonable opportunity of being heard in support of the appeal which must be taken to include the possible right of reply to the point raised by the Crown, 38 C. 307. If the Court desires to hear the appellant under this section before admitting the appeal, he should be given a reasonable notice, 38 C. 385. Where a Magistrate called upon a pleader who presented an appeal to argue it at once and on the pleader expressing his inability to do so, prayed for a short adjournment to enable him to acquaint himself with the evidence in the case, and the Magistrate rejected the appeal under this section, it was held that no reasonable opportunity of being heard was offered under this section, 7 Bom. L.R. 89; 36 C. 385, 6 M.L.T. 309; 20 Cr. L.J. 271=90 Ind. Cas. 31; 38 C. 307 at 303; 16 Cr. L.J. 538=29 Ind. Cas. 666, 30 Cr. L.J. 791=117 Ind. Cas. 279. A criminal appeal should not be heard at the time of the presentation of the papers, even for the purpose of dismissal under this section. The posting for the purpose of hearing under this section must be special posting, after a reasonable time, not less than a week. This is the practice of the High Court and ought to be the practice of the mufassal Courts, 48 M. 385, but there is nothing in this section to prevent a Court from hearing the pleader at the time of the presentation of the appeal, if he desires that course but if he does not desire to be heard at once, then a future date of hearing is to be fixed of which notice is to be given to the appellant or his pleader, 29 Bom. L.R. 488=28 Cr. L.J. 467=101 Ind. Cas. 593. Where an appeal memorandum signed by a pleader is presented to a Magistrate by the party in person and the Magistrate rejected the appeal summarily under this section, it was held that no reasonable opportunity was given to the pleader to appear and argue the appeal and the order was set aside, 29 M. 236. The language of this section requires a reasonable opportunity to be given to the appellant of being heard in support of his appeal. If no such opportunity is given, the Court has no jurisdiction to dismiss the appeal, and when an appeal is so dismissed, the Court has inherent power to order its being re-heard after giving a reasonable opportunity to the appellant, 26 Cr. L.J. 1169=88 Ind. Cas. 593 where 23 M.L.J. 371=(1912) M.W.N. 982=12 M.L.T. 330 is referred to. Where a District Magistrate sends for the records and disposes of the appeal after the receipt of the same, it cannot be said that the appellant had been given a reasonable opportunity of being heard if, as a matter of fact, he is not heard after receipt of the records. Such a procedure does not come within the requirements of law 18 Cr. L.J. 639=39 Ind. Cas. 1007. If questions of fact are to be argued

questions of fact the depositions have to be carefully studied, 43 M. 333. But where an appeal and a bill petition were presented by a pleader and the Magistrate heard the pleader in support of both and when dismissing the bill application called for the records from the lower Court and dismissed the appeal summarily after receipt of the records without hearing the pleader, it was held that the Magistrate though not bound to hear the pleader on receipt of the records yet he might have in the exercise of his discretion, allowed another opportunity to him to argue the appeal with reference to the records, 3 Cr. L. Rev. 127. It is not absolute rule that the appellant or his pleader should be heard after the records sent for are received. If the appellants' pleader had been heard fully and the records were sent for to verify certain points raised by the pleader, then there would be no illegality in dismissing the appeal without hearing the pleader again after the records were received, 29 Bom. L. R. 433 = 23 Cr. L. J. 467 = 101 Ind. Cas. 593. A general notice that appeals will be heard for admission, only the next Court day after presentation is not a sufficient compliance with law, 5 M. 11; 35 C. 333; 43 M. 333. Where a Court decides to proceed under this section in disposing an appeal received under S. 420, *supra*, from an appellant who is in jail, it is not legally bound to give notice to the appellant, nor is it generally necessary to do so. It is sufficient as a rule, if the Court allows 7 days to elapse before proceeding to dispose of the appeal under this section, *Mad. Cr. Rules of Pr. Rule 264*. Where a jail appeal was filed, but before it was disposed of, another appeal petition is presented by a pleader, the Court was not competent to dismiss the jail appeal summarily but should hear the appellant's pleader before rejecting the appeal, 1936 A.W.N. 333; 17 A. 241 (F.B.). When in ignorance of the fact that a convicted accused has preferred an appeal through a practitioner, the Sessions Judge rejected an appeal subsequently preferred by the accused from jail, it was held that the dismissal through mistake is no dismissal and the appeal presented by the practitioner cannot be disposed of without hearing him under this section, 43 A. 203. But where jail appeals from convicted persons were pending in the Sessions Court, an appeal petition on behalf of the same persons was filed through a *mulattar* and the jail appeals were summarily rejected by the Judge in ignorance of the fact that the latter appeal in which Counsel was to be heard, was pending, it was held that the Sessions Judge had no power to set aside his own order dismissing the jail appeals, but the High Court alone has power to do so in its revisional jurisdiction and the High Court directed the Judge to re-hear the appeals after giving Counsel an opportunity of being heard, 23 A.L.J. 1031. A jail appeal once dismissed under this section, the matter cannot be re-opened by an appeal presented through Counsel, 27 C.W.N. 821 = 23 Cr. L. J. 1313 = 82 Ind. Cas. 515; See also 50 M.L.J. 81 = 23 L.W. 56 = 1926 M.W.N. 187 = 27 Cr. L. J. 151 = 91 Ind. Cas. 1030. Where the appellate Court dismissed the appeal in respect of one charge and admitted the appeal so far as another charge in the same trial, the practice cannot be said to be illegal although it is undesirable to do so, 5 Ran. 274.

Sub-section (2) — There is a discretion given to the Court to call for the records. The appellant has no right to ask the Court to send for the records. Rejection of the appeal summarily without sending for the records is a course which, though legal is ordinarily very inconvenient. The words "shall not be bound to do so," show that the Legislature contemplates dismissal of appeals as a rule without perusing all or any part of the proceedings of the lower Court, 1853 A.W.N. 143. Where the grounds of appeal disclose the reasons for discrediting the prosecution witnesses, the Appellate Court ought to call for the records and satisfy itself that the conviction is right, before dismissing the appeal summarily, 29 M. 236, *followed* in 43 M. 333. When the question involved in the appeal is one of fact, and the judgment of the Court below is plain and clear, calling for records would be mere waste of time. But when a point of law is raised in the appeal memorandum which on the face of it is not without substance, it is not proper to reject the appeal summarily without calling for records, 3 Pat. L.J. 339 = 19 Cr. L.J. 209 = 43 Ind. Cas. 733. After the records were sent for and received, the appellate Court should hear the pleader, and should not dismiss the appeal summarily without hearing him, 47 C.L.J. 531 and 534; but if the pleader had been fully heard before the records were sent for and the records were sent for by the Court for the purpose of satisfying itself as to certain points raised before it, the pleader need not be heard over again after receipt of records, 29 Bom. L.R. 433 = 23 Cr. L. J. 467 = 101 Ind. Cas. 593.

422. If the Appellate Court does not dismiss the appeal sum-

Notice of appeal.

marily, it shall cause notice to be given to the appellant or his pleader, and to such officer as the Local Government may appoint in this behalf, of the time and place at which such appeal will be heard, and shall, on the application of such officer, furnish him with a copy of the grounds of appeal;

and, in cases of appeals under section 417, the Appellate Court shall cause a like notice to be given to the accused.

Once an appeal is accepted the appellate Court it is bound to proceed under this section. The appeal which has to be heard in accordance with this section is the whole appeal; consequently all the grounds taken in the appeal petition are open for consideration at the final hearing, and the appellant cannot be restricted to any select ground out of those specified in his petition. A restrictive order for admission, viz., on some grounds taken, is clearly not contemplated by this section. An appeal cannot be admitted only for a limited purpose. A restrictive order of admission is not contemplated by this section and such restricted admission is deemed *ultra vires*, 41 C 406 at 410; Ratanlal 826. The appeal that has to be heard is whole appeal and not merely a portion of it, e.g. the question of sentence only; however, convenient and practical that course may be, it is not warranted, 4 Pat. 254; 41 C. 406 at 410; 13 C.W.N. 921. See also 13 Bom. L.R. 550=12 Cr. L.J. 431=11 Ind. Cas. 615.

Shall cause notice to be given to appellant or his pleader,—Notice is obligatory, Weir II, 475. Hearing an appeal without notice either to the appellant or his pleader is illegal, 9 Cr. L.J. 553=2 Ind. Cas. 247. The fact that the pleader for the appellant was present at the time when the appeal is admitted does not relieve the Court from the necessity of giving notice to the appellant or his pleader as to the day fixed for the hearing and the place of hearing, unless the attention of the pleader is specially directed to it by the Court. The object of giving notice is to give precise information to the appellant as to the time and place of hearing. Notice is the warning to a party to his to enable him to resist a possible result, viz., not merely information that, that which is threatened will or may possibly happen in a matter in which he is concerned, but also that he can avoid such results if he takes proper measures to do so, 13 A. 171 at 180, 181. In the case of an appeal against acquittal under S 417, *supra*, notice is to be given to the acquitted accused. Every endeavour should be made to effect personal service, 1832 A.W.N. 170; 37 A. 419. In 50 A. 543 (F.B.). It was held that where a stage had been reached of an appellant in Jail being given notice under this section, he is entitled, if he is not unrepresented by a pleader, to appear in person at the hearing of the appeal, if he so desires. The Full Bench decision in, 13 A. 171, it was held by the later Full Bench, went too far in holding that an appellant in Jail had no right to appear at the hearing of the appeal if he is unrepresented and wishes to appear in person. As to practice in England, see S. 11 of the Criminal Appeal Act (7 Edw. 7 C. 23), which enacts that an appellant in custody shall be entitled to be present if he desires it, on the hearing of the appeal except where the appeal is on some ground involving a question of law alone, but in that case and on application for leave to appeal and on any other proceedings incidental to an appeal, shall not be entitled to be present except where the rules provide that he shall appear or where the Court gives leave to be present.

To such officer as the Local Government may appoint in this behalf.—Rule 60, Mod. Cr. Rules of Pr says that the following officers shall be given notice under this section (1). The District Magistrate, in appeals other than appeals to the Court of Session (2). The Public Prosecutor in appeals in Session Court (3). The Prosecuting Inspector of Police in *mufassal* Districts, other than the Nilgiris, against convictions in cognizable cases in the appellate Courts in those Districts other than Courts of Session (4). The Agent and Manager of the particular Railway in cases of appeal against convictions under the Railway Act (5). The

District Forest officer in appeals against convictions for Forest Offences (6) Circle officers of Salt and Abkari Department against convictions for Salt and Abkari offences (7). The Crown Prosecutor for the Town of Madras in appeals from convictions by Presidency Magistrates to the High Court and to the Public Prosecutor in other appeals to the High Court. This section provides for a notice of appeal to the officer appointed by the Local Government, but it does not say that others are not to have notice. The section imposes a necessary condition but does not override the principle of natural justice "*Audi alteram partem*," 33 M. 1091 at 1095. A mere omission to serve notice of appeal on a District Magistrate as provided by this section is nothing more than an irregularity and does not make the proceedings in appeal, *ab initio* void, 8 Cr. L. Rev. 21, but see *contra*, (1915) M.W.N. 554=16 Cr. L. J. 736=31 Ind. Cas. 176 and 53 C. 969, where it was held that failure to issue notice is an illegality and the order passed on appeal was held bad. The omission to send a notice of appeal though undoubtedly irregular will not afford a ground to interfere in revision by the High Court at the instance of the complainant against an order of acquittal when as a matter of fact no objection is raised by the District Magistrate to the proceedings in the appellate Court, 25 Bom. L.R. 251=26 Cr. L.J. 731=86 Ind. Cas. 237 where 24 Bom. L.R. 1150=24 Cr. L.J. 700=73 Ind. Cas. 812 is referred to. Where no notice of appeal was given to the Prosecuting Inspector under the section and the accused was acquitted, the complainant is not entitled to have the acquittal set aside by the High Court in revision, when such revision is opposed by the Government, 4 Cr. L. Rev. 320. A complainant cannot claim as of right to be heard in an appeal from a conviction. The matter is in the discretion of the appellate Court, 7 M.H.C.R. Appx. 42=Weir II, 476. See also 53 C. 969 as to when notice to complainant will be necessary. In appeals against orders awarding compensation under S. 250 *supra* there are a number of cases on the question whether the accused to whom the compensation is awarded is entitled to have notice. In 29 M. 187 it was held that on the principle that no order to the prejudice of a party is to be made without notice to him, the order of compensation was wrong and was set aside for want of notice to the accused, but this decision was distinguished in 33 M. 89, where it was held that notice to the accused was desirable, but the law does not render it absolutely essential, and want of notice to the accused is no ground for interference in revision especially when notice was given to the officer appointed by Government and he failed to appear. But it was held in 27 M.L.J. 629, that the person to whom notice of appeal should go in compensation appeal is the District Magistrate and want of notice to the District Magistrate is not a ground for setting aside the order passed on appeal at the instance of the accused when the District Magistrate who had notice took no steps in the matter for that purpose. See 33 M. 1091 where it was held after a consideration of all the above rulings that in appeals from compensation orders under S. 250, *supra*, notice should ordinarily be given to the accused as this section does not override the principle of natural justice, and the accused in whose favour the compensation order is passed is entitled to be heard in support of the order but failure to give notice will not necessarily render the proceedings of the Court illegal. In Madras, the officer appointed by the Local Government is the Public Prosecutor, in case of appeals to the Sessions Court and to the High Court—*Fort St. George Gazette*, 1887, Pt. I, p. 30. In Bengal the Legal Remembrancer is the Public Prosecutor for the High Court, and in other cases rule is issued to the District Magistrate, 7 C.W.N. 80. In Bombay, the District Magistrate should be served with notice. The fact that notice of appeal was not served either on the complainant or on the officer appointed under this section is no ground for interfering in revision with an order of acquittal at the instance of a private party where no injustice had been occasioned and where the lower Court in a very full judgment had dealt with the question involved, from various stand-points, 20 L.W. 327=26 Cr. L. J. 249=84 Ind. Cas. 249.

Time and place at which appeal will be heard.—The particular date should be specified in the notice. A District Magistrate directed that a particular appeal will be heard in the month of January, without specifying any particular date and it was heard and dismissed on the 6th of January. The appellant had no information as to any particular date of hearing and when he appeared in Court he learnt that the appeal had been dismissed and

could not be re-heard. It was held by the High Court that the appellant should have been informed as to the particular date of hearing and the Magistrate was directed to re-hear the appeal, 1881 A.W.N. 46. Disposal of an appeal before the date fixed for hearing is a material error in procedure, *Weir II*, 475. When the notice specifies a particular place, the appeal should not be heard in a different place without fresh notice as to change of place, 2 Cr. L. J. 66.

423. (1) The Appellate Court shall then send for the record of the case, if such record is not already in Court. After perusing such record, and hearing the appellant or his pleader, if he appears and the Public Prosecutor if he appears, and, in case of an appeal under section 417, the accused if he appears the Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law ;

(b) in an appeal from a conviction, (1) reverse the finding and sentence, and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or (2) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce the sentence, or (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence, but, subject to the provisions of section 106, sub-section (3), not so as to enhance the same ;

(c) in an appeal from any other order, alter or reverse such order ;

(d) make any amendment or any consequential or incidental order that may be just or proper.

(2) Nothing herein contained shall authorise the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him.

Scope of the section.—This section does not confer any right of appeal. It only lays down the powers of an appellate Court when a right of appeal is allowed by other provisions of the Code. S. 404, *supra*, enacts the general rule—no appeal shall lie except as provided for, and Ss. 405 to 416, *supra*, provide *inter alia* for appeals in certain cases but not in any case of acquittal, and S. 417 *supra* provides for appeals against orders of acquittal and enacts that the appeal shall lie at the direction of Government and should be presented to the High Court, 7 M. 213 at 214. A Court of appeal under this Code is not a mere Court of error, but the Court as a Court of appeal is enjoined by S. 537 *infra*, and S. 167, of the Indian Evidence Act, not to reverse any finding or sentence passed by a Court of competent jurisdiction on account of any error, omission, irregularity, or improper admission or rejection of evidence unless in its judgment such error, omission or irregularity has in fact occasioned a failure of justice, or unless independently of the evidence objected to and admitted, it ought to have

varied the decision, 24 M. 523 at 541. It is a rule underlying the whole fabric of appellate jurisdiction that the power of an appellate Court is measured by the power of the Court from whose judgment or order the appeal is preferred. This is equally so in the Civil and Criminal branches of the law of procedure. It is a fundamental principle that every Court of appeal exists for the purpose, where necessary, of doing, or causing it to be done, that which each Court subordinate to its appellate jurisdiction should have, but has not, done or caused to be done and nothing further. Therefore the jurisdiction in appeal is necessarily limited in each case to the same extent as the jurisdiction from which that particular case comes. It is a proposition which cannot be disputed that all powers conferred upon an appellate Court, as such, must be interpreted as subject to the general rule stated above. In *Weir II*, 457 it was held that an appellate Court cannot on appeal pass a sentence which the trial Court was not competent to pass. All jurisdiction starts with the trial Court and remains a constant factor throughout. All subsequent stages of the proceeding are governed by it. The appellate Court while altering a sentence into one of fine cannot inflict a fine beyond the maximum which could have been imposed by the trial Court. The substitution of fine for imprisonment is a merciful commutation and does not constitute an enhancement, 12 Cr. L.J. 444=11 Ind. Cas. 783. See 1929 M.W.N. 896. The powers conferred by this section on a Court of appeal are not to be used in such a way as to spring up a new case upon the accused without giving him any notice of the charge he has to meet, 16 Cr. L.J. 599=30 Ind. Cas. 151; nor is it entitled while setting aside the conviction for one offence to convict the accused for another offence not charged in the trial Court, 21 L.W. 520=26 Cr. L.J. 1036=87 Ind. Cas. 824. Where an accused person was charged and convicted of an offence under S. 452, I.P.C., it is not open to the appellate Court on appeal to convert such a conviction into one under a Special Act, such as the Arms Act, and convict him under that Act, say, under S. 19 (c) of the said Act. Such a conviction is illegal as the accused was not charged with that offence and had no opportunity of meeting it, 4 Ran. 335. To decide the appeal requires more than a refusal to interfere with a discretion; it requires a decision on the evidence as to the facts proved, 30 Bom. L.R. 854 at 956. A criminal appeal under this section cannot be dismissed by the Court for default of appearance of the appellant which does not relieve the Court of the imperative duties of perusing the records and rendering judgment in accordance with the provisions of Ss. 367 and 421, *infra*, 46 M. 382; 50 B. 673, following *Ratanlal* 593 and 13 A. 171; 14 A.L.J. 327=17 Cr. L.J. 333=35 Ind. Cas. 667; 6 Pat. 18; 50 C. 972; 12 Cr. L.J. 481=12 Ind. Cas. 89; 12 C.W.N. 243; 9 Cr. L.J. 553=2 Ind. Cas. 237; 24 Cr. L.J. 475=72 Ind. Cas. 891. When an appeal is once dismissed, another appeal on behalf of the same appellant cannot be entertained for whatever reason, 50 M. L.J. 51=23 L.W. 56=1926 M.W.N. 147=27 Cr. L.J. 184=91 Ind. Cas. 1000. The fact that an appeal has been admitted will not preclude the Court from dealing with the question whether an appeal lay or not, 40 C. 631. Where after the presentation of an appeal, the records are sent for, and a date is fixed for hearing, the Court has no power to dismiss the appeal for non-appearance of pleader, as under the provisions of this section it was incumbent on the Magistrate to go through the records and dispose of the appeal on the merits, 27 C.W.N. 947. Even though no one may appear in a criminal appeal, it is the duty of the criminal Court to examine the matter and to come to some sort of decision on the merits, 25 Cr. L.J. 79=71 Ind. Cas. 217. The sound rule to apply in trying a criminal appeal where questions of disputed facts are in issue is to consider whether the conviction is right, and in this respect a criminal appeal differs from a civil one, in which the Court must be convinced before reversing a finding of fact by the lower Court, that the finding is wrong, 11 C.L.R. 23. When the law allows an appeal the appellant is entitled to have from the Court of appeal an explicit opinion on the question of fact involved in the case and the Court of appeal should take its own view of the evidence after perusal of the records, 39 C.L.J. 117=25 Cr. L.J. 1044=81 Ind. Cas. 820. It is not necessary in criminal cases that the appellant should clearly establish that the order of the lower Court was wrong, 23 C. 347. In every case which comes before an appellate Court the trial Court has the advantage of seeing and hearing the witnesses and the appellate Court has not that advantage; but it is not right to say that an appellate Court can never hope to make a diagnosis as to the truth of the case as good as that made by the trial Court. No doubt the trial Court has an advantage

could not be re-heard. It was held by the High Court that the appellant should have been informed as to the particular date of hearing and the Magistrate was directed to re-hear the appeal, 1881 A.W.N. 46. Disposal of an appeal before the date fixed for hearing is a material error in procedure, *Weir II*, 475. When the notice specifies a particular place, the appeal should not be heard in a different place without fresh notice as to change of place, 2 Cr. L. J. 66.

423. (1) The Appellate Court shall then send for the record of the case, if such record is not already in Court. After perusing such record, and hearing the appellant or his pleader, if he appears and the Public Prosecutor if he appears, and, in case of an appeal under section 417, the accused if he appears the Court may, if it considers that there is no sufficient ground for interfering, dismiss the appeal, or may—

Powers of Appellate Court in disposing of appeal.

(a) in an appeal from an order of acquittal, reverse such order and direct that further inquiry be made, or that the accused be re-tried or committed for trial, as the case may be, or find him guilty and pass sentence on him according to law ;

(b) in an appeal from a conviction, (1) reverse the finding and sentence, and acquit or discharge the accused, or order him to be re-tried by a Court of competent jurisdiction subordinate to such Appellate Court or committed for trial, or (2) alter the finding, maintaining the sentence, or, with or without altering the finding, reduce the sentence, or (3) with or without such reduction and with or without altering the finding, alter the nature of the sentence, but, subject to the provisions of section 106, sub-section (3), not so as to enhance the same ;

(c) in an appeal from any other order, alter or reverse such order ;

(d) make any amendment or any consequential or incidental order that may be just or proper.

(2) Nothing herein contained shall authorise the Court to alter or reverse the verdict of a jury, unless it is of opinion that such verdict is erroneous owing to a misdirection by the Judge, or to a misunderstanding on the part of the jury of the law as laid down by him.

Scope of the section.—This section does not confer any right of appeal. It only lays down the powers of an appellate Court when a right of appeal is allowed by other provisions of the Code. S. 401, *supra*, enacts the general rule—no appeal shall lie except as provided for, and Ss. 403 to 416, *supra*, provide *inter alia* for appeals in certain cases but not in any case of acquittal and S. 417 *supra* provides for appeals against orders of acquittal and enacts that the appeal shall lie at the direction of Government and should be presented to the High Court, 7 M. 213 at 214. A Court of appeal under this Code is not a mere Court of error, but the Court as a Court of appeal is enjoined by S. 537 *infra*, and S. 167, of the Indian Evidence Act, not to reverse any finding or sentence passed by a Court of competent jurisdiction on account of any error, omission, irregularity, or improper admission or rejection of evidence unless in its judgment such error, omission or irregularity has in fact occasioned a failure of justice, or unless independently of the evidence objected to and admitted, it ought to have

varied the decision, 21 M. 523 at 541. It is a rule underlying the whole fabric of appellate jurisdiction that the power of an appellate Court is measured by the power of the Court from whose judgment or order the appeal is preferred. This is equally so in the Civil and Criminal branches of the law of procedure. It is a fundamental principle that every Court of appeal exists for the purpose, where necessary, of doing, or causing it to be done, that which each Court subordinate to its appellate jurisdiction should have, but has not, done or caused to be done and nothing further. Therefore the jurisdiction in appeal is necessarily limited in each case to the same extent as the jurisdiction from which that particular case comes. It is a proposition which cannot be disputed that all powers conferred upon an appellate Court, as such, must be interpreted as subject to the general rule stated above. In *Weir II*, 457 it was held that an appellate Court cannot on appeal pass a sentence which the trial Court was not competent to pass. All jurisdiction starts with the trial Court and remains a constant factor throughout. All subsequent stages of the proceeding are governed by it. The appellate Court while altering a sentence into one of fine cannot inflict a fine beyond the maximum which could have been imposed by the trial Court. The substitution of fine for imprisonment is a meritorious commutation and does not constitute an enhancement, 12 Cr. L.J. 444=11 Ind. Cas. 733 See 1929 M.W.N. 896. The powers conferred by this section on a Court of appeal are not to be used in such a way as to spring up a new case upon the accused without giving him any notice of the charge he has to meet, 16 Cr. L.J. 599=30 Ind. Cas. 131; nor is it entitled while settling aside the conviction for one offence to convict the accused for another offence not charged in the trial Court, 21 L.W. 520=16 Cr. L.J. 1036=87 Ind. Cas. 921. Where an accused person was charged and convicted of an offence under S. 452, I.P.C., it is not open to the appellate Court on appeal to convert such a conviction into one under a Special Act, such as the Arms Act, and convict him under that Act, say, under S. 19 (c) of the said Act. Such a conviction is illegal as the accused was not charged with that offence and had no opportunity of meeting it, 4 Ran. 355. To decide the appeal requires more than a refusal to interfere with a discretion; it requires a decision on the evidence as to the facts proved, 30 Bom. L.R. 934 at 956. A criminal appeal under this section cannot be dismissed by the Court for default of appearance of the appellant which does not relieve the Court of the imperative duties of perusing the records and rendering judgment in accordance with the provisions of Ss. 367 and 424, *infra*, 46 M. 352; 50 B. 673, *following* *Ratanlal* 593 and 13 A. 171; 14 A.L.J. 327=17 Cr. L.J. 353=35 Ind. Cas. 657; 6 Pat. 16; 50 C. 973; 12 Cr. L.J. 431=13 Ind. Cas. 89; 12 C.W.N. 243; 9 Cr. L.J. 553=2 Ind. Cas. 247; 24 Cr. L.J. 475=73 Ind. Cas. 891. When an appeal is once dismissed, another appeal on behalf of the same appellant cannot be entertained for whatever reason, 50 M. L.J. 51=23 L.W. 56=1926 M.W.N. 147=27 Cr. L.J. 184=91 Ind. Cas. 1000. The fact that an appeal has been admitted will not preclude the Court from dealing with the question whether an appeal lay or not, 40 C. 631. Where after the presentation of an appeal, the records are sent for, and a date is fixed for hearing, the Court has no power to dismiss the appeal for non-appearance of pleader, as under the provisions of this section it was incumbent on the Magistrate to go through the records and dispose of the appeal on the merits, 27 C.W.N. 947. Even though no one may appear in a criminal appeal, it is the duty of the criminal Court to examine the matter and to come to some sort of decision on the merits, 24 Cr. L.J. 89=71 Ind. Cas. 217. The sound rule to apply in trying a criminal appeal where questions of disputed facts are in issue is to consider whether the conviction is right, and in this respect a criminal appeal differs from a civil one, in which the Court must be convinced before reversing a finding of fact by the lower Court, that the finding is wrong, 11 C.L.R. 25. When the law allows an appeal the appellant is entitled to have from the Court of appeal an explicit opinion on the question of fact involved in the case and the Court of appeal should take its own view of the evidence after perusal of the records, 39 C.L.J. 117=25 Cr. L.J. 1044=81 Ind. Cas. 820. It is not necessary in criminal cases that the appellant should clearly establish that the order of the lower Court was wrong, 23 C. 347. In every case which comes before an appellate Court the trial Court has the advantage of seeing and hearing the witnesses and the appellate Court has not that advantage; but it is not right to say that an appellate Court can never hope to make a diagnosis as to the truth of the case as good as that made by the trial Court. No doubt the trial Court has an advantage

vindicated. The only persons who can be heard in an appeal are those mentioned in this section and not the complainant when the question is whether the conviction is right or not, 50 C. 153 at 153.

In case of appeal under S. 417 the accused, if he appears.—S. 427, *infra* says that when an appeal is presented under S. 417, *supra*, the High Court may issue a warrant for the arrest of the accused for his being brought before it or any subordinate Court and the Court before which the accused is brought may commit him to prison pending the disposal of the appeal or admit him to bail. If the accused is committed to prison he cannot possibly appear before the High Court and even if he is on bail, many an accused find it difficult to be present in the High Court at the time of hearing. He can always be represented by a pleader who is entitled to be heard in support of the order of acquittal before the High Court. As a matter of practice the High Court under a Government of India circular engages a pleader, if an accused does not retain one, to defend the accused in all cases of acquittal as in the case of Referred Trials.

Dismiss the appeal, if no sufficient ground for interfering.—An appellant is not in the same favourable position before an appellate Court as he was before the trial Court and before he could succeed in his appeal he must satisfy the appellate Court that there is sufficient ground for interfering with the conviction, and if no sufficient ground is shown, it is the duty of the appellate Court not to interfere but to dismiss the appeal, 3 A. 336. The real test for the interference by the appellate Court is, can the appellate Court say that the decision of the lower Court is wrong 19 B. 749 at 763, but if the appellate Court had any doubt that the conviction was right and any doubt as to the commission of the offence charged, it is bound to acquit the accused in spite of what the original Court had said or done 23 C. 347; 11 C. L. R. 23. In appeals against acquittal the High Court ought not to interfere unless the lower Court has so blundered and gone wrong as to produce a result mischievous at once to the administration of justice and the interests of the public, 3 A. 448; 9 A. 52; 16 A. 212; or unless the Judge was clearly wrong and the judgment either perverse or based on errors of procedure, 16 Cr. L. J. 529=29 Ind. Cas. 637. There is no real distinction between a right of appeal from an order of acquittal and one against conviction. In both cases the appellant has to satisfy the High Court that there does exist some good and strong ground apparent upon the record for interfering, 20 A. 439; 19 B. 51; 17 C. 483. The High Court ought not to interfere with an acquittal unless the lower Court which had the witnesses before it and arrived at conclusions of fact with this great advantage in its favour had clearly gone wrong and its judgment was either perverse or based on obvious error of procedure, 16 Cr. L. J. 529=29 Ind. Cas. 637 at 638. When once an appeal is dismissed, the High Court has no power to review its own order confirming the conviction and sentence, nor can the High Court entertain another appeal when once an appeal had been dismissed for default on the ground that Counsel was not heard owing to some mistake on the first occasion, 57 M. L. J. 51=23 L. W. 55=1926 M. W. N. 147=27 Cr. L. J. 184=91 Ind. Cas. 1000. The only remedy is to refer the matter to Local Government under Chapter XXIX of the Code. See notes under S. 369, *supra* at pages 659-670.

Sub-section (1) (a).—This section deals with the powers of the High Court in appeals against acquittal. When after an illegal trial contravening the provisions of S. 233, *supra*, the accused is acquitted and an appeal against such acquittal is preferred, the High Court cannot itself convict the accused but can only direct a re-trial. The Court however may refuse to direct a re-trial having regard to the length of time that had elapsed from the date of the alleged offence, 39 M. 527 (F. B.). There is no distinction in the Code between the right of appeal against conviction and an acquittal, both being governed by the same rules and being subject to the same limitation, 17 C. 485; 20 A. 439; 26 M. L. J. 160; 33 M. 1028 and 1032-1034; 36 A. 165; 26 C. W. N. 128; 17 Cr. L. J. 9=32 Ind. Cas. 137. No Court other than a High Court is empowered to entertain an appeal from an acquittal. See S. 417, *supra*. This sub-section applies only to the High Court and to no other Court, 7 M. 213; 20 C. 633; 24 C. 528; 23 M. 225. The powers conferred by this sub-section are of a very exceptional nature and the Court ought to be satisfied that exceptional grounds exist

for an order

varied the decision, 24 M. 523 at 541. It is a rule under-lying the whole fabric of appellate jurisdiction that the power of an appellate Court is measured by the power of the Court from whose judgment or order the appeal is preferred. This is equally so in the Civil and Criminal branches of the law of procedure. It is a fundamental principle that every Court of appeal exists for the purpose, where necessary, of doing, or causing it to be done, that which each Court subordinate to its appellate jurisdiction should have, but has not, done or caused to be done and nothing further. Therefore the jurisdiction in appeal is necessarily limited in each case to the same extent as the jurisdiction from which that particular case comes. It is a proposition which cannot be disputed that all powers conferred upon an appellate Court, as such, must be interpreted as subject to the general rule stated above. In *Weir II*, 457 It was held that an appellate Court cannot on appeal pass a sentence which the trial Court was not competent to pass. All jurisdiction starts with the trial Court and remains a constant factor throughout. All subsequent stages of the proceeding are governed by it. The appellate Court while altering a sentence into one of fine cannot inflict a fine beyond the maximum which could have been imposed by the trial Court. The substitution of fine for imprisonment is a merciful commutation and does not constitute an enhancement, 12 Cr. L.J. 445=11 Ind. Cas. 783. See 1929 M.W.N. 896. The powers conferred by this section on a Court of appeal are not to be used in such a way as to spring up a new case upon the accused without giving him any notice of the charge he has to meet, 16 Cr. L.J. 579=30 Ind. Cas. 131; nor is it entitled while setting aside the conviction for one offence to convict the accused for another offence not charged in the trial Court, 21 L.W. 520=26 Cr. L.J. 1036=87 Ind. Cas. 924. Where an accused person was charged and convicted of an offence under S. 452, I.P.C., it is not open to the appellate Court on appeal to convert such a conviction into one under a Special Act, such as the Arms Act, and convict him under that Act, say, under S. 19 (e) of the said Act. Such a conviction is illegal as the accused was not charged with that offence and had no opportunity of meeting it, 4 Ran. 335. To decide the appeal requires more than a refusal to interfere with a discretion, it requires a decision on the evidence as to the facts proved, 30 Bom. L.R. 954 at 956. A criminal appeal under this section cannot be dismissed by the Court for default of appearance of the appellant which does not relieve the Court of the imperative duties of perusing the records and rendering judgment in accordance with the provisions of Ss. 367 and 424, *infra*, 46 M. 382; 50 B. 673, following *Ratanlal* 593 and 13 A. 171; 14 A. L.J. 327=17 Cr. L.J. 333=35 Ind. Cas. 657; 6 Pat. 16; 30 C. 972; 12 Cr. L.J. 481=12 Ind. Cas. 89; 12 C.W.N. 249; 9 Cr. L.J. 553=2 Ind. Cas. 247; 24 Cr. L.J. 475=72 Ind. Cas. 891. When an appeal is once dismissed, another appeal on behalf of the same appellant cannot be entertained for whatever reason, 50 M. L.J. 51=23 L.W. 56=1925 M.W.N. 147=27 Cr. L.J. 184=91 Ind. Cas. 1000. The fact that an appeal has been admitted will not preclude the Court from dealing with the question whether an appeal lay or not, 40 C. 631. Where after the presentation of an appeal, the records are sent for, and a date is fixed for hearing, the Court has no power to dismiss the appeal for non-appearance of pleader, as under the provisions of this section it was incumbent on the Magistrate to go through the records and dispose of the appeal on the merits, 27 C.W.N. 947. Even though no one may appear in a criminal appeal, it is the duty of the criminal Court to examine the matter and to come to some sort of decision on the merits, 23 Cr. L.J. 79=71 Ind. Cas. 217. The sound rule to apply in trying a criminal appeal where questions of disputed facts are in issue is to consider whether the conviction is right, and in this respect a criminal appeal differs from a civil one, in which the Court must be convinced before reversing a finding of fact by the lower Court, that the finding is wrong, 11 C.L.R. 25. When the law allows an appeal the appellant is entitled to have from the Court of appeal an explicit opinion on the question of fact involved in and the Court of appeal should take its own view of the evidence after perusal of 39 C.L.J. 117=25 Cr. L.J. 1044=81 Ind. Cas. 820. It is not necessary the appellant should clearly establish that the order of the lower Court. In every case which comes before an appellate Court the trial Court seeing and hearing the witnesses and the appellate Court has not not right to say that an appellate Court can never hope to make a the case as good as that made by the trial Court. No

to see and hear the witnesses but it is an advantage which may be counteracted and more than counteracted by the greater experience and knowledge of the appellate Court. Where there is a doubt the accused must receive the benefit of that doubt, 28 Cr. L.J. 683=103 Ind. Cas. 416. When an appeal is so dismissed the Magistrate was directed to restore it to file, and dispose of it according to law, 9 Cr. L.J. 553=2 Ind. Cas. 347; 1 Bom. L.R. 275. The judgment of an appellate Court ought not to be read in connection with or as supplementary to the judgment of the Court of first instance; it should be quite independent and stand by itself, 35 C. 138. An appellate Court is not bound to hear the complainant in a criminal appeal. This is left to the discretion of the appellate Court, 7 M.H.C.R. Appx. 42, but it will do well to hear the pleader appointed by the complainant when the Public Prosecutor does not appear to support the order appealed against, Weir II, 476. The powers of an Appellate Court are laid down exhaustively by this section. It is not illegal for an appellate Court when setting aside the proceedings of the lower Court to leave it to the subordinate Court's discretion to re-try the accused, 46 C. 212; 53 C. 192. S. 345 (6) *supra*, permits a composition of a case after conviction and during the pendency of an appeal in the appellate Court. A criminal appeal is a continuation of the criminal case and except so far as there is a provision to the contrary the appellant has the privilege of the accused and cannot be punished for making false statements in his appeal petition which under the Code does not require to be verified, 12 M. 431 at 453, 7 Lah. 148. An appellate Court hearing an appeal is entitled to act upon the admission of the appellant's pleader as to the admissibility of further evidence in appeal. It is not a case of something done at the trial and convicting the accused upon the admission of his pleader. There is no rule or authority or principle which lays down that an appellate Court could not act on the admission of the appellant's pleader. He has authority to admit certain facts and thereby dispense with proof and there is no question of surprise in such a case, 30 Bom. L.R. 646. An appellate Court cannot decline to interfere on appeal simply because in its opinion the matter is a mere trifle. It is bound to hear the appeal and to find whether the conviction is legal or not, Ratanlal, 978. With regard to the function of a Court of appeal in relation to the trial Court on questions of fact the weighty observations of *Lindley, M.R.*, in [1903] A.C. 73 ought to be borne in mind. "Even where the appeal turns on a question of fact the court of appeal has to bear in mind that its duty is to rehear the case, and the Court must re-consider the materials before the judge with such other materials as it may have decided to admit. The Court must then make up its own mind, not disregarding the judgment appealed from but carefully weighing and considering it, and not shrinking from over-ruling it if on full consideration the Court comes to the conclusion that the judgment is wrong. When, as often happens, much turns on the relative credibility of witnesses, who have been examined and cross-examined before the Judge, the Court is sensible of the great advantage it has had in seeing and hearing them. It is often very difficult to estimate correctly the relative credibility of witnesses from written depositions; and when the question arises which witness is to be believed rather than another and that question turns on manner and demeanour, the Court of appeal always is and must be guided by the impression made on the Judge who saw the witness. But there may obviously be other circumstances quite apart from the manner and demeanour which may show whether a statement is credible or not and these circumstances may warrant the Court in differing from the Judge even on a question of fact, turning on the credibility of witnesses whom the Court has not seen." See (1923) A.C. 231; 39 B. 338 (P.C.). See also the observation of *Lord Dunedin* in 17 L.W. 1 (P.C.)=31 M.L.T. 307=27 C.W.N. 414. "There are two ways in which one may approach the question of credibility. When the question is whether a witness is speaking the truth or not, light is thrown upon it by the demeanour of that witness in the box, by the manner in which he answers questions, and by how he seems to be affected by the questions that are put to him and so on. No doubt, there the trial Judge has an advantage which cannot possibly be shared by any appellate Court. But when the views upon credibility are founded upon argumentative inferences from facts which are not disputed, then the Court of appeal is really in just as good a situation as a judge of the first instance." An appellate Court must attach due weight to the opinion of the trial Judge as regards the credibility of the witnesses examined by him, 27 Cr. L.J. 377=94 Ind. Cas. 173. In appeals arising out of counter cases which had ended in conviction in the

trial Court, it is the duty of the appellate Court to keep each appeal separate and deal with each appeal on the merits confining itself to the evidence recorded in each case and that case alone. The appellate Court cannot treat two appeals arising out of counter cases as one case, make up its mind that there were two contradictory stories, find one of them to be true and the other untrustworthy, allow one appeal and dismiss the other, 47 C.L.J. 211 at 213=23 Cr. L.J. 512=103 Ind. Cas. 243. See also 8 Lah. 193. An appellate Court hearing an appeal, is bound to weigh the evidence on the record before it and not to accept the opinion of another Judge in a previous case on evidence that was not before it, 8 Lah. 264 following 23 A. 81 and 26 Cr. L.J. 1121=65 Ind. Cas. 353.

Shall then send for the record of the case.—The use of the word "then" clearly indicates that any power conferred by this section can be used only after the proceedings have reached the stage at which this section becomes applicable, *viz.*, after the appeal has been admitted and after notice under S. 422 has been given, 24 Cr. L.J. 89=71 Ind. Cas. 217.

If such record is not already in Court.—Sub-section (2) of S. 421, *supra*, says that before dismissing an appeal summarily the Court may call for the records of the case, but it shall not be bound to do so. But after admission of the appeal the Court is bound to send for the record if such record is not already called for by the Court at an earlier stage under S. 421 (2) *supra*; after calling for the records and fixing a date for hearing, the appeal cannot be dismissed for default of appearance of pleader, 27 C.W.N. 947. See 43 M. 332; 50 B. 673; 50 C. 972; 6 Pat. 16; 12 C.W.N. 243; 14 A.L.J. 327; 13 A. 71; 23 Cr. L.J. 475=72 Ind. Cas. 891; 12 Cr. L.J. 49; 9 Cr. L.J. 533.

After hearing appellant or his pleader, if he appears.—There must be sufficient notice of the date and place of hearing and an order dismissing an appeal for want of appearance or acquitting the appellants when there was no sufficient notice or no notice at all is illegal and cannot stand, 22 Bom. L.R. 183=21 Cr. L.J. 373=55 Ind. Cas. 853; 53 C. 969. The Court is bound to hear the appellant or his pleader if he is present before the Court. So long as a pleader is not guilty of unnecessary repetition or irrelevant argument he is entitled to present his clients' case as he thinks best and it is no ground for a Court to decline to hear a pleader or to cut short his arguments merely because it is expected by the superior Court to turn out a certain amount of work within a fixed time, 29 Cr. L.J. 279=107 Ind. Cas. 763. If after due notice nobody appears there is nothing in the Code to prevent the appellate Court from disposing of the appeal on the merits after perusing the records, 13 A. 171 (F.B.); 50 C. 972; but the appeal cannot be dismissed for default of appearance, 50 B. 673, 27 C.W.N. 947; 45 M. 332; 6 Pat. 16; 14 A.L.J. 327 13 A. 171. The Code does not permit the dismissal of an appeal upon the ground that the appellant does not appear to support it, 9 Cr. L.J. 533=2 Ind. Cas. 247; 12 Cr. L.J. 481=12 Ind. Cas. 89; 14 Cr. L.J. 182=19 Ind. Cas. 182; 24 Cr. L.J. 475=72 Ind. Cas. 891; 50 B. 673. For definition of the word "pleader," see S. 4 (1) (c), *supra*. It was held in 38 C. 307 that an appellant has a right of reply if the Crown had been heard even in cases falling under S. 421 *supra*, and therefore as to the right of reply in a case under this section there is no doubt whatever. When the appellant is represented by a pleader who has no proper *vakalat* the proper course is to adjourn the hearing of the appeal and thus afford the appellant an opportunity of being represented, 21 Cr. L.J. 413=56 Ind. Cas. 61 but no *vakalat* is required to appear for an accused, [1926] Pat. 125=27 Cr. L.J. 686=94 Ind. Cas. 714; 43 M.L.J. 683.

The public prosecutor, if he appears.—It is not in every criminal appeal the Public Prosecutor will be instructed by the District Magistrate to appear. A complainant cannot claim as of right to be heard in an appeal from a conviction. The matter is in the discretion of the appellate Court, 7 M.H.C.R. Appx. 42, but if after notice the Public Prosecutor does not appear it is open to an appellate Court to hear a pleader privately instructed to support a prosecution and to do so would generally be discreet on the part of the Court, Weir II, 478. See 53 C. 969, as to when it is necessary to give notice to complainant. The chief reason for not permitting the pleader instructed by the complainant to be heard is that he may desire to press unduly a line of argument which would not commend itself as the proper one to a District Magistrate who is only to see that justice is

vindicated. The only persons who can be heard in an appeal are those mentioned in this section and not the complainant when the question is whether the conviction is right or not, 50 G. 159 at 163.

In case of appeal under S. 417 the accused, if he appears.—S. 427, *infra* says that when an appeal is presented under S. 417, *supra*, the High Court may issue a warrant for the arrest of the accused for his being brought before it or any subordinate Court and the Court before which the accused is brought may commit him to prison pending the disposal of the appeal or admit him to bail. If the accused is committed to prison he cannot possibly appear before the High Court and even if he is on bail, many an accused find it difficult to be present in the High Court at the time of hearing. He can always be represented by a pleader who is entitled to be heard in support of the order of acquittal before the High Court. As a matter of practice the High Court under a Government of India circular engages a pleader, if an accused does not retain one, to defend the accused in all cases of acquittal as in the case of Referred Trials.

Dismiss the appeal, if no sufficient ground for interfering.—An appellant is not in the same favourable position before an appellate Court as he was before the trial Court and before he could succeed in his appeal he must satisfy the appellate Court that there is sufficient ground for interfering with the conviction, and if no sufficient ground is shown, it is the duty of the appellate Court not to interfere but to dismiss the appeal, 5 A. 386. The real test for the interference by the appellate Court is, can the appellate Court say that the decision of the lower Court is wrong 19 B. 749 at 763, but if the appellate Court had any doubt that the conviction was right and any doubt as to the commission of the offence charged, it is bound to acquit the accused in spite of what the original Court had said or done 23 C. 347; 11 C. L. R. 25. In appeals against acquittal the High Court ought not to interfere unless the lower Court has so blundered and gone wrong as to produce a result mischievous at once to the administration of justice and the interests of the public, 4 A. 193; 9 A. 52; 16 A. 212; or unless the Judge was clearly wrong and the judgment either perverse or based on errors of procedure, 16 Cr. L. J. 529=29 Ind. Cas. 657. There is no real distinction between a right of appeal from an order of acquittal and one against conviction. In both cases the appellant has to satisfy the High Court that there does exist some good and strong ground apparent upon the record for interfering, 20 A. 439; 19 B. 51; 17 C. 485. The High Court ought not to interfere with an acquittal unless the lower Court which had the witnesses before it and arrived at conclusions of fact with this great advantage in its favour had clearly gone wrong and its judgment was either perverse or based on obvious error of procedure, 16 Cr. L. J. 529=29 Ind. Cas. 657 at 658. When once an appeal is dismissed, the High Court has no power to review its own order confirming the conviction and sentence, nor can the High Court entertain another appeal when once an appeal had been dismissed for default on the ground that Counsel was not heard owing to some mistake on the first occasion, 50 M. L. J. 51=23 L. W. 56=1926 M. W. N. 147=27 Cr. L. J. 184=91 Ind. Cas. 1000. The only remedy is to refer the matter to Local Government under Chapter XXIX of the Code. See notes under S. 369, *supra* at pages 659-670.

Sub-section (1) (a).—This section deals with the powers of the High Court in appeals against acquittal. When after an illegal trial contravening the provisions of S. 293, *supra*, the accused is acquitted and an appeal against such acquittal is preferred, the High Court cannot itself convict the accused but can only direct a re-trial. The Court however may refuse to direct a re-trial having regard to the length of time that had elapsed from the date of the alleged offence, 39 M. 527 (F B). There is no distinction in the Code between the right of appeal against conviction and an acquittal, both being governed by the same rules and being subject to the same limitation, 17 C. 485; 20 A. 439; 26 M. L. J. 160; 38 M. 1028 and 1032-1034; 36 A. 188, 26 C. W. N. 129; 17 Cr. L. J. 9=32 Ind. Cas. 137. No Court other than a High Court is empowered to entertain an appeal from an acquittal. See S. 417, *supra*. This sub-section applies only to the High Court and to no other Court, 7 M. 213; 20 C. 633; 24 C. 529; 23 M. 229. The powers conferred by this sub-section are of a very exceptional nature and the High Court ought to be satisfied that exceptional grounds exist for setting aside an order of acquittal.

Reverse such order and direct further inquiry.—The High Court alone can when reversing the order of acquittal, direct further inquiry into the case. A Sessions Judge has no jurisdiction to interfere with an order of acquittal by a Magistrate, 23 M. 225; 20 C. 633; 2 C.W.N. colvi. The power to alter a finding is not expressly mentioned in sub-section (a) as in sub-section (b), which deals with appeals from conviction. The word "reverse" evidently means "to set aside," "to make null" and when reversing the order the Court may order further inquiry or re-trial instead of altering the finding, 26 M. 1 at 15.

Order the accused be re-tried or committed for trial.—It is not illegal for an appellate Court when quashing the proceedings of the lower Court to leave it to the latter's discretion to re-try the accused and such an order cannot be construed as an acquittal disentitling the lower Court from re-trying the accused, 53 C. 192. When an appellate Court in appeal sets aside a conviction and the High Court is of opinion that the acquittal of the lower Court is unsustainable, the proper procedure in revision is to set aside the acquittal and direct a re-hearing of the appeal and not to order a re-trial of the whole case, 27 Cr. L.J. 834=93 Ind. Cas. 934. There is a strong principle that a man ought not to be tried a second time for the same offence unless there are very grave reasons for doing so. The power to order re-trial should be exercised sparingly bearing in mind this principle, 13 A.L.J. 477=16 Cr. L.J. 433=29 Ind. Cas. 65. It is doubtful whether an appellate Court under the section could make the position of the appellants worse by ordering a re-trial for a more serious offence, e.g., of ordering a re-trial for an offence under S. 330, I.P.C. when setting aside a conviction had under S. 323, I.P.C. in appeal, 28 Cr. L.J. 575=102 Ind. Cas. 511. When no evidence sufficient to sustain a conviction exists on record, the appellate Court is not justified in sending back the case for re-trial under this section, 28 M.L.J. 379. The Court also will refuse to direct a re-trial having regard to the length of time that had elapsed from the date of the alleged offence, 39 M. 527 (F.B.) It is open to the High Court under this clause in an appeal from an acquittal to reverse such order and to order the accused to be re-tried, but where there was no legal trial before the original Court there was no legal acquittal and therefore there is therefore neither an appeal against acquittal nor an acquittal for the High Court to reverse, and the question whether the accused should be legally tried is a question not for judicial decision but for the consideration of the authorities with whom it rests to proceed with the prosecution, 29 B. 449 at 487. In an appeal under S. 406, *supra*, against an order taking security to keep the peace under S. 107, *supra*, the appellate Court is competent when setting aside the order to order a re-trial under this section, 43 A. 501. No appellate Court other than the High Court is empowered to direct the accused to be committed for trial as no appellate Court other than the High Court could set aside an order of acquittal, 26 M. 478, but any appellate Court in hearing an appeal from a conviction could order commitment under clause (b) of this sub-section and no preliminary inquiry is necessary before such a commitment, Weir II, 479; Weir II, 484.

Or find accused guilty and pass sentence.—The High Court in an appeal against acquittal under S. 417 *supra*, is empowered to find the accused guilty of the offence charged and acquitted by the trial Court and pass sentence on the accused according to law. But it is not clear whether the High Court, could find the accused guilty of an offence with which the accused was not charged; in 7 N.W.P.H.C.R. 196 the accused was acquitted on appeal from a conviction by the Sessions Court for an offence under S. 409, I.P.C., but the facts proved constituted the offence of criminal breach of trust under S. 406, I.P.C., the High Court on appeal by Government ordered a re-trial with the remark that the charge was not framed with sufficient precision. When there is only one charge and the accused was acquitted there is no difficulty whatever, but when there are more charges than one and the accused was acquitted of some of the charges and convicted of the others, the question arises whether in an appeal from the conviction he could be convicted of those offences for which he was acquitted without preferring an appeal from such acquittal. The latest authorities are against permitting a conviction for offences for which the accused was acquitted. See notes under clause 1 (b) under heading 'after the finding maintaining the sentence' at p. 765-768.

Sub-section (1) (b).—This clause deals with the powers of an Appellate Court in an appeal from a conviction. First it may reverse the finding and sentence and acquit or discharge the accused, or order him to be tried by a Court of competent jurisdiction subordinate to such Appellate Court, or direct the accused to be committed for trial. In an appeal preferred against a conviction by one of the accused the appellate Court cannot disturb the order of acquittal passed against his co-accused. The powers of the appellate Court under this section are distinct and different as regards the appeal from a conviction and one from an acquittal and so long as the acquittal passed by a competent Court stands, the Court before which the order of acquittal is produced, is not entitled to impeach it on the ground that the presiding officer was disqualified under, S. 556, *infra*, 8 A.L.J. 1129=12 Cr. L.J. 575=12 Ind. Cas. 839. Under this sub-section the appellate Court is not entitled to call for findings but, it may, if it thinks fit, call for further evidence, 2 Cr. L. Rev. 347; 4 Cr. L. Rev. 272.

Order him to be re-tried.—An appellate Court has full discretion in the matter of ordering a re-trial. A re-trial may be ordered (1) when the original trial is void for want of jurisdiction or misjoinder, (2) when the inquiry has obviously been superficial and material witnesses have not been examined. It should not be ordered for enabling the prosecution to fill up gaps in the evidence when it had ample opportunities to do so, 11 Cr. L.J. 681=8 Ind. Cas. 594; 36 M. 457; 7 W.R. (Cr.) 3. Ordinarily, the power to order re-trial should not be invoked when setting aside a conviction for illegality or want of jurisdiction; for in such a case proceedings may be taken again independently of such order, 12 C.W.N. 246. Before directing a re-trial the appellate Court is bound to consider the evidence already recorded and see what possible object could be served by a fresh trial, *Weir II*, 430; 23 C. 103. An appellate Court should not order a re-trial on the sole ground that some additional witnesses ought to have been examined for the prosecution, if as a matter of fact, the pleader who conducted the prosecution had exercised a proper discretion in not calling these witnesses, 31 C. 710. Where a trial is invalid on legal grounds and an irregularity committed by the lower Court has occasioned a failure of justice, a re-trial may be ordered, 28 C. 63; 8 C. L.J. 59. The prosecution is not entitled to ask and the appellate Court has no power to order a re-trial, when the prosecution comes to Court with an incomplete case which so far as it goes confirms the defence. Ordinarily a re-trial by the appellate Court in such a case is giving an opportunity to the prosecution to fill up gaps in the evidence by a re-trial and ought not to be allowed 23 Cr. L.J. 253=107 Ind. Cas. 529. Where the evidence recorded by the trial Court is as full as the law requires and when there is no irregularity of procedure or defect in the inquiry, it is not proper for an appellate Court in appeal to order a re-trial but its clear duty is to consider, on the evidence, whether the conviction can be sustained or not, *Ratanlal* 530. The re-trial may be held by any Court of competent jurisdiction subordinate to such appellate Court. Power is given by the section to direct a re-trial by a Court of competent jurisdiction subordinate to the appellate Court. Where a Sessions Judge on an appeal from an Assistant Sessions Judge sets aside the conviction and directed a re-trial, before himself, holding that the Legislature must have overlooked the possibility of an appeal from the Assistant Sessions Judge to the Sessions Judge and therefore he has taken it on himself, to do what he thinks the Legislature ought to have done, it was held that the order of the Judge was clearly illegal being based on a speculation of his own as to the intention of the Legislature. The High Court further remarked that the Judge may possibly have arrived at the result he desired by directing re-trial before the Assistant Sessions Judge and then transferring the case to his own file under S. 523, *infra* 24 A.L.J. 506=27 Cr. L.J. 733=85 Ind. Cas. 383. The provisions of this clause do not preclude an appellate Court when reversing the finding and sentence under appeal, instead of directing a re-trial, itself trying the accused if the offence is one ordinarily triable by it 30 M. 223; *Weir II*, 431. But see 21 C. 935 and *Ratanlal* 832. When a trial is ordered the whole case is re-opened and the accused must be tried again on all the charges originally framed having regard to the provisions of this section, and the provisions of S. 403 *supra*, cannot apply, 40 C. 163 at 167. When an appellate Court orders a re-trial of a case under this section, it cannot restrict the evidence to be taken to that mentioned in its order. The only legal order the appellate Court could make, is to direct the

case to be re-tried in the light of the observations contained in its order and in such a case it is quite open to an accused person to produce such additional evidence as he may wish to adduce, 3 C. L. J. 303=3 Cr. L. J. 304. When a case is directed to be re-tried by the appellate Court on the basis of certain findings of fact, the trying Court cannot go behind those findings of fact when re-trying the accused, 15 Cr. L. J. 619=25 Ind. Cas. 627. When a Sessions Judge on appeal sets aside the conviction, and orders a re-trial, the District Magistrate has no authority to disregard the order of the Sessions Judge on the ground that the sentence of imprisonment already undergone by the accused is sufficient punishment and so no fresh trial was necessary; neither the District Magistrate nor any other Magistrate had authority to release the accused from jail without holding a fresh inquiry as directed by the Sessions Judge on appeal, 5 L. B. R. 42=10 Cr. L. J. 77=2 Ind. Cas. 541. It is not illegal for an appellate Court when quashing the proceedings of the lower Court to leave it to the latter's discretion to re-try the accused and such an order cannot be construed as an acquittal disentitling the lower Court from re-trying the accused, 53 C. 192. When a Judge hearing an appeal finds that the accused had been gravely prejudiced by a gross mistake in the drawing up of the charge by the trial court and also by the omission by it to consider documents produced by the accused, the proper Course is to remand the case for re-trial from the stage at which the trial had become irregular, *i.e.*, the framing of the charge and thus prevent the prosecution from improving its case, 23 Cr. L. J. 833=101 Ind. Cas. 903. There is no rule that when a re-trial is ordered by the appellate Court it should always be sent to a different Magistrate, each case must be decided on its own merits, 23 Cr. L. J. 617=103 Ind. Cas. 103. Where the order for re-trial does not state whether it is to be held by the same Magistrate or some other Magistrate, then it should not be presumed that it was the intention of the appellate Court to direct the re-trial to be held by the same Magistrate. The matter is left entirely to the discretion of the Magistrate who has to appoint the Court by which the case is to be re-tried, 30 C. W. N. 1002=27 Cr. L. J. 1188=97 Ind. Cas. 913.

Or committed for trial—If a Sessions Court as an appellate Court thinks that the case ought to be re-tried by the Court of Session it ought to set aside the conviction and order a commitment under this clause, 13 A. L. J. 477; 15 A. 205. This sub-section does not authorise a Sessions Court to commit a case to itself, but only empowers it to direct a competent Court to commit, 1907 A. W. N. 178; 22 C. 50. The power to direct a commitment is not confined to cases exclusively triable by a Court of Session, 23 C. 350; 27 C. 172; 16 B. 580. The power of ordering a new trial merely for the purpose of enhancing the punishment ought to be exercised very sparingly, 13 A. L. J. 477 at 478; 24 M. 675. No preliminary inquiry is needed before the appellate Court orders committal, *Weir II*, 479 and 484. When the High Court hearing an appeal from a conviction finds that the illegality committed by the lower Court (a special Magistrate under the Malabar Ordinance) vitiates the conviction and sets aside the same, it can commit the accused for re-trial on the same charges by a Sessions Court, when the Court of the Special Magistrate has ceased to exist, 18 L. W. 899.

After the finding maintaining the sentence—The word "alter" means substitute one for another and "alter the finding maintaining the sentence" means reverse the finding on which the conviction is based and do not empower the appellate tribunal (or at any rate an appellate tribunal other than the High Court) to reverse or set aside an acquittal, 26 M. 478 at 480. It was the law, before the Privy Council decision in 50 A. 722, that the High Court when hearing an appeal against a conviction may under this clause alter the finding and then as a Court of revision may, under S. 439, *infra*, enhance the sentence so as to make it appropriate to the altered finding. The prohibition in sub-section (4) of S. 439, *infra*, was held in 37 M. 119 and other decisions to refer to a case where a trial has ended in a complete acquittal and not to a case where the trial has ended in a conviction (say for culpable homicide or grievous hurt when charged for murder) but also where the Court has wrongly applied the law or has wrongly found some of the facts not proved and has, in consequence, held that the conviction should be under some section of the Code other than the section properly applicable, as any other construction would be inconsistent with the power to alter the "finding" given to the Court as a Court of revision by virtue of its power to exercise the power conferred on a Court of appeal by this clause and the terms of a.

statute should not be so construed as to involve an inconsistency between its different parts. There was also a conflict of opinion between the various High Courts as to the power of the High Court to alter a conviction under S. 304, I.P.C., or S. 325, I.P.C., into one under S. 302 I.P.C., and then sentence the accused to one under S. 302, I.P.C., with which he was originally charged and tried. The question was whether the High Court can itself convict the accused who was charged with the major offence of murder under S. 302, I.P.C., but was acquitted whether expressly or impliedly and convicted of the lesser offence under S. 304 or S. 325 I.P.C., and then after notice to the accused enhance the sentence in revision. The decisions in 37 M. 119; 1 Ran. 436; 8 Lah. 136 and 6 Pat. 217 took one view while 4 Ran. 140; 44 A. 332; 43 B. 510; 50 M. 259 took a different view but the conflict of opinion is now set at rest by the decision of the Privy Council in 50 A. 722 (P.C.), where it is held that the High Court in revision has no power to alter a conviction under S. 304, I.P.C., into one under S. 302, I.P.C., and then sentence the accused to death under S. 302, I.P.C., as the trial Court must be taken to have acquitted the accused of the charge under S. 302, I.P.C., and the Local Government having a right of appeal under S. 417 *supra*, had not chosen to appeal. Their Lordships in the course of the judgment also remarked that if the learned Judges in 37 M. 119 intended to hold that the prohibition in S. 439 (4), *infra* refers only to a case of the trial ending in a complete acquittal of the accused on all the charges or offences and not to a case where the accused was charged with murder under S. 302, I.P.C., but acquitted of murder but convicted of a lesser offence under S. 304, I.P.C., their Lordships were unable to agree with that part of the decision as the words of S. 439 (4) are clear and there can be no doubt as to their meaning and there was no justification for the qualification which the learned Judges in 37 M. 119 attached to S. 439 (4) *supra*. See also 31 Bom. L.R. 529. The finding which an appellate Court may alter under this clause may relate either to an offence with which the accused is apparently charged in the lower Court or to one of which he might be convicted under Ss. 237 and 238 *supra* without a distinct charge. Abetment of an offence is not a minor offence and it can come under S. 237 *supra*, only if there is no element in the abetment which is not included in the charge and therefore an appellate Court has no power to convict an appellant of abetment of the offence when acquitting him on the main charge and such a conviction is illegal, 49 A. 120; 30 Cr. L.J. 944=118 Ind. Cas. 473; 35 A. 329. In 6 Lah. 268 (P.C.) the accused was charged and convicted of murder and their Lordships of the Privy Council altered the conviction into one under S. 201 I.P.C., causing disappearance of evidence of murder on a construction of S. 237 *supra* although there was no specific charge for that offence. The law as it stands at present is that if on the facts proved of which the accused may be taken to have notice another offence appears to have been committed and if on those facts, it seems doubtful as to which offence the accused has committed, he may be convicted under Ss. 226 and 227 *supra*, of the other offence but in each particular case it is to be considered whether the procedure followed though not strictly correct is one which should be adopted, 51 C. 476 at 478. A conviction for murder cannot be altered to one affecting property, 7 Lah. 361. In cases not falling under Ss. 237, and 238, *supra*, the accused cannot be convicted of an offence with which he was not charged in the lower Court, where however he has been charged and the lower Court has recorded a finding of acquittal on such charge, the appellate Court can alter the finding and there is obviously no injustice in doing so, 33 M. 243 at 245 34 M. 545; 16 A. L.J. 918=20 Cr. L.J. 22=49 Ind. Cas. 503; 27 Cr. L.J. 931=96 Ind. Cas. 213; 33 M. 264. See also 23 C. 973; 27 C. 172, 34 C. 325; but there is only one restriction on the powers of the appellate Court (except the High Court) it cannot enhance the sentence under appeal, 23 C. 973, 15 A. 203; Weir II, 435; alteration will be permissible only so far as it affects the portion of the order adverse to the accused and cannot include the direction of inquiry into new and distinct matter which had hitherto been neglected, 2 Cr. L. Rev. 86 at 83, 21 Cr. L.J. 435=35 Ind. Cas. 532. An appellate Court is not competent to alter a charge under S. 376 I.P.C., into one under S. 356, I.P.C., as the charge under the latter section involves different elements and different questions of fact. In such a case the appellate Court is not entitled to call upon the accused to plead to the charge, examine him, allow him to adduce evidence and then convict him. The proper procedure is to order a re-trial 3 Ran. 63. See also 23 A. L.J. 924=25 Cr. L.J. 1131=93 Ind. Cas. 153, but where the

accused is convicted under Ss. 147 and 353, I.P.O., by the trial Court, the appellate Court can alter the conviction to one under S. 323/149 and S. 353/149, I.P.O., as such alteration is legal, S. 149 not creating a definite offence and the omission to mention S. 149 in the charge did not vitiate the conviction or prejudice the accused, 7 Pat 484 following 9 A. 633; 47 M. 746 (F.B.). But see 1929 M.W.N. 639 where it was held that S. 149, I.P.O., constitutes an offence of its own and 47 M. 476 (F.B.) cannot be considered good law after the Privy Council decision in 52 C. 197. A conviction under S. 380, I.P.O., can be altered into one under S. 403 I.P.O., as the offences are of the same nature and there is no surprise to the accused, 30 Cr. L.J. 413=115 Ind. Cas. 25. The offence must be one for which the accused was charged or might have been charged in the trial, and when setting aside a conviction for murder on appeal, the High Court cannot alter the conviction to one of dishonestly receiving stolen property as the accused was never charged with that offence and it was not a cognate offence, 20 A. 107. If the prosecution establishes certain facts constituting an offence and the Court misapplies the law by charging and convicting the accused for an offence other than that for which he should have been properly charged and notwithstanding such error, the accused by his defence endeavours to meet the accusation of the commission of those acts, then the appellate Court might alter the charge or finding and convict him for an offence which those acts might constitute, provided the accused has not been prejudiced by the alteration. Such an error is one of form rather than substance. Where the accused is convicted of theft of certain trees and the appellate Court while finding that the accused acted under a *bona fide* claim of right and their acts did not amount to theft cannot convict them of being members of an unlawful assembly under S. 143, I.P.O., in having gone to the place armed. The defence in the two cases will be different and such an alteration of conviction will certainly prejudice the appellants, 54 C. 476 at 479 following 26 C. 863; 30 C. 283; 40 C. 168; 6 Lah. 226 (P.C.). The appellate Court is not empowered to alter the conviction so as to find the accused guilty of a more serious charge than that with which he was charged and tried as such a course would be improper and unfair, 6 C.L.R. 427; 26 C. 863. But the appellate Court can alter a finding from a graver to a less grave offence for one of two reasons either because it rejects certain evidence accepted by the lower Court or because it applies the law differently to the same facts. An example of the former class of cases is reduction of robbery into theft by rejecting evidence as to the use of violence and an example of the latter would be a conversion of a finding of theft in a building into one of simple theft on a construction of the word building when the appellate Court while concurring with the finding of the trial Court that hurt was caused on the evidence but differs in the application of the law whether the hurt was simple or grievous falling under S. 323 or S. 324, I.P.O., and finds only the lesser offence of hurt has been made out, neither the letter nor the spirit of this section is broken by maintaining the sentence. The test of enhancement must be found not among the technicalities of penal definition but by answering the broad question 'For this man's offence has the appellate Court inflicted punishment more severe than that originally awarded?' 53 M.L.J. 694=39 M.L.T. 20=28 Cr. L.J. 824=105 Ind. Cas. 440. If the accused has been prejudiced by the omission to prove the altered charge and if the defence might have been different had the altered charge been framed in the first Court the appellate Court should not exercise its power to alter the finding, 30 C. 238; (1916) 2 M.W.N. 267=20 Cr. L.J. 780=53 Ind. Cas. 620. The appellate Court cannot alter the finding of the lower Court to hold the appellant guilty of an offence of which he has been acquitted by that Court maintaining the sentence, 23 C. 975; 27 C. 172; Weir II, 436; 3 Pat. L.J. 563; 41 C. 350. But see 26 M. 478. Where the trial and conviction is by a Court not competent to try the offence, *s. g.* an offence under S. 332 I.P.O. not triable by a second class Magistrate but triable only by first class Magistrate the whole trial is illegal and in such a case the appellate Court cannot alter the conviction to an offence triable by the Magistrate say an offence under S. 332, I.P.O., (1928) M.W.N. 465=29 Cr. L.J. 799=111 Ind. Cas. 126, nor can the appellate Court convict the accused of an offence which the first Court was not competent to try, 7 A. 441 (F.B.), similarly where the two offences are entirely of a different character and in making his defence on the first charge the accused could not be regarded as pleading to the altered charge, the appellate Court should not convict the accused under this clause, 3 C.W.N. 367. Where the two charges (alteration from

S. 376 to S. 386, I.P.C.) involve different elements and different questions of facts, the power of altering the finding should not be exercised, 3 Bom L.R. 120. Where the appellate Court finds a different common object for an unlawful assembly from that charged, it amounts to different finding of fact from that to which the accused were called upon to plead and to defend themselves at the trial, 27 C. 990; 33 C. 295, but an accused when charged as being a member of an unlawful assembly with the specific common object of assaulting the inmates of a house can be convicted in appeal of being a member of the unlawful assembly with the common object of causing hurt to the inmates of the house without an alteration of the charge, as assault means use of violence to persons whether it be assault or hurt or grievous hurt, 28 Cr. L.J. 769=101 Ind. Cas. 97. A conviction cannot be altered from S. 147 to S. 323, I.P.C., where there was no charge under the latter section and the common object charged did not specify that it was to cause hurt, 38 C. 293. In 49 A. 120 it was held that an appellate Court cannot alter the conviction in appeal to a totally different offence from that for which the accused had been actually convicted by the trial Court but the appellate Court is entitled and can substitute a conviction for a lesser offence in appeal from that which had been held to have been committed by the trial Court. Thus when actual assault was not found to have been committed by the appellate Court but only a threat of assault, the appellate Court can substitute a conviction under S. 189, I.P.C., instead of one under S. 359, I.P.C. for which the accused had been convicted by the trial Court, 2 Luck. 503. A conviction under Ss. 147 and 323, I.P.C., cannot be altered on appeal into one under S. 160, I.P.C., without a proper charge being framed, and the accused tried again on the latter charge. It is not a case where an accused who is charged with a major offence is convicted of a minor offence when the major offence is not proved. The offence under S. 160, I.P.C., is different from those under Ss. 147 and 323, I.P.C., for under the former section, to establish an offence of affray it must be shown that the fight took place in a public place and that there was a disturbance of the public peace, 47 M. 61 where 19 A.L.J. 497 is not followed, See 30 C.W.N. 523=26 Cr. L.J. 1018=87 Ind. Cas. 942 where 30 C. 288 and 18 C.W.N. 1274, are followed. An appellate Court cannot so alter a charge as to make it necessary for an accused person to meet an absolutely different case from that charged in the lower Court, 23 A.L.J. 924. An appellate Court cannot alter a finding into one of abetment of the offence for which the appellant has been convicted, 33 M. 264, 11 B.H.C.R. 240; 30 Cr. L.J. 934=118 Ind. Cas. 473; 15 L.W. 583=(1922 M.W.N. 182; 1921 Pat. 96, 13 Cr. L.J. 203 and 223; 49 A. 120; 26 Bom L.R. 323=25 Cr. L.J. 1135=81 Ind. Cas. 959; 25 Cr. L.J. 1292=82 Ind. Cas. 364, nor can an appellate Court alter a conviction under S. 359, I.P.C., to one under S. 189, I.P.C., (1912) M.W.N. 1110. A Sessions Judge when upholding the conviction and sentence of the first Court has no power to set aside the acquittal for some other offence which is not a case of altering the conviction within this section, 37 C.L.J. 409. It is not a proper way of dealing with a case on appeal under this clause by convicting the accused for an offence which did not form the subject-matter of the complaint more particularly when the appellate Court has found that all the other matters complained of were either false or unproved, 3 C.W.N. 296. An appellate Court while setting aside the conviction under S. 452, I.P.C., cannot alter the conviction to one under a special Act [S. 19 (e) Arms Act] for the reason that the accused was not charged with that offence and had no opportunity to meet it, 27 Cr. L.J. 1380=93 Ind. Cas. 480. The appellate Court under this clause has power to alter the finding in order to legitimise the sentence passed by the Court of first instance, 3 Cr. L.J. 43. When an appellate Court illegally altered a conviction under S. 205 read with 109 I.P.C. into one under S. 419, I.P.C., the High Court in revision can re-alter the conviction to one under S. 205, read with 109, I.P.C., 6 Pat. 217.

Reduce the sentence—When the Court of first instance had no jurisdiction to try the case the appellate Court when hearing an appeal from the conviction could not proceed with the appeal on the merits, with a view that in the event of its deciding that the offence has been made out to the reduction of the sentence passed on the accused by the Magistrate to one which the Magistrate was competent to pass under the Code. The only course left open to the appellate Court in such a case is to set aside the conviction and sentence and to send back the case for fresh disposal according to law, 4 A. 141. When the Court of first

instance convicts a person for two offences but passes only a single sentence for both the offences, the appellate Court when acquitting the accused of one of the offences is bound to reduce the sentence and cannot maintain the sentence in its entirety which amounts to an enhancement of sentence. It is now well settled law (See 30 M. 43; Weir II, 437A; 22 B. 760; 49 A. 434; 24 C 316; 30 Bom. L.R. 967), that it is not open to an appellate Court, when setting aside the conviction for one of two or more offences to confirm the whole sentence passed by the trial Court. The reason is that when, (take a simple case), a single sentence is awarded for two offences, part of it must be deemed to have been incurred for one offence and part for the other so that to maintain the whole sentence for only one of them, amounts to such an enhancement as is prohibited by (1) (b) of the section, 33 M L J. 694=39 M L T. 20=23 Cr. L J. 824=104 Ind. Cas. 440. If the appellate Court thinks in such a case the sentence ought not to be reduced it should refer the matter to the High Court for enhancement, 30 M. 43; 22 B. 760; 24 C. 316; Weir II, 437, A.; 8 M L T. 117=11 Cr. L J. 493=7 Ind. Cas. 415; see 49 A. 434; 53 M L J. 694=39 M L T. 20=28 Cr. L J. 824=104 Ind. Cas. 440; See also 30 Bom. L.R. 967=29 Cr. L J. 1032=112 Ind. Cas. 538, where the High Court following the above decisions held that the appellate Court's action amounted to an enhancement of sentence which it had no power to do, itself issued notice to the accused to show cause why sentence should not be enhanced, and enhanced the sentence in revision as the offence was one of extortion by a Police officer. But where the appellate Court, in a case where there was no distinct charge in respect of a separate count, sets aside the conviction in respect of two out of the three counts and does not interfere with the conviction and sentence on the third count, that did not amount to an enhancement of sentence on the part of the appellate Court, 29 Cr L.J. 847=111 Ind. Cas. 399

After the nature of the sentence but not so as to enhance the same.—As a general rule, an appellate Court has no power to enhance the sentence in appeal. The High Court alone in the exercise of its revisional jurisdiction is empowered to enhance the sentence. Altering a sentence of fine into one of imprisonment is not permitted by this section, as such a course is an enhancement of sentence, 18 A. 301; 18 B. 751. It is impossible to lay down any general rule to determine what is or what is not an enhancement of sentence when only a portion of the sentence is altered to a punishment of lesser degree of severity, 27 C. 175. In a criminal appeal it is desirable that the High Court should first deal with the appeal on its merits and then it might consider or not whether a notice to enhance the sentence should be issued under S. 433, *infra*, 49 B. 450. The question whether the sentence has been enhanced by the appellate Court is a question of fact in each particular case, 23 A. 497. In each case the Court has to consider what is the effect of the alteration. Where the appellate Court altered a conviction of one month's imprisonment and a fine of rupees five into one of three days, imprisonment and a fine of rupees, one hundred and in default of payment of fine to a further term of one month's imprisonment, it was held that in the absence of any evidence that the accused was unable to pay the fine or regarded the sentence passed on appeal as more severe, it could not be said that the sentence had been enhanced, 36 A. 435, but the Madras High Court held in 30 M. 103 (F.B.) that when the aggregate amount of imprisonment which the accused might have to undergo even in default of payment of fine does not exceed the total amount of imprisonment which the accused might have to undergo under the order of the trying Magistrate, there was no enhancement of sentence. See also 23 B. 439, but these decisions, it was pointed out in 36 A. 435, overlooked the fact that a sentence of a fine is not wiped out by serving the alternative sentence of imprisonment but is still liable to be enforced under the process of Court. But the new proviso added to sub-section (1) of S. 396, *supra*, says that if the offender had undergone the whole of such imprisonment in default, no Court shall issue a warrant for the levy of the fine unless for special reasons, and therefore the chief reason given in 36 A. 435 does not hold good. See also 1929 M.W.N. 896. A sentence of fine is always considered lighter than a sentence of imprisonment, 23 B. 439, followed in 1929 M.W.N. 896. The power of an appellate Court to alter the sentence must be measured by that of the trial Court. When on appeal from a conviction by a second-class Magistrate of three months' imprisonment, the appellate Court altered the sentence to one of fine of rupees

four hundred, such alteration was held illegal, 45, A. 594; 12 Cr. L.J. 444=11 Ind. Cas. 788; 3 Pat. 638. The imposition of solitary confinement is an enhancement even though the sentence is reduced, 1887 A.W.N. 170. The test of enhancement must be found not among the technicalities of the penal definition but by answering the broad question "for this man's offence has the appellate Court inflicted a punishment more severe than that originally awarded?" 53 M.L.J. 694 at 696=39 M.L.T. 20 at 21=28 Cr. L.J. 824=104 Ind. Cas. 440. Alteration of a sentence of two months' imprisonment plus a fine of rupees fifty or in default one month's further imprisonment to six weeks' imprisonment and fine of rupees two hundred or in default to further imprisonment for six weeks is an enhancement. The alteration means that while the original sentence was practically three months and rupees fifty fine, the altered sentence is equal to three months and rupees two hundred fine, 27 Cr. L.J. 812=95 Ind. Cas. 476. Whipping is generally looked upon as a more degrading punishment than imprisonment, but it does not necessarily follow that the substitution of rigorous imprisonment for whipping would not under any circumstances amount to an enhancement. A poor wretch who has a large family to support might prefer to be left off with a few stripes instead of being incarcerated in jail for any lengthened period of time but the Court is bound to show satisfactorily that it is not really enhancing before it undertakes to substitute the one punishment for the other without his consent. The Legislature has not supplied us with any data from which the comparative severity of the two sentences can be determined and it is therefore impossible to say how many stripes would be equivalent to a sentence of rigorous imprisonment for a given period of time. There is no legal or rational standard of comparison of any kind whatever, and, in the absence of such standard, the Court has no power to take it for granted that a sentence of twenty stripes is equivalent to one of rigorous imprisonment for three months, 6 B.L.R. Appx. 95 at 96-97=15 W.R. (Cr.) 7. Where the appellate Court reduced the sentence of imprisonment but also awarded whipping, it was held that the sentence of whipping amounted to an enhancement of sentence, Weir II, 487. The practice has been to regard the alteration of a sentence of imprisonment to one of whippings as an enhancement of sentence but it has not been authorised by this sub-section, 30 Cr. L.J. 328=114 Ind. Cas. 523. An appellate Court has no power to alter the sentence of an accused who has not appealed and whose sentence is not open to appeal or to revise it, 8 M.H.C.R. (Appx) vii. An appellate Court when hearing an appeal by some of the accused cannot pass any order with regard to an accused who has not appealed. The only course open to it if it is of opinion that the lower Court's judgment or order should be varied, altered or set aside in favour of one who has not appealed is to refer the case to the High Court under S. 423, *infra*.

An order by the appellate Court as to payment of costs under S. 31 of the Court-Fees Act is not an enhancement as it forms no part of the penalty or sentence passed in the case, 29 M. 188, and it was held in 31 M. 547 that the appellate Court is not competent in an appeal from a conviction to set aside an order as to payment of costs made under S. 31 of the Court-Fees Act.

Subject to the provisions of S. 106 (3).—This provision empowering the appellate Court to direct the accused to furnish security for keeping the peace when confirming the conviction was introduced in the Code of 1899 and such an order does not amount to an enhancement of sentence. The appellate Court must find the accused guilty of an offence, specified in S. 106, *supra*, 29 C. 333. See S. 415, *supra*, which provides the addition of an order directing a convicted person to find security to keep the peace does not make the sentence passed appealable, if the sentence is not otherwise appealable as such an order is evidently thought to be no part of the sentence passed.

Sub section (1) (d). Consequential or Incidental Orders.—This clause was introduced for the first time in the Code of 1893. It empowers an appellate Court when deciding an appeal against acquittal or conviction to make any consequential or incidental order that may be just or proper; but it does not empower the appellate Court to make any order which may be held to have some sort of connection with the appeal before it, which it may think just or proper. For example, power to excuse delay in the presentation of an

appeal is not a consequential or incidental order. The application of this section must be taken as legitimate only after the preliminary stages indicated in Ss. 421 and 422, *supra*, have been passed, i.e., after the appeal has been admitted and after the notice referred to in S. 422, *supra*, has been given, 24 Cr. L.J. 89=71 Ind. Cas. 217. The expression "makes any incidental or consequential order" cannot be considered so liberally as to embrace any and every ancillary order which is capable of being described as incidental or consequential. Otherwise an appellate Court, affirming, for instance, a conviction for kidnapping a woman, might add and enforce a direction that the offender should pay her by way of maintenance a monthly allowance. This can hardly be. Orders within the purview of this provision must fall under one or other of two heads: (i) orders which follow as a matter of course, being necessary complements to the main order passed, without which the latter would be incomplete or ineffective, e.g., directions as to refund of fines to acquitted appellants, (ii) orders which though ancillary in character require more than the support of the criminal Court's inherent jurisdiction and could not be passed without express authority, e.g., an order for compensation for having preferred a false and vexatious complaint under S. 250, *supra*, 39 C. 157 (F.B.) at 161-162; 3 A.L.J. 332=3 Cr. L.J. 441; 45 A. 80; 7 Lah. 152. The award of costs cannot be regarded as incidental or consequential to the disposal of a revision petition against an order under S. 145, *supra*, within the meaning of this sub-section, because it does not necessarily follow from an order passed in revision, 48 M. 252 (F.B.), following 39 C. 157. Appointing a receiver pending a criminal revision case against an order under S. 145, *supra* cannot be said to be an incidental or consequential order under this sub-section. 49 M.L.J. 533=22 L.W. 723=(1925) M.W.N. 772=27 Cr. L.J. 126=91 Ind. Cas. 702. An appellate Court has power under this clause to set aside an order requiring security to keep the peace made by the Court of first instance as an incidental order even when upholding the conviction, 30 C. 101. When the conviction is set aside the bond taken becomes void, S. 106 (2) *supra*. It is a little curious that S. 106 (3) *supra* speaks of the power of the appellate Court to pass an order under this section when hearing an appeal, but makes no mention of the power to set aside such an order passed by the Court of first instance. An appellate Court is not competent to pass an order under S. 250, *supra*, when setting aside a conviction. The words "the Magistrate by whom the case is heard" occurring in that section cannot refer to an appellate Court but has reference only to an original Court, 39 C. 157; 23 A. 825. Orders for restoration of property under Ss. 517 to 522, *infra*, are consequential or incidental orders within the clause, 38 C. 41; 27 A. 415; 18 C.W.N. 859 at 962. Such disposal of property produced at the trial is a consequential order on its findings on the merits. It is not denied that such an order, if passed by the trial Court on its decision discharging convicting or acquitting the accused would be valid. If this be so in the case of a trial Court, it is not clear why the appellate Court when disposing of the appeal against conviction or acquittal on the merits should not act under this sub-section, 29 Cr. L.J. 810=111 Ind. Cas. 314 where 3 A.L.J. 770=1906 A.W.N. 236=4 Cr. L.J. 370; 46 M. 162 at 164; 35 A. 374 are followed. And this power is now expressly given by clause (3) of S. 522, *infra* and the decisions in, 39 C. 1030 and 137, which took a different view are no longer law. The appellate Court when hearing an appeal from a conviction is competent under this clause to suspend the sentence passed by the lower Court and in lieu thereof make an order under S. 562, *infra* provided it is satisfied that the case is a fit one to be dealt with under that section, 24 A. 306; 29 M. 567; 2 Bom. L.R. 817. An order for confiscation under the Indian Forest Act, is not within this clause and an appellate Court cannot pass an order for confiscation, 27 C. 450; 4 A. 417. Under this clause the High Court has no power to direct a subordinate Court to examine or otherwise deal with certain passages appearing in a judgment of the lower Court. *Wheeler v. Wheeler*. The making of an order under S. 31 of the Court Fees Act by the appellate Court under this clause and does not ordinarily amount to an enhancement of sentence and such an order does not form part of the sentence, though the amount is determinable as to a fine, (1924) M.W.N. 439. An erroneous order under S. 31 of the Court Fees Act directing the accused to pay costs as to Court-fee stamps, the offence being not a conviction, is rectified by the appellate Court if no appeal lies, by the High Court, 363-81 Ind. Cas. 56.

Sub-section (2).—The considerations governing an appeal from a trial with the aid of Assessors which ends in a conviction differ greatly from those governing an appeal from a conviction in a trial held with a Jury. In the latter case the appeal is restricted by the provisions of this sub-section and S. 537, *infra*, whereas in the former the whole case is before the appellate Court, 29 Cr. L.J. 325 at 328=108 Ind. Cas. 81. This sub-section deals with appeals from the verdict of Jury. A verdict of Jury cannot lightly be interfered with or set aside unless the High Court is satisfied that there has been a misdirection which has occasioned a failure of justice, 28 Cr. L.J. 689=103 Ind. Cas. 545. The terms of this sub-section are imperative and in the absence of a mis-direction it is not competent to the High Court to alter or reverse the verdict of a Jury, 28 Cr. L.J. 692=103 Ind. Cas. 548. The High Court is not entitled to alter or reverse the verdict of a Jury unless it is of opinion that the verdict is erroneous for reasons set forth in this sub-section, 32 M. 179, but the exercise of the powers by the High Court should be used only sparingly, 10 Bom L.R. 563.

Unless it is of opinion that such verdict is erroneous.—The term "verdict" means the entire verdict on all the charges framed in the course of the trial for various offences as provided by S. 296, *supra*, and is not limited to a verdict on a particular charge on which the accused is convicted, and he has appealed against such conviction, 22 C. 377; 1 Cr. L.J. 542. The word "erroneous" is not to be read as meaning wrong on the facts. It must rather be read in connection with words that follow, as meaning that the verdict has been vitiated and rendered bad or defective by reason of a misdirection or a misunderstanding of the law by the Jury. The appellate Court cannot reverse the verdict of a Jury unless there is any misdirection by the Judge or any misunderstanding on the part of the Jury of the law as laid down by him. Then only can the verdict be said to be tainted with error in the process by which it has been arrived at. It throws upon the appellate Court the duty of ascertaining whether the process or method which the Judge directed the Jury to follow as to the acceptance or disregarding the evidence or as to the view taken of the law was erroneous on any material point, but not the duty of determining for itself whether the verdict, as a conclusion of fact was right or wrong, 21 C. 935 at 972; 14 B. 115; 33 C.W.N. 84. To justify the reversal of a unanimous verdict of a Jury on the ground of misdirection it must be shown that the verdict has occasioned a failure of justice, due to misdirection, and that apart from this the Jury would not have come to the same conclusion, 26 C.W.N. 538=24 Cr. L.J. 143=71 Ind. Cas. 367. In the absence of any provision in the Indian Statute Law, the English rule of repugnancy or contradiction on the face of the record in the verdict of Jury, is not by itself sufficient to ensure the quashing of a conviction and the technicalities which are borrowed from English Law and founded on ideas as to the sacred character of the verdict of a Jury whose finding of fact are unknown cannot be imported so as to give such a character which by the express provisions of law does not attach to the Jury verdicts in India, 41 C. 350, followed in 52 C. 112; 41 C. 734 at 761. The appellate Court is not bound to go through the facts and find for itself whether the verdict is actually erroneous on fact, 25 C. 230. Even in a case where the verdict of the Jury counts for nothing on account of one of the Jury men not entitled to sit on the Jury and the Court therefore was not properly constituted, the High Court on a perusal of the record finds that the verdict is in accordance with the facts of case is not justified in setting aside the verdict and ordering a retrial, 46 C.L.J. 231 at 245=28 Cr. L.J. 873=104 Ind. Cas. 723. For the proper exercise of the function by the High Court the Judge should record his heads of charge to the Jury and should not merely write a judgment as it would be impossible to say from it how the case has been left for the decision of the Jury, Weir II 499.

Owing to a misdirection by the Judge.—S. 297, *supra* enacts that the Judge shall sum up the evidence for the prosecution and defence, and lay down the law for the guidance of the Jury. The word "misdirection" thus includes not only an error in laying down the law by which the Jury are to be guided but also an error in summing up the evidence; for a defective summing up of the evidence is as much an infringement of S. 297 as an error in laying down the law and law mistake of law, 11 Cr. L.J. 13=4 Ind. Cas. 597; 3 B.H.C.R. 23 at 94. Technically 'misdirection' means an error of law made by a Judge in

charging the Jury on an error of a Judge in charging the Jury on a question of law. A non-direction may amount to misdirection if it is on a point of prime importance telling in favour of the accused, 27 B. 644 at 651; 4 Bom. L.R. 693. The following omissions were held to amount to misdirection:—(1) omission to direct Jury to give benefit of doubt to the accused, 1 M.L.T. 330; (2) omission to call specific attention to the defence evidence, 35 C. 531; 18 M.L.J. 541; 4 C.W.N. 196; 11 C. 10; (3) omission to state the defence of each accused, 30 C. 822; 4 C.W.N. 196; 7 C. 42; 29 C. 782; 30 M. 41; 18 M.L.J. 250; (4) omission to state that it was unsafe to convict on retracted confession unless corroborated by independent evidence, Weir II, 501 and 510; 21 M. 83; 26 M. 33; 18 M.L.J. 250; (5) omission to point out essential elements of the offence charged, 1 C.W.N. 301; 25 C. 711; 36 C. 281; Weir II, 493 and 519. Wrongly placing the onus of proof on the accused by taking an erroneous view of the law is a misdirection, 4 C.W.N. 576. An expression of opinion by the Judge on various questions of fact without telling the Jury that they are the sole Judges of fact is a misdirection, 33 C. 531; similarly asking the Jury to consider the effect of a document not proved is a misdirection, 26 C. 49; 27 B. 626. So also telling the Jury that they may use as evidence against the accused a statement made behind his back and not tested by cross-examination, 18 M.L.J. 66 and 250. It is a misdirection to tell the Jury at the re-trial of an accused person after the discharge of the Jury originally empanelled that they must consider carefully whether there was any reason for coming to a different conclusion on any particular point from that arrived at by the Court on the former occasion. He is justified in warning the Jury that they are not bound by the result of the previous trial, if he mentions to them that there was a previous trial, 9 C.L.J. 380—10 Cr. L.J. 493—4 Ind. Cas. 120. See Notes pp. 559 to 561 as to summing up to the Jury and misdirections.

If proper directions are not given to the Jury with respect to a material point then it is not open to the High Court in appeal to guess and gamble as to whether or not the Jury's verdict would have been different if such direction had been given. The trial must be dealt with by the High Court on the footing that no sufficient directions were given to the Jury, 27 Cr. L.J. 1492 (2)=93 Ind. Cas. 714 (2). The right of the High Court to interfere with a verdict of a Jury is limited to cases where there has been a mis-direction on a point of law or where the High Court is satisfied that the Jury have mis-understood the Judge's charge on a point of law, 47 C.L.J. 433; 29 Cr. L.J. 819=111 Ind. Cas. 323; 33 C.W.N. 84. Where a misdirection has been made out, the real test for applying S. 537, *infra*, is whether the accused has been really prejudiced by such misdirection and when there is prejudice, a re-trial will be ordered, 5 B.H.C.R. (Cr. Ca.) 85; 6 B.H.C.R. (Cr. Ca.) 47; 10 B.H.C.R. 497; 18 M.L.J. 66 and 250; 5 Bom. L.R. 207; 4 C.W.N. 576; 14 C.W.N. 493; 27 Cr. L.J. 785=95 Ind. Cas. 383; 7 Pat. 15. A verdict of a Jury cannot be set aside on the mere ground of miscarriage of justice. It must further be established that failure of justice has been occasioned by a mis-direction by the Judge in his charge to the Jury, 29 Cr. L.J. 325 at 332=108 Ind. Cas. 81. See also 17 Cr. L.J. 333 at 355=30 Ind. Cas. 657. Where there was a misjoinder of charges and the charge to the Jury did not set out the facts of the case and the nature of the evidence for the prosecution and defence, a re-trial was ordered as the High Court was of opinion that the case ought to be investigated by a Jury, 33 C. 822; but if the Court is of opinion that the evidence would not warrant a conviction, it would be useless to send back the case for a new trial in order that a new Jury may have the opportunity of convicting on the evidence upon a proper summing up, 29 C. 782; 5 W.R. (Cr.) 80 (F.B.) When a verdict is set aside on the ground of misdirection, as a matter of practice the proper course is not to acquit the accused but to direct a re-trial. It is only in special circumstances, as where the accused has been harassed by repeated trials or where the evidence is so clearly insufficient or incredible that no Jury could reasonably convict, that an appellate Court would be justified in acquitting the accused on the ground of misdirection, 27 Cr. L.J. 785=93 Ind. Cas. 383.

Or to a misunderstanding on the part of Jury of the law as laid down by the Judge.—It is submitted that it is not clear how such misunderstanding on the part of the Jury as to the law laid down by the Judge is to be ascertained. When on account of the Jury misunderstanding the law, a wrong verdict is delivered, it can be

corrected only by the Judge disagreeing with the Jury and referring the case to the High Court under S. 307, *supra*, which alone can deal with the matter effectively, 28 B. 412.

The provision contained in this sub-section is one in favour of the accused that is to say, an appellate Court may alter or reverse the verdict in the sense of preventing a conviction taking effect as the result of a misdirection. But it clearly cannot substitute its own verdict for that of the Jury. It seems to be the view followed for many years in Calcutta as illustrated in 21 C. 955 and in other Provinces as well, 39 A. 348 at 352. This sub-section does not in any way affect the power of the Court to deal with the sentence. It only affects the power to "reverse or alter" where the Court is of opinion that the verdict is erroneous owing to misdirection or misunderstanding of the law by the Jury. Where the verdict of the Jury is set aside by the High Court as illegal, a fresh trial will be ordered, 46 C. 212. This sub-section only applies if it becomes necessary to consider whether the verdict of the Jury was erroneous owing to a misdirection by the Judge. It does not narrow down S. 418, *supra*, which allows an appeal in a Jury trial on a question of law. If there has been no trial in that because such trial was illegal it must be set aside for that reason only and no question arises as regards any misdirection affecting the Jury's verdict. This is the law in England and this has been consistently followed in India. S. 537 (c) is clear on this point and S. 537 cannot apply to provisions of the law as to empannelling of a Jury when they are violated, 27 Cr. L.J. 793=55 Ind. Cas. 393 where 26 A. 211 is followed.

424. The rules contained in Chapter XXVI as to the judgment of a Criminal Court of original jurisdiction shall apply, so far as may be practicable, to the judgment of any Appellate Court other than a High Court.

Judgment of subordinate Appellate Court.

Provided that, unless the Appellate Court otherwise directs, the accused shall not be brought up, or required to attend, to hear judgment delivered.

Scope of the section.—The provisions of this section read with S. 367, *supra*, are imperative and should be complied with in such a manner as to indicate clearly that the evidence has been gone into and tested, extrinsically as well as intrinsically and the appellate Court has arrived at an independent opinion for itself. Appellate Courts continually overlook that this section prescribes that the rules contained in Chapter XXVI *supra*, as to judgments shall apply to judgments of appellate Courts, 37 C. 194; 14 O.W.N. 23 (N). Its judgment should not appear to be in the nature of a supplement to the judgment of the trial Court but should be adequate in itself to enable the High Court to dispose of the petition in revision without the necessity of going through the trial record, 1 Ran. 301; 35 C. 138; 25 Cr. L.J. 113=76 Ind. Cas. 177; 25 Cr. L.J. 246=76 Ind. Cas. 710; 27 Cr. L.J. 1104=98 Ind. Cas. 716, referring to 2 Lah. 303; 19 A. 506; 33 A. 393. This section lays down what an appellate judgment ought to contain. The rules laid down in Chapter XXVI as to judgments of Courts of original jurisdiction are made applicable so far as may be practicable to judgments of appellate Courts other than the High Court.

Rules contained in Chapter XXVI.—See Ss. 206 to 375, *supra*, which deal with judgments of the trial Court.

So far as may be practicable.—It is rather difficult to lay down rules with precision as to the particulars which an appellate judgment should contain so as to comply with the requirements of law, see 19 A. 506.

Judgment of Appellate Court.—This section read with S. 367 lays down, what the contents of a judgment of a subordinate appellate Court should be. Where the law allows an appeal, the appellant is entitled to have from the Court of appeal, that has to deal with it, its explicit opinion on the questions of fact involved in the case and the Court of appeal should take its own view of the evidence after perusing the record. The judgment of the

Court of appeal should be such that the High Court as a Court of revision, might on looking into the judgment, be in a position to judge for itself what the case was and how the Court of appeal considered the evidence as bearing on the guilt or innocence of the individual accused before the latter affirmed the judgment of the trial Court, 39 C.L.J. 117=23 Cr. L.J. 1044=81 Ind. Cas. 820; 23 Cr. L.J. 901=81 Ind. Cas. 437. A judgment of an appellate Court which does not set out or discuss the evidence on which the conclusions are based is not a proper judgment and is liable to be set aside, 29 Cr. L.J. 1031=112 Ind. Cas. 359. No judgment which purports to dispose of an appeal under the preceding section is a legal judgment unless it contains at least (i) the point or points for determination raised by the memorandum of appeal; (ii) the decision thereon; and (iii) reasons for the decision, 13 Cr.L.J. 559=15 Ind. Cas. 975; 14 Cr. L.J. 570=21 Ind. Cas. 170; 37 C. 125; 24 A.L.J. 318; 17 Bom. L.R. 1035; 27 Cr. L.J. 343=92 Ind. Cas. 855. The judgment should show on the face of it that the Appellate Court has applied its mind to the consideration of the evidence on the record, and the pleas raised by the appellant, both in the Court below and in his memorandum of appeal, 33 A. 393 at 394. It is not necessary for an appellate Court to write a long and elaborate judgment, but as laid down in 2 Lah. 303, it is clearly its duty not only to examine the evidence but also to write a judgment affording a clear indication that the appeal has been properly tried and that the points urged by the appellant have been duly considered and decided. It fails in the discharge of its duty imposed on it by law, if it writes a judgment which cannot be followed without reference to the judgment of the trial Court, 23 Cr. L.J. 703 (1)=110 Ind. Cas. 419. An appellate judgment cannot be read in connection with and as supplementary to the judgment of the Court of first instance. It must be quite independent and stand by itself. The judgment should show on the face of it that the case of each accused has been considered and reasons should be given to indicate that the Court directed judicial attention to the case of each accused, 35 C. 133. There must be sufficient materials in the appellate judgment itself to show that the appeal has been properly tried. The judgment or order must bear marks of such intelligent appreciation on the part of the appellate Court of the necessary facts and materials as would warrant the superior Court to infer that the conclusions were properly arrived at by the lower appellate Court, 27 Cr. L.J. 1404=98 Ind. Cas. 716. A judgment which gives a summary of the facts but does not discuss the points urged in the appeal memorandum and does not give any reasons for holding the conviction to be correct is not a legal judgment, 23 Cr. L.J. 720=107 Ind. Cas. 665. In the case of a joint trial, the judgment of an appellate Court, dealing with the case of several accused should show on the face of it that the case of each accused has been taken into consideration and should state reasons as far as may be necessary, to show, that the appellate Court had devoted judicial attention to the case of each accused, 39 C.L.J. 117; 33 C. 133; 22 C. 241; 16 Cr. L.J. 496=29 Ind. Cas. 336. An appellate judgment must be a self-contained document and cannot be read in connection with and as supplementary to the judgment of the trial Court. It must indicate that the Court had applied its mind to the case of each of the accused and to the defence set up by him, 23 Cr. L.J. 113=76 Ind. Cas. 177; 13 Cr. L.J. 559=15 Ind. Cas. 975; 2 Lah. 303; 2 Cr.L. Rev. 91; 35 C. 133; 20 C.W.N. 1296; (1918) M.W.N. 129. Where there are several accused and judgment of the Magistrate though it deals fairly with the case of the prosecution as a whole does not give satisfactory reasons for accepting it against individual accused separately, the judgment ought to be set aside and the Magistrate directed to restore the appeal to file and dispose of it according to law, after hearing fresh arguments as to the complicity of each individual accused, 2 L.W. 958=6 Cr. L. Rev. 433=16 Cr.L.J. 735=31 Ind. Cas. 175. See also 6 Cr.L. Rev. 434=29 Ind. Cas. 336; 22 C. 241; 2 Ran. 641. The provisions of this section read with S. 367 (6) *supra*, are applicable to orders under S. 123 (3) in security cases, 37 C. 9; 35 C. 138. It is the duty of the appellate Court in every case to examine for itself the evidence and to give the accused person the benefit of a reasonable doubt which it may entertain after such examination and it is also its duty to arrive at an independent opinion as to the weight of evidence, Weir II, 535 and 538; 22 C. 241. It is the duty of the appellate Court to notice briefly but clearly the objections urged on appeal and how they are disposed of besides stating the points for determination, the decisions thereon and the reasons for such

decision, 32 C. 178; 7 M.L.T. 182. It is difficult to lay down any rule with precision in order to determine what judgment of an appellate Court complies with and what judgment does not comply with the requirements of this Code. The object, no doubt, of the Legislature in formulating rules as to judgments was partly to ensure that a Criminal Court should consider the case before it, in its different bearings and should on such consideration arrive at definite conclusions and also another object may have been, that the judgment should show that in fact the Criminal Court had considered the evidence in a case of first instance or in a case of appeal and had found, in case of a conviction, that the facts proved to the satisfaction of the Court brought an offence home to the person whom the Court convicted, 19 A. 503 (F.B.) followed in 24 A.L.J. 318; 10 A.L.J. 435. When an appellate Magistrate after hearing the parties passed the order "appeal dismissed under S. 423, Cr. P. O." it was held that the judgment did not fulfil the conditions of this section and S. 637, *infra* could not cure such a defect as it was not a case of omission or irregularity in the judgment but the absence of a judgment, 17 Bom. L.R. 881. A recital of facts preceding an offence without a discussion of the evidence and without considering the essential points as to the ownership of the thing stolen and the possibility of the accused having acted in good faith does not satisfy the requirements of this section, (1912) M.W.N. 831=12 M.L.T. 335=13 Cr. L.J. 712=16 Ind. Cas. 520. When an appellate judgment merely stated "after reading the evidence and hearing the learned Counsel for the appellant and the learned Government Pleader, I am convinced the Deputy Magistrate has decided the case rightly," it was held that it was not a proper judgment, 23 C. 420. For similar cases see 11 C. 449; 13 C. 110; 1 C.W.N. 169; Weir II. 536; 1 Bom. L.R. 225; 15 B. 11. A humorous judgment is not necessarily bad, 12 Cr. L.J. 464=11 Ind. Cas. 1000. When there is no proper judgment as required by this section the High Court will direct a re-hearing of the appeal by the appellate Court, 15 B. 11; 35 C. 133; 7 C.W.N. 30; 11 C. 449; 13 C. 110; 22 C. 241. Where in a criminal appeal there are a number of appellants, it is the duty of the Court to consider the case of each accused separately having regard to the charges against him, the special evidence directed against him, and his particular defence if any, and omission so to consider the case against each individual accused separately would vitiate the judgment, 48 M.L.J. 304=26 Cr. L.J. 1089=88 Ind. Cas. 177 where 2 L.W. 938 and 1918 M.W.N. 129 are followed, 35 C. 133. When an appellate Court has signed the judgment it has no power to re-hear the appeal even in cases where a pleader appearing for the appellant was not heard and he requested the Court for an opportunity of being heard, [1923] Pat. 237.

Other than the High Court.—The Chartered High Courts are not governed by the rules contained in Chapter XXVI and by the provisions of this section as to the recording of judgments

The Proviso.—This proviso enacts that the accused shall not be brought up or required to attend to hear Judgment delivered unless the Court otherwise directs

425. (1) Whenever a case is decided on appeal by the High Court under this Chapter, it shall certify its judgment or

Order by High Court on appeal to be certified to lower Court.

order to the Court by which the finding, sentence or order appealed against was recorded or passed.

If the finding, sentence or order was recorded or passed by a Magistrate other than the District Magistrate, the certificate shall be sent through the District Magistrate.

(2) The Court to which the High Court certifies its judgment or order shall thereupon make such orders as are conformable to the judgment or order of the High Court, and, if necessary, the record shall be amended in accordance therewith.

This section provides that in cases decided by the High Court under this Chapter, the High Court shall certify its judgment or order to the lower Court concerned and the lower Court shall thereupon make such orders as are conformable to the judgment of the High Court, and, if necessary, the record shall be amended in accordance with the judgment or order of the High Court.

426. (1) Pending any appeal by a convicted person, the Appellate Court may, for reasons to be recorded by it in writing, order that the execution of the sentence or order appealed against be suspended and, also, if he is in confinement, that he be released on bail or on his own bond.

Suspension of sentence pending appeal
Release of appellant on bail.

(2) The power conferred by this section on an Appellate Court may be exercised also by the High Court in the case of any appeal by a convicted person to a Court subordinate thereto.

(3) When the appellant is ultimately sentenced to imprisonment, penal servitude or transportation, the time during which he is so released shall be excluded in computing the term for which he is so sentenced.

Scope of the section—This section empowers the High Court and the appellate Court to order the suspension of sentence pending an appeal and to release the appellant on bail if he is in confinement. When bail is granted by the High Court pending an appeal and the Magistrate receives reliable information thereof such as by a telegram sent by counsel's Counsel, the Magistrate is bound to act on it immediately though he had not received the High Court's order. In the particular case their Lordships of the High Court further remarked that they must lay down more stringently that all bail orders must be issued on the very day on which they are pronounced by the Judge presiding at the trial or order on record. 23 C 213 where 2 C.W.R. 453 is followed. When an appellate Court or a Court hearing a revision admits the appellant or applicant to bail or orders that a fine which is part of the sentence should not be paid up pending the disposal of the case, it thereby orders the suspension of the sentence on the appellant, 22 A.L.J. 1103; 25 Cr. L.J. 357=84 Ind. Cas. 712. A Sessions Judge has no authority to suspend the sentence in the absence of an appeal to him. 5 M.H.C.B. (Appx.) 1. It is his authority to suspend his own sentence to enable the convict to appeal, 4 M.H.C.B. (Appx.) 1, 12 W.R. (Cr.) 47. When a Sessions Judge so suspended the operation of a sentence passed by a second class Magistrate, it was held that his action was illegal and that the time during which the sentence was so illegally suspended could not be excluded under this section in computing the term of the sentence even though the result of such illegality had been that the accused had escaped a considerable portion of the sentence of rigorous imprisonment passed on them. The High Court in setting aside the illegal order of the Sessions Judge had no power to enhance the punishment unless it was shown that the original sentence was inadequate. Weir II, 526. Under this section a Sessions Judge as a Court of appeal has power to pass an order that the prisoner who had been convicted and sentenced by a Court of law by a subordinate Court should be treated as an under-trial prisoner for the disposal of the appeal but when an order for detention in the Reformatory for a sentence of imprisonment had been passed on an accused person within the meaning of this section, and the order of the Sessions Judge suspending the sentence under this section would not prevent the carrying out of the sentence of detention in the Reformatory as such detention order is not included in the meaning of L.P.C., and a distinction is made in Ss. 8(1), 9 and 30 of the Reformatory Act, 1911, order for detention and sentence, 16 Cr. L.J. 134=27 Ind. Cas. 19.

under S. 498, *infra*, to release a convicted person on bail whether an appeal has been preferred to him or not. When refusing bail the Sessions Judge may suspend the sentence of the appellant pending his appeal, 3 W.R. (Cr.) 57. Where an appellant is released on bail by the High Court pending an appeal thereto, the bond should be for the appearance of the appellant before the Magistrate and not for his appearance in the High Court to answer the charge. 1885 A.W. N. 44. The effect of an order by an appellate Court suspending the execution of a sentence pending disposal of an appeal is that the appellant is detained in jail and treated in all respects as an under trial prisoner, G.O. No. 1412 Jud. dated 19-10-1918, Rule 267, Mad. Cr. Rules of Pr. Whenever the appellate Court suspends a sentence of imprisonment under this section, it shall send a copy of its order to the superintendent or keeper of the jail in which the appellant is confined, Rule 61, Mad. Cr. Rules of Pr. The period of suspension will not be counted towards the term of imprisonment imposed on the appellant by the trial Court so that if the appeal dismissed, the appellant will have to undergo the full period of imprisonment irrespective of the period of the suspension of the sentence.

Sub-section (2)—The High Court also is empowered to suspend the sentence even though the appeal has been preferred by the convicted person to a Court subordinate thereto. Of course S. 498, *infra*, empowers the High Court in any case whether there be an appeal from conviction or not to direct that any person be released on bail. The power of the High Court to grant bail under this sub-section is undoubted, but it will only interfere with the discretion exercised by the Sessions Judge in refusing bail, if that discretion was manifestly wrong or if, in fact, no real discretion has been exercised. As pointed out in 37 C. 412, although the High Court has unfettered powers to grant bail, yet in exercising these powers, the High Court ought to have regard to the limitations imposed on lower Courts in this connection in the case of persons actually convicted; the principle which will necessarily guide the Court in granting bail is whether there are reasonable grounds for believing that the applicants committed the offence in question, 27 Cr. L.J. 319—82 Ind. Cas. 703.

Staying execution of sentence of death pending appeal to Privy Council.—With regard to staying execution of the sentence of death, their Lordships of the Privy Council are unable to interfere. The Privy Council is not a Court of Criminal appeal. The tendering of advice to His Majesty as to the exercise of His Prerogative of Pardon is a matter for the Executive Government and is outside their Lordships' province. It is, of course, open to the convicted person's advisers to notify to the Government of India that an appeal to the Privy Council is pending. The Government of India will no doubt give due weight to the fact and consider the circumstances. But their Lordships do not think it necessary to express any opinion as to whether the sentence ought to be suspended, 42 C. 739 at 741.

427. When an appeal is presented under section 417, the High Court may issue a warrant directing that the accused be arrested and brought before it or any subordinate Court, and the Court before which he is brought may commit him to prison pending the disposal of the appeal, or admit him to bail.

Arrest of accused in appeal from acquittal.

This section provides that the High Court may issue a warrant for the arrest of the accused when an appeal against acquittal has been presented to it under S. 417, *supra*. It is generally undesirable that the prisoner's fate should be discussed while he remained at large more especially in capital cases where the Government should apply for an arrest of the accused under this section, 9 A. 523 at 529; 2 A. 336; 1 C. 281. The admission of an appeal under S. 417, *supra*, has the effect of revising the proceedings against the accused who has been acquitted and the arrest of such person pending the appeal could be ordered under this section, 2 A. 312 (F.B.). The accused when arrested and brought before the High Court or any Court subordinate to it may be committed to prison pending the disposal of the appeal or he may be released on bail. When the person so arrested is convicted by the High Court the sentence will run not from the date of arrest but only from the actual date of commitment to jail after conviction, 6 C. L. R. 312 at 337.

428. (1) In dealing with any appeal under this Chapter, the Appellate Court, if it thinks additional evidence to be necessary, shall record its reasons, and may either take such evidence itself, or direct it to be taken by a Magistrate, or, when the Appellate Court is a High Court, by a Court of Session or a Magistrate.

(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) Unless the Appellate Court otherwise directs, the accused or his pleader shall be present when the additional evidence is taken; but such evidence shall not be taken in the presence of jurors or assessors.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXV as if it were an inquiry.

Scope and Object of the section.—The object of the section is to prevent a guilty man's escape through some carelessness or ignorance of the Magistrate or the vindication of a wrongfully accused person's innocence where through carelessness or ignorance he has omitted to record something to elucidate the truth, 18 W.R. (Cr.) 31; 26 Cr. L.J. 1171=83 Ind. Cas. 593. This section gives the appellate Court a wide discretion. All that is necessary is that an appellate Court when directing the taking of further evidence should record its reasons. The intention of the Legislature is to empower the appellate Court to see that justice is done between the prosecutor and the person prosecuted and the appellate Court finds that certain evidence is necessary in order to enable it to give a correct finding it would be justified in taking action under this section, 7 Lah. 148. Where a Sessions Judge failed to exercise his discretion by bringing on record certain statements of witnesses before the committing Magistrate as evidence and the appellate Court on appeal is of opinion that those statements are material for the disposal of the appeal, the appellate Court under this section may direct the Sessions Judge to bring upon the record those statements of witnesses after giving notice to the accused as required by sub-section (3) of this section, 27 Cr. L.J. 813=93 Ind. Cas. 477. The provisions of the section can properly be availed of in order to have legal evidence when the evidence on record has been found to be inadmissible. In such a case there is no question of surprise. The evidence found to be inadmissible has been let in without any objection by the accused and it cannot be said to be a case of the prosecution having ample opportunities to produce certain evidence at the original trial had failed to do so and sought to rectify the omission on appeal. Where the evidence was tendered but such evidence should not have been admitted by the Court, it is on very much the same footing as a confession inadmissible in evidence for want of the certificate, etc., the law specially allowing the rectification by enacting B. 533 (2) *infra*, 30 Bom. L.R. 648=29 Cr. L.J. 990=112 Ind. Cas. 110. The powers conferred by this section on the appellate Court are not intended to be exercised in cases in which the prosecution having had ample opportunities to produce evidence have done so and that entire evidence falls short of sustaining the charge, 36 M. 437—*per Sundara Ayyar, J.*, see also 25 C.L.J. 473. The discretion to be exercised by the appellate Court is not an arbitrary discretion, as is shown by the provision "it shall record its reasons," but it should not be exercised especially against the accused when the prosecution falls on the evidence on record, 42 M. 885—*per Sadasiva Ayyar, J.* It would not be creditable to the administration of justice that a conviction of a charge, if otherwise sustainable, should be upset owing to a misconception on the part of the prosecution to the proper mode of proving a statutory requisite not affecting the merits, a misconception shared by the trial Court. The Appellate Court when it has the statutory power to prevent such miscarriage by directing fresh evidence to be taken it should act under this section—*per Wallis, C.J.*, in 42 M. 885.

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(2) When the additional evidence is taken by the Court of Session or the Magistrate, it or he shall certify such evidence to the Appellate Court, and such Court shall thereupon proceed to dispose of the appeal.

(3) Unless the Appellate Court otherwise directs, the accused or his pleader shall be present when the additional evidence is taken; but such evidence shall not be taken in the presence of jurors or assessors.

(4) The taking of evidence under this section shall be subject to the provisions of Chapter XXV as if it were an inquiry.

Scope and Object of the section.—The object of the section is to prevent a guilty man's escape through some carelessness or ignorance of the Magistrate or the vindication of a wrongfully accused person's innocence where through carelessness or ignorance he has omitted to record something to elucidate the truth, 18 W.R. (Cr.) 31; 26 Cr. L.J. 1171=83 Ind. Cas. 595. This section gives the appellate Court a wide discretion. All that is necessary is that an appellate Court when directing the taking of further evidence should record its reasons. The intention of the Legislature is to empower the appellate Court to see that justice is done between the prosecutor and the person prosecuted and the appellate Court finds that certain evidence is necessary in order to enable it to give a correct finding it would be justified in taking action under this section, 7 Lah. 148. Where a Sessions Judge failed to exercise his discretion by bringing on record certain statements of witnesses before the committing Magistrate as evidence and the appellate Court on appeal is of opinion that those statements are material for the disposal of the appeal, the appellate Court under this section may direct the Sessions Judge to bring upon the record those statements of witnesses after giving notice to the accused as required by sub-section (3) of this section, 27 Cr. L.J. 813=93 Ind. Cas. 477. The provisions of the section can properly be availed of in order to have legal evidence when the evidence on record has been found to be inadmissible. In such a case there is no question of surprise. The evidence found to be inadmissible has been let in without any objection by the accused and it cannot be said to be a case of the prosecution having ample opportunities to produce certain evidence at the original trial had failed to do so and sought to rectify the omission on appeal. Where the evidence was tendered but such evidence should not have been admitted by the Court, it is on very much the same footing as a confession inadmissible in evidence for want of the certificate, etc., the law specially allowing the rectification by enacting S. 533 (2) *infra*, 30 Bom. L.R. 648=29 Cr. L.J. 990=112 Ind. Cas. 110. The powers conferred by this section on the appellate Court are not intended to be exercised in cases in which the prosecution having had ample opportunities to produce evidence have done so and that entire evidence falls short of sustaining the charge, 36 M. 437—*per Sundara Ayyar, J.*, see also 25 C L J. 473. The discretion to be exercised by the appellate Court is not an arbitrary discretion, as is shown by the provision "it shall record its reasons," but it should not be exercised especially against the accused when the prosecution fails on the evidence on record, 42 M. 885—*per Sadasiva Ayyar, J.* It would not be creditable to the administration of justice that a conviction of a charge, if otherwise sustainable, should be upset owing to a misconception on the part of the prosecution to the proper mode of proving a statutory requisite not affecting the merits, a misconception shared by the trial Court. The Appellate Court when it has the statutory power to prevent such miscarriage by directing fresh evidence to be taken it should act under this section—*per Wallis, C.J.*, in 42 M. 885.

The necessity of recording additional evidence must be apparent from something on record already and cannot be derived from external information, 3 L.B.R. 115. This section does not empower the appellate Court to call for a fresh finding from the Subordinate Magistrate, 4 Cr. L. Rev. 272; 2 Cr. L. Rev. 347. The Appellate Court will not, except in very exceptional circumstances, direct that further inquiry should be made or that additional evidence should be taken, 25 C.L.J. 473; 5 A. 217 at 221. Where an appellate Court finds that the trial Court had committed an illegality in procedure by failing to comply with the imperative provisions of S. 256, *supra*, such a case will not fall within the provisions of this section. The case cannot be remanded for taking additional evidence when an illegality has been committed by the trial Court but it can only be done when the appellate Court thinks it desirable that further evidence in the case should be recorded. A direction therefore by the appellate Court under this section to allow the appellant to cross-examine the two prosecution witnesses and the Magistrate to record and certify the evidence to the appellate Court is bad in law, 53 B. 578. This section does not empower the appellate Court so to act in case where there is no evidence legally capable of sustaining the charge but contemplates a further inquiry by taking additional evidence to be directed by the appellate Court when the conviction by the lower Court has been based upon some evidence which might legally support it, but which, in the opinion of the appellate Court, is not quite satisfactory, 9 B.L.R. Appx 31 at 32; 22 M.L.J. 73 at 82=10 M.L.T. 506. This section does not empower an appellate Court to call for a fresh finding from the subordinate Court after taking further evidence and the appellate Court cannot act on such fresh finding, (1913) M.W.N. 778=16 Cr. L.J. 79=26 Ind. Cas. 671; 9 M.L.T. 436=12 Cr. L.J. 243=10 Ind. Cas. 230; 1 Pat. L.J. 99; 3 C.L.J. 323=3 Cr. L.J. 304. This section does not warrant an appellate Court sending a case to the police for investigation when the case has been originally taken cognizance of on a complaint to the Court, 1900 A.W.N. 130. This section has no application to proceedings under S. 476 B, *infra*, and additional evidence cannot be taken by the Court, 51 M. 603, following 33 M. 93.

In dealing with any appeal under this Chapter.—The power to take or call for further evidence given by this section is expressly limited to appeals under Chapter XXXI of the Code. This section allows additional evidence to be admitted in appeals against acquittals as well as in appeals against convictions although cases in which this power is exercised will naturally be rare, 26 M.L.J. 160. There is nothing in this section to preclude an appellate Court from endeavouring by this means to ascertain the value of statements made by a defence witness or to limit the application of this section to the reception of merely formal evidence, 53 M.L.J. 676=1928 M.W.N. 777.

The appellate Court, if it thinks additional evidence to be necessary.—This section requires that the appellate Court should consider additional evidence to be necessary. The word 'necessary' does not import that it should be possible to pronounce judgment without additional evidence. There is no restriction in the language of the section either as to the nature of the evidence or that it is to be taken for the prosecution only to be invoked when formal proof is necessary in the prosecution evidence and the power of the appellate Court is not necessarily restricted to order re-trial in such a case; 23 Cr. L.J. 401=77 Ind. Cas. 431. The language seems to indicate cases where there being already evidence on record, the Court considers it to be unsatisfactory or where the evidence on record leaves the Court in such a state of doubt that it considers it necessary to enable it to decide the case to have further evidence. The necessity must be determined on the facts of each case, 22 M.L.J. 73=10 M.L.T. 536; 18 Bom. L.R. 739. It is better to take action under this section when the appellate Court finds that certain witnesses, who ought to have been examined by the lower Court, have not been examined, 31 C. 710. Where an adjournment to procure attendance of witnesses is refused on the ground that the witnesses were men of straw, the High Court directed the evidence to be taken and certified, 19 M. 375; 6 C.L.J. 251. To prevent a miscarriage of justice, the appellate Court should take action under this section to supply a defect in formal proof, 42 M. 835. This section does not apply to orders passed under S. 125 *supra*, as they are neither appellate nor revisional, 20 Cr. L.J. 221=47 Ind. Cas. 731; 32 C. 919. Discovery of fresh evidence after

filing an appeal will not be sufficient ground for adducing fresh evidence before the appellate Court, 9 M.L.T. 323, following 31 M. 114.

Shall record its reasons.—The power cannot be exercised arbitrarily; the appellate Court is bound to record its reasons and when it failed to do so the conviction had was set aside, 8 M.L.T. 418; 8 M.L.T. 428=(1910) M.W.N. 829=11 Cr. L.J. 734=8 Ind. Cas. 943. In 9 M.L.T. 406=10 Ind. Cas. 290 it was held that this was only an irregularity cured by S. 537, *infra*, but the conviction was set aside on another illegality which the Magistrate had committed.

May either take such evidence itself or direct it to be taken.—The appellate Court when dealing with an appeal may direct the additional evidence to be taken by the lower Court or may itself record such evidence, 6 C.L.J. 231 at 252. But if an appellate Court finds an imperative provision, of law, *e.g.*, the examination of the accused under S. 342, *supra*, has not been complied with, the proper procedure is to set aside the conviction and sentence and remand the case to the trial Court to comply with the provisions of law and deal with the case on the merits, 40 C.L.J. 319=26 Cr. L.J. 313=84 Ind. Cas. 437; 51 C. 933. An appellate Court should not refer to evidence which did not form part of the record of the proceedings before the trial Court, 8 M.L.T. 81=11 Cr. L.J. 221=6 Ind. Cas. 12. When on appeal from a conviction by a Deputy Magistrate, the Sessions Court got additional evidence taken and on a consideration of such evidence confirmed the conviction and dismissed the appeal, it was held that there was no further right of appeal, 27 C. 372. See also 6 B.H.C.R. (Cr. Ca.) 64; 8 W.R. (Cr.) 59; 15 W.R. (Cr.) 33.

Sub-section (2)—The Court or Magistrate taking additional evidence is to merely certify such evidence to the appellate Court. The Court or Magistrate has no power to express any opinion on it or to record any finding or judgment which is the function of the appellate Court, 3 B.L.R. (Ap. Cr.) 62, but the Court or Magistrate is competent to act under S. 479, *infra*, if an offence against public justice as is described under S. 195, *supra*, is committed by a witness whose evidence is on record 6 B.L.R. 693 (F.B.)=15 W.R. (Cr.) 64.

Sub-section (3)—Unless the appellate Court otherwise directs, the presence of the accused or his pleader is necessary when additional evidence is recorded. In 24 M. 523 the High Court took additional evidence in the absence of the accused when hearing appeal from a conviction had by the Sessions Court. Additional evidence under this section shall not be taken in the presence of the Jurors or Assessors. This is the only case where a Court of Sessions is authorised to record evidence in the absence of the Jury or Assessors, 5 A. 136.

429. When the Judges composing the Court of Appeal are equally divided in opinion, the case, with their opinions thereon, shall be laid before another Judge of the same Court, and such Judge, after such hearing (if any) as he thinks fit, shall deliver his opinion, and the judgment or order shall follow such opinion.

Procedure where Judges of Court of Appeal are equally divided.

Scope of the section.—Two points are worthy of note in connection with this section. *first*, that what is laid before another Judge is the case, and, *secondly*, that the judgment or order follows such opinion delivered by such Judge. When in a trial of two or more prisoners, with regard to one of whom, the Judges composing the Court of appeal are agreed in their opinions while as regards the other, the judges may be equally divided in opinion in such a contingency it is quite possible to maintain the view that, upon a reasonable interpretation of the term "case" what has to be laid before another Judge is the case of the prisoner as to whom the judges are equally divided in opinion. In a case where the Judges are equally divided in opinion upon the question of guilt of one accused person, though upon certain aspects of the case they may be agreed on their view, in such a contingency, what is laid before another Judge is not the point or points upon which the Judges are equally divided in opinion but the "case." This obviously means that, so far as

particular accused is concerned, the whole case is laid before the third Judge, and it is his duty to consider all the points involved, before he delivers his opinion upon the case. The judgment or order follows such opinion which need not necessarily be the opinion of the majority of the three Judges; for instance at the original hearing of the appeal one Judge may consider the prisoner not guilty, another Judge may consider him guilty under one section of the Indian Penal Code and liable to be punished in a certain way; the third Judge may find him guilty under a different section and pass such sentence as he thinks fit. It is this last opinion which prevails subject to the provisions of S. 377, *supra* in the case of confirmation of sentence of death, 38 C. 202 at 208-9; see also 27 M. 271. If in any case of murder under S. 302, I.P.C., one finds two Judges are in disagreement over the question of sentence, one favouring the death penalty the other transportation for life, that in itself is a sufficient ground for holding that death penalty should not be inflicted. This is not an inflexible rule or that the third Judge to whom the matter is referred on a difference of opinion on the question of sentence, is not required to go into the case himself, whether the case before him is or is not a fit one for the infliction of the death penalty, 33 C.W.N. 1226 at 1234. See S. 378 *supra*, and the notes thereunder at p. 696-697.

Equally divided in opinion.—The Judges may be equally divided in their opinions on a point of law or on the merits of the case. S. 36 of the Letters Patent which lays down that the opinion of the senior Judge will prevail has no application to a case falling under this section. Difference of opinion between Judges hearing a reference under section 307 *supra*, will be governed by this section, 15 B. 432 at 475; 27 C. 501 at 503 and 592 at 910 S. 36 of the Letters Patent applies to a case under S. 107, Government of India Act, 21 Cr. L.J. 25=53 Ind. Cas. 169; see also 47 C. 438; 39 M. 750 (F.B.).

The case shall be laid before another Judge.—An amendment was proposed to have the case heard before the two Judges who differed, with another Judge, constituting a Bench of three Judges, but it was not accepted. The whole case is to be considered by a third Judge on all the points involved and it will be according to the opinion of such Judge the judgment will follow, 38 C. 202; 15 C.W.N. 16; 21 Cr. L.J. 547-56 Ind. Cas. 831. See also 30 Cr. L.J. 933=118 Ind. Cas. 577. But the third Judge should not differ on point of agreement between the two differing Judges, the third Judge before whom the case is to be laid is not bound to hear the pleaders; the wording of the section is "such hearing if any, as he thinks fit"; but as a matter of practice full arguments are heard especially in *Referred Trials*. Under this section the third Judge before whom the case is laid is required to deliver his opinion and the judgment or order shall follow such opinion. That does not enable the Judge to refer the point involved in the case to a Full Bench. References to the Full Bench are made under the appellate side rules by a Division Bench and the third Judge sitting alone cannot be said to be a Division Bench, 29 C.W.N. 475=41 C.L.J. 237=26 Cr. L.J. 915=85 Ind. Cas. 979. The third Judge may, if he thinks fit, place the matter before the Chief Justice with a request to refer the case to a Full Bench. The third Judge to whom a case is referred should not differ on a point in which both the referring Judges are agreed unless there are very strong grounds for doing so, 22 C.W.N. 743=28 C.L.J. 32=19 Cr. L.J. 753=46 Ind. Cas. 593.

430. Judgments and orders passed by an

Finality of orders on appeal.

Appellate Court upon appeal shall be final, except in the cases provided for in section 417 and Chapter XXXII.

A judgment can be said to be final when it cannot be set aside or interfered with by any Court or authority on appeal or otherwise, 12 C. 538; S. 417 deals with appeals against acquittal by Government and Chapter XXXII deals with reference and revision. Where a Sessions Judge wrongly dismissed an appeal as barred by limitation, but on discovering his error admitted the appeal and acquitted the accused it was held the acquittal was without jurisdiction, the first order dismissing the appeal being final and not open to review, 19 B.

732; 1887 P.R. (Cr.) 24. The Judgment of a Division Bench of the High Court confirming the sentence is final, 14 C. 42 (F.B.). A case which has been dismissed for default of appearance is final and cannot be re-opened, 10 C.L.J. 80; 44 A. 759; 4 B. 101, but a Court is not entitled to dismiss an appeal for default of appearance, 46 M. 482; 50 C. 972; 50 B. 673; 13 A. 171; 27 C.W.N. 947. The power of the High Court to report any particular case to the Local Government when the High Court cannot interfere in appeal or revision, remains, other remedies being barred by statute, 17 Cr. L.J. 231=31 Ind. Cas. 617.

431. Every appeal under section 417 shall finally abate on the death of the accused, and every other appeal under this Chapter (except an appeal from a sentence of fine) shall finally abate on the death of the appellant.

Abatement of appeals.

Scope and Object of the section.—The object of the section is obviously to prevent the estate of the accused being damaged, although his death had terminated, the personal interest of the convict, 9 Cr. L.J. 103=1903 P.R. (Cr.) 24. This section applies only to appeals and appeals by Government against acquittal under S. 417, *supra*, and they finally abate on the death of the accused. An appeal by a convicted person abates on his death and his legal representatives cannot continue the appeal, 2 B. 564. The exception, is an appeal from a sentence of fine where the estate of the deceased is affected and there is no abatement in such a case.

Shall finally abate on death of accused—In a case where two persons are convicted by a Court of Session for breach of trust and sentenced to rigorous imprisonment for one year and a fine of rupees one thousand and both appealed to the High Court, but during the pendency of the appeal one of the appellants died, the High Court reversed the conviction of the other appellants, and no order was passed in the case of the dead appellant. On an application by a nephew of the deceased appellant, for a reversal of his conviction, it was held, that the appeal had abated on the death of the appellant and the remedy of his representative was to apply to the Government, 19 B. 714; Ratanlal 707.

Except in appeals from a sentence of fine.—These words were introduced in the Code of 1898 to meet the decision in, 19 B. 714 which held that an appeal from a sentence of fine abates on the death of the appellant. In the case of a sentence of fine the appeal does not abate by reason of the death of the appellant because it is a matter which affects his estate. The object of this provision is obviously to prevent the estate of the deceased being damaged, see S. 70, I.P.O. The principle of this section applies to revisions also, but such application for revision will not abate on the death of the petitioner in cases of sentence of fine, 1919 P.R. (Cr.) 8; 1893 P.R. (Cr.) 6; the principle was also applied to proceedings under S. 250, *supra*, and legal representative of the deceased prisoner was allowed to proceed, 1908 P.R. (Cr.) 24=9 Cr. L.J. 103.

CHAPTER XXXII.

OF REFERENCE AND REVISION.

Scope and Object of the Chapter.—The object of this chapter appears to confer upon superior Courts in all case where no appeal is provided a kind of supervisory jurisdiction without the intervention necessarily of any interested party for the purpose of correcting any miscarriage of justice arising from irregularities in procedure, misconstruction of law propriety of sentences or orders passed by lower Courts. The Court acting under this chapter of "Reference and Revision" is not bound to interfere. It has got a wide discretion. The expressions used are "if he thinks fit", in its discretion", "may; " all of which denote that the Court is given a wide discretion in the matter which must be exercised with great circumspection in each individual case.

432. A Presidency Magistrate may, if he thinks fit, refer for the opinion of the High Court any question of law which arises in the hearing of any case pending before him, or may give judgment in any such case subject to the decision of the High Court on such reference and, pending such decision, may either commit the accused to jail, or release him on bail to appear for judgment when called upon.

Reference by Presidency Magistrate to High Court

Scope of the section.—The power of reference conferred upon the Presidency Magistrate by this section is confined to questions of law which the Magistrate requires to decide in order to perform his duty in disposing of the case before him, and that the Magistrate ought not to refer to the High Court questions of law unless they are matters upon which he has a duty to make up his mind, and S. 193, *infra*, provides that when a question has been so referred the High Court shall pass such order thereon as it thinks fit and shall cause a copy of such orders to be sent to the Magistrate who shall dispose of the case in conformity with such order. 50 C.L.J. 408 (F.B.) at pp 458 and 459.

Any Presidency Magistrate—This section deals with reference by Presidency Magistrates to the High Court, 28 Cr. L.J. 978=105 Ind. Cas. 802. Other Magistrates are not competent to refer questions of law which may arise before them, for decision, to the High Court

May refer any question of Law.—A Reference can be made for the opinion of the High Court only on any question of law which arises in the hearing of the case pending before the Magistrate. It is confined to questions of law which the Magistrate requires to decide in order to perform his duty in disposing of the case before him and no reference ought to be made unless they are matters upon which the Magistrate has a duty to make up his mind, 50 C.L.J. 408 (F.B.) at p 458. He cannot make a reference under this section 'before the hearing of the case'. 1 Bom. L.R. 521, and except in a case where there is a valid reference under this section, the High Court cannot and will not express an opinion upon any question unless it is brought before it by way of revision, 9 Cr. L.J. 243. A Reference must be on a question of law only and the High Court will only deal with particular point or points of law stated for its opinion but not with the facts of the case nor with any objection as to the validity of the proceedings referred, 33 C. 193; Ratanlal 539 and 858 and the point of law must arise at the hearing of the particular case and not before such hearing, 1 Bom. L.R. 521. On a reference by a Presidency Magistrate under this section it is for the prosecution to begin, 19 C. 330. The order of the High Court on a Reference under this section is conclusive both as to the merits of the case and to the amount of punishment, 1890 A.W.N. 225.

433. (1) When a question has been so referred, the High Court shall pass such order thereon as it thinks fit, and shall cause a copy of such order to be sent to the Magistrate by whom the reference was made, who shall dispose of the case conformably to the said order.

Disposal of case according to decision of High Court

Direction as to costs.

(2) The High Court may direct by whom the costs of such reference shall be paid.

The High Court shall pass such order thereon as it thinks fit.—It is to be observed that while under S. 432, *supra*, the power of the Magistrate is to refer a question of law arising in the hearing of a case pending before him, the power of the High Court under this section is to pass such orders thereon as it thinks fit, 80 C.L.J. 408 (F.B.) at 455.

This section provides for an order directing costs to be paid by a party, not usually made in criminal cases. In criminal cases the right to award costs rests in every case on statute, and here is an instance where the statute specially provides for costs. For other instances, see the provisions contained in Ss. 148 (3), 344, 488 (7), & 526 *infra*. The word used is "may" and the Court has a discretion in the matter of awarding costs.

The High Court has no power to review an order passed by itself on a Reference under this section, Ratanlal 638 and where the Magistrate does not dispose of the case conformably to the order of the High Court, the accused may bring up the matter on appeal against the decision of the Magistrate under S. 411, *supra*, Ratanlal 225.

434. (1) When any person has, in a trial before a Judge of a

Power to reserve questions arising in original jurisdiction of High Court.

High Court consisting of more Judges than one and acting in the exercise of its original criminal jurisdiction, been convicted of an offence, the Judge, if he thinks fit, may reserve and refer for the

decision of a Court consisting of two or more Judges of such Court any question of law which has arisen in the course of the trial of such person, and the determination of which would affect the event of the trial.

(2) If the Judge reserves any such question, the person convicted shall, pending the decision thereon, be remanded to

Procedure when question reserved.

jail, or, if the Judge thinks fit, be admitted to bail; and the High Court shall have power to review the

case or such part of it as may be necessary, and finally determine such question, and thereupon to alter the sentence passed by the Court of original jurisdiction, and to pass such judgment or order as the High Court thinks fit.

Scope of the section.—It is discretionary with a Judge to refer for decision any question of law. He is not bound to refer; the words 'if he thinks fit, may reserve and refer,' make this clear. The Judge cannot postpone conviction and sentence. The High Court under sub-section (2) is empowered to review the case and alter the sentence passed and to pass such judgment or order as it thinks fit such as convicting or acquitting the accused or ordering a re-trial.

May reserve any question.—This section refers only to a trial before a Judge of the High Court acting in the exercise of its original criminal jurisdiction. It is in the discretion of the Judge whether or not he will reserve a point of law for the opinion of the High Court consisting of two or more Judges, 10 B H C.R. 75; 4 Ran. 488, but he is at liberty to refuse any application to him to reserve any point, 22 B. 112. The powers of the Judge cannot in any way be controlled by a Bench or a Full Bench of the Court and no appeal or revision lies against the order of the Judge, and except on a reference under this section the proceedings of the Judge cannot be revised, see 14 C. 42 (F.B.). A point of law cannot be referred under this section to a Full Bench before the accused is called upon to plead even if the Presiding Judge wished it, 28 C 211 at 214; 5 C.W.N. 169. When on an application by accused's Pleader, a question of law is reserved for the decision of the Court the Counsel for the prosecution is to begin, 8 B. 200.

High Court shall have power to review.—The High Court under this section is empowered to review the whole case and dispose of the case finally. It can determine whether the admission of rejected evidence would have affected the result of the trial, 1 C. 207; 2 B. 61. The High Court in 17 C. 642 went into the merits of the case and quashed the conviction, see also 4 C.W.N. 433; 32 B. 111. Mere appreciation of evidence is not one of law

coming under this section, 5 Bom. L.R. 686. The power which the High Court exercises under this section is that of review as expressly stated in this section and the Court is a Court of Reference and Revision and is treated as such, as appears from the heading of Chapter XXXII, of the Code, 8 B. 200 at 211. The Legislature has not conferred on the High Court in express words the power of reviewing its judgment in all criminal cases as it has done in civil cases, 46 M. 382. The provisions of S. 369, *supra*, so far as they affect a High Court apply merely to questions of law arising in its original criminal jurisdiction and which are reserved and are subsequently disposed of under the provisions of S. 434 and the corresponding provisions of the Letters Patent, 7 A. 672 at 674. See 10 C.L.J. 13; 25 M. 61. See also the new amendment of S. 369, *supra*, and 46 M. 382 at 404.

And thereupon to alter the sentence.—The word "thereupon" has been construed to mean that the determination of the point or points of law reserved must be in favour of the prisoner before the Court can interfere with the conviction and sentence. It has been definitely held that if it be found that the opinion of the trial Judge on the point or points reserved cannot be supported, it is not open to the High Court to direct a retrial. There is a large mass of authority in support of the view that the High Court will not substitute its own finding for the verdict of the Jury and that it might consider whether the evidence or matter improperly admitted was of such a nature that it possibly may have considerably influenced the minds of the Jury and whether it was reasonably certain, that the Jury *would*, not *might*, have acted on the 'unobjectionable evidence if the wrongly admitted evidence or matter had not also been presented to them. Further, it has been held that S. 337, *infra*, has no application to such a case, 50 C.L.J. 105, (F.B.) at 124, following 43 C. 477 and not following 53 C. 350.

435. (1) The High Court or any Sessions Judge or District Magistrate, or any Sub-divisional Magistrate empowered by the local Government in this behalf, may call for and examine the record of any proceeding, before any inferior Criminal Court situate

Power to call for records of inferior Courts.

within the local limits of its or his jurisdiction for the purpose of satisfying itself or himself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of any proceedings of such inferior Court, and may, when calling for such record, direct that the execution of any sentence be suspended and, if the accused is in confinement, that he be released on bail or on his own bond pending the examination of the record.

Explanation.—All Magistrates whether exercising original or appellate jurisdiction, shall be deemed to be inferior to the Sessions Judge for the purposes of this sub-section and of section 437.

(2) If any Sub-divisional Magistrate acting under sub-section (1) considers that any such finding, sentence or order is illegal or improper or that any such proceedings are irregular, he shall forward the record, with such remarks thereon as he thinks fit to the District Magistrate.

(3) [Omitted by Act, XVIII of 1923, S. 116.]

(4) If an application under this section has been made either to the Sessions Judge or District Magistrate, no further application shall be entertained by the other of them.

Extent of Amendment.—Power is now expressly given in sub-section (1) to superior Courts when sending for records in any case to suspend the execution of sentence and also to release the accused on bail if he is in confinement, pending revision, and the new explanation added makes it clear that all Magistrates whether exercising original or appellate jurisdiction shall be inferior to the Sessions Judge. This removes the doubt which existed before whether a District Magistrate when acting as an appellate Court was subordinate to the Sessions Judge for the purposes of this section, and is in accordance with the view in 3 A. 23. Sub-section (3) has now been omitted and orders under Ss. 143 and 144, *supra*, and proceedings under Chapter XII and S. 176, *supra*, like other orders passed under the Code are made revivable by the High Court. There is no longer any necessity to invoke the aid of the High Court under S. 107 of the Government of India Act, so far as those orders are concerned. The decisions in 3 D. 742 and Ratanlal 812, which hold that the verdict at the request is not subject to revision by the High Court are no longer law. See in this connection, 51 B 330; 31 Bom. L.R. 1050=29 Cr. L.J. 1063=112 Ind. Cas. 567. See also notes at p. 317.

Scope and Object of the section.—The language of this section is very general and gives power to superior Courts to send for the records of any case from inferior Courts for the purpose of satisfying themselves of the correctness, legality or propriety of any finding, sentence or order and as to the regularity of any proceeding in such subordinate Courts. It states the grounds and provides for the machinery for the exercise of the power which Ss. 436, and 439, *infra*, confer, and this power may be exercised at all times and may be put in force in matters not merely coming before the Judge in Court, but also on matters coming to his knowledge, on reliable information. Weir II, 538. The object of the Legislature in enacting this section was to secure the setting right of a patent error or defect. In the absence of a well-founded suspicion or error it is inexpedient to scrutinise order of discharge or other orders, which upon the face of them bear token of careful consideration, and appear to be good and lawful. This section does not give the High Court a roving commission either in the direction of stamping with approval the proceedings of a lower Court or in the direction of questioning about and looking to see if possibly, under a fair record, there was some trace of possible error, 1899 A.W.N. 135. This section deals with the grounds upon which revisional jurisdiction may ordinarily be exercised. It states expressly that every finding, sentence or order is liable to review, not only on the ground of illegality or irregularity but also on the ground of incorrectness, i.e., on the ground of its being wrong on the merits. S. 439, *infra*, is not to be read as independent of this section. This section states the grounds and provides the machinery for the exercise of the powers which, Ss. 436 to 439, *infra*, confer on the revision Courts, 19 Cr. L.J. 217=22 Ind. Cas. 1001. This section does not deal merely with the finding, sentence or order, but with proceedings generally and the power of the High Court extends to calling for and examining the record of any proceeding for the purpose of satisfying itself as to the regularity of such proceedings, 47 M. 722. The High Court will not ordinarily interfere in proceedings before a Magistrate by directing him to admit certain document in evidence when he refused to receive them as evidence. The proper remedy is for the party to get an order for further enquiry or a retrial from the proper Court after the termination of the proceedings, 1 Cr. L. Rev. 201. The power of superintendence in which the High Court possesses under S. 107 of the Government of India Act is not a legal fiction and it is a term having a legal force and significance. It is the power by which the English Courts interfere by *prohibition* and *mandamus*. It is confined to cases in which the Court has acted without jurisdiction or in excess of jurisdiction vested in it by law. The High Court will not interfere merely because there has been an irregularity in the proceedings but the irregularity must have been so serious that one of the parties suffered prejudice, i.e., disability to lay before the Court his version of the facts of the case and the law to be applied. The High Court will not interfere with any decision arrived at after a fair trial, however erroneous in law or fact the decision may appear to be, 1 Pat L.J. 335=17 Cr. L.J. 369=33 Ind. Cas. 801. The finding of the inferior Court should be accepted unless there is any error of law or procedure vitiating the finding or unless there are any special circumstances apparent on the record to show that in arriving at its conclusion of fact the lower Court has misappreciated evidence, 9 Bom. L.R. 1385. Where there is a misreading of the documentary evidence and fundamental errors in principle which vitiate

the conduct and disposal of the case, the case comes within the purview of this section, 28 B. 479. The mere fact that a criminal case was pending for a very long time, such delay not being due to the complainant, is no ground for quashing the proceedings by the High Court. By doing so it would amount to a denial of justice to the complainant which would be a scandal, 28 Cr. L.J. 164=99 Ind. Cas. 596. Under this section the High Court is given very extensive powers to call for and examine proceedings of inferior criminal Courts, if necessity for it is brought to its notice in any manner. But before doing so it would have to be satisfied that there are *a priori* grounds for apprehending a miscarriage of justice, 20 A.L.J. 909. The decision in 3 C. 742 and Ratanlal 832 which held that the verdict of a Jury at an inquest held is not subject to revision is no longer law as those proceedings at an inquest are proceedings now within this section. See notes at p. 317. The Madras High Court by its circular order, dated 17-12-1884, has called special attention of the Sessions Judges and District Magistrates to the following points in exercising powers of revision under this section :—(1) The rash issue of process, (2) The dealing with disputed claims of right under colour of a charge of criminal trespass or mischief and conviction is had without a finding of a criminal intent, (3) Indiscreet and excessive fines, (4) Light punishments in cases requiring severe punishments which ought to have been sent up to superior Courts, (5) The imposition of heavy fines in addition to imprisonment to extend the term of imprisonment beyond the jurisdiction of Magistrates, (6) Demanding excessive bail or excessive security, (7) Unnecessary delay in the trial of cases. The provisions are not exhaustive of the powers of the High Court, *e.g.*, power to issue a writ of *certiorari* possessed by the supreme Court cannot be said to have been taken away, 43 M. 146 (P.C.) ; 39 M. 1164 (F.B.).

High Court, Sessions Judge or District Magistrate.—The High Court, Sessions Judges and District Magistrates have co-ordinate powers under this section, but the powers of Sessions Judges and District Magistrates are only limited powers. The controlling power of revision vested in the High Court in criminal cases is a discretionary power and it must be exercised having regard to all the circumstances of each particular case, anxious attention being paid to the said circumstances which vary greatly, 28 B. 533. Except when exercising powers under Ss. 436 and 437, *infra*, they can only report for the orders of the High Court under 488, *infra*. The High Court does not generally entertain an application for revision in cases where the Sessions Judge or the District Magistrate having concurrent jurisdiction has not been moved first, 36 C. 643 ; 14 C. 887 ; 28 A. 268 ; 30 A. 116 ; 3 Pat. L.J. 302 ; 19 Cr. L.J. 126 ; 18 L.W. 691, following 43 A. 497 and 36 C. 648 ; 28 Cr. L.J. 544=102 Ind. Cas. 352. But where such concurrent jurisdiction is not possessed, no such rule exists, 1887 A.W.N. 165 ; 1888 A.W.N. 132 ; 1890 A.W.N. 161 ; 14 C. 887. See also 27 Cr. L.J. 71=91 Ind. Cas. 247 where 36 C. 643 ; 48 C. 534 and 3 Pat. L.J. 302 ; 19 Cr. L.J. 589=43 Ind. Cas. 397 are followed. Application for revision under this section can be entertained by the District Magistrate or Sessions Judge who have concurrent jurisdiction in the matter and the District Magistrate or Sessions Judge may, if he thinks fit, report for the orders of the High Court, the result of such examination and action can be taken under S. 439, *infra*, by the High Court. Where neither the District Magistrate nor Sessions Judge is moved, in the first instance the High Court will decline to entertain an application for revision, 29 Cr. L.J. 618=109 Ind. Cas. 810. It has been the settled practice of the Allahabad High Court to refuse to hear an application for revision even after an *ex parte* admission of the application, when the applicant has not first applied to the District Magistrate or the Sessions Judge for revision. Where a settled practice has been observed for a number of years, it is not advisable to vary it ; though there may not be any rule of

=43 Ind. Cas. 414. But the rule is not inflexible. See 2 L.W. 1126 ; 28 Cr. L.J. 544=102 Ind. Cas. 352 ; 28 Cr. L.J. 818=104 Ind. Cas. 255.

Sub-divisional Magistrates empowered.—All Sub-divisional Magistrates in Madras and the Punjab are empowered to act under this section. But sub-section (2) limits their power to reporting the case to the District Magistrate for orders, 7 M. 560.

May call for and examine records of any proceedings.—Records may be called for of any proceeding under this section. Proceedings under S. 107, *supra*, are proceedings within this section, and so High Court can *suo motu* call for records in such proceedings and revise an illegal order passed by a Magistrate, 29 Cr. L.J. 842=111 Ind. Cas. 391 and that too at any stage of the case and the proceedings may be revised by the High Court to prevent manifest and patent injustice, 19 C. 52; 22 C. 131; 25 C. 233; 26 C. 786; 33 C. 68, and even after a prisoner had served out his whole sentence, 7 A. 135. But there is no provision in the Code enabling a Judge to stop a trial already commenced and to refer to the High Court any questions of law arising on the merits of that case, Ratanlal 245. Revisional powers of superior Courts cannot be regarded as in any way impliedly restricting the jurisdiction conferred on Magistrates to inquire into offences, 29 M. 126 (F.B.). The High Court can interfere when it finds that the Court below has abused its discretion or failed to exercise a sound judicial discretion, 2 C. 110. The High Court has jurisdiction to interfere at any stage of the criminal proceedings if it considers that such interference is necessary in the interests of justice. No hard and fast rule can be laid down since it is impossible as well as undesirable to do so, 39 M. 561 at 564; 47 M. 722; 22 C. 131; 25 C. 233; 25 C. 786 10 C.W.N. 822; 20 B. 543; 1892 A.W.N. 102; 14 A.L.J. 851; 16 A.L.J. 458; 21 Cr. L.J. 379 =55 Ind. Cas. 859; 39 C.L.J. 236=25 Cr. L.J. 1233=82 Ind. Cas. 266; 24 Cr. L.J. 591=73 Ind. Cas. 335. It is only in very exceptional instances that the High Court will interfere in revision with the action of a subordinate Court in respect of any pending case especially when such case has reached the stage of a charge being framed and only the defence of the accused remains to be heard, 28 C. 786, *followed* in 28 Cr. L.J. 644=103 Ind. Cas. 100. It is a very sound general principle that parties should not be encouraged to resort to criminal Courts in cases in which the point at issue between them is one which can more appropriately be decided by a civil Court and the tendency on the part of litigants to do so should be checked by criminal Courts, which should be on their guard against lending their aid to such procedure. When the question between the parties was whether a decree against the complainant had been satisfied or not, by the transfer to the decree-holder of certain lands, the executing Court was the proper place for this matter to be decided, and a complaint of cheating ought not to be entertained when execution proceedings are pending before the civil Court and the order for the issue of warrant of arrest against the decree-holder was quashed by the High Court, 26 Cr. L.J. 287=84 Ind. Cas. 351 where 12 Cr. L.J. 50 =8 Ind. Cas. 1161 is *followed*. Where the facts do not in any view constitute an offence the continuance of the trial is an abuse of process and it is the duty of the High Court to interfere 52 C. 198, *following* 22 C. 131. An order under S. 88, *supra*, refusing to release certain property from attachment is a proceeding within the meaning of this and S. 499, *infra*, and is subject to revision by the High Court, 25 Cr. L.J. 82=76 Ind. Cas. 18. The High Court has interfered on facts in 28 B. 533, 8 Bom. L.R. 851; 9 Bom. L.R. 706, 12 B. 377; 15 C. 608; 22 C. 998; 32 C. 180; 18 M. L.J. 57; 14 M. L.T. 200. Where a Sessions Judge *suo motu* called for records of an inferior Court and returned the same without interference he is not precluded subsequently from entertaining an application by a party to re-open the case and he cannot reject it for the reason that he had declined to interfere on his own motion, 16 Cr. L.J. 711=30 Ind. Cas. 999.

Before any Inferior Criminal Court.—"Inferior" means statutorily incompetent to hold or exercise equal powers. There may be inferiority without subordination but there cannot be subordination without inferiority, as subordination means inferior in rank, 9 B. 100 at 103. The word "Inferior" in the section includes the word "subordinate" in S. 497, *infra*, 8 M. 18 (F.B.). The epithet "Inferior" seems to have been simply used to avoid the use of *subordinate* on account of the special limitations of the latter word which would prevent Courts of Session from looking into certain cases beyond the line of subordination which yet may be properly examined for the purpose of an order under the following sections of the Code, 9 B. 100 at 103. Inferior criminal Court must mean inferior so far as regards the particular matter in respect of which the superior Court is asked to exercise its revisional jurisdiction, 10 C. 268 at 271. If there is no inferiority then there is no power of revision. A first-class Magistrate is inferior to the District Magistrate and to the Sessions Judge,

6 M.L.J. 157; 8 M. 18 (F.B.); 12 C. 473 (F.B.); 7 A. 833 (F.B.). But the expression "inferior criminal Court" does not include a Civil or Revenue Court, 40 C. 777 (F.B.), followed in 28 Cr. L.J. 16=99 Ind. Cas. 48; 26 A. 249 (F.B.); see also 14 Bom. L.R. 970=13 Cr. L.J. 843=17 Ind. Cas. 717, where it was held that a District Registrar was not an inferior criminal Court. It is only with regard to proceedings of inferior criminal Courts that the High Court has jurisdiction under this section. If it is not so inferior, the High Court has no jurisdiction. For example the Secretary to the Government of Bengal when issuing a warrant under the *Goondas Act* (Beng. Act I of 1923) is not an inferior Criminal Court within the revisional jurisdiction of the High Court, 51 C. 880 at 488, followed 53 C. 962. See also 25 A.L.J. 217; 15 Cr. L.J. 217=22 Ind. Cas. 1001. When a Magistrate hears an appeal under the provisions of the Bombay District Municipalities Act, 8, 86, he is merely an appellate authority having jurisdiction given by the Act to deal with the question of civil liability, and is therefore not an inferior criminal Court subject to the revisional jurisdiction of the High Court under this section and therefore the High Court has no power to revise the order of the Magistrate, 27 Cr. L.J. 1127=97 Ind. Cas. 647 where 9 Bom. L.R. 1347=6 Cr. L.J. 425 is followed. The High Court when acting under this section can send for only the record of an inferior criminal Court but not the record of a civil or revenue Court under this section and has no authority to interfere in revision with orders passed by such Courts. The Code classifies criminal Courts in S. 6 *supra*, and a civil or revenue Court cannot possibly come within this classification, 15 Cr. L.J. 217=22 Ind. Cas. 1001, followed in 23 Cr. L.J. 16=99 Ind. Cas. 48.

Situate within local limits of its or his jurisdiction.—The word "situate" means fixed or located. When referred to the Court it must be taken to mean the place where the Court ordinarily sits, 30 M. 136 at 137. A Sessions Judge or District Magistrate cannot have revisional jurisdiction outside the limits of his division or district.

For the purpose of satisfying itself.—This section confers on certain superior judicial officers power to send for records of subordinate Court for the purpose of satisfying themselves as to the correctness, legality or propriety of their proceedings. But this section confers no power to correct the errors etc., which power is expressly given by the succeeding section of the Code. The power herein given is to point out the errors, etc., to subordinate Courts for their future guidance. In exercising the power under the section the judicial officers specified herein are not entitled to take further evidence themselves, 3 Bom. L.R. 677.

Correctness, Legality or Propriety of any finding, Sentence or Order.—Correctness does not mean that the superior Court may inquire whether the finding of the lower Court was acceptable to it on a balance of the evidence recorded in the trial Court. The correctness of the finding, sentence or order also implies a legal defence such as the finding being based on an entire want of evidence, or being incorrect in the sense that the witnesses may have said, for instance that no theft was committed, and the Court may have recorded a finding that theft was committed. Legality and propriety will both include questions of law as to whether a finding, sentence or order was legal or proper having regard to the evidence, 27 A.L.J. 775 at 776=30 Cr. L.J. 736 (2), 117 Ind. Cas. 336 (2). This section applies not only when the order is incorrect or illegal but also when it is improper as violating the principles of natural justice, 38 M. 1091. The High Court can call for the records to satisfy itself of the correctness and propriety of proceedings of the Magistrates. The controlling power of revision of the High Court is a discretionary power which should be fairly exercised according to exigencies of each case. The infliction of an inadequate punishment is undoubtedly an impropriety which the jurisdiction in revision is intended to remedy, 16 B. 580 at 583. No restriction is placed by this section upon the grounds on which the Sessions Judge may order further inquiry. If misappreciation of evidence has led to the passing of an incorrect or improper order of discharge such an order can undoubtedly be revised under this section, 32 M. 216 where 14 M. 334 was followed. If the circumstances of the case and the evidence are such that different Courts might take opposite views and a view of the facts taken by the trial Court is questionable, is not a sufficient ground for ordering a further inquiry, 49 A. 879; 28 Cr. L.J. 342=100 Ind. Cas. 822. *Weir II*, 253. The High Court can interfere on facts to prevent miscarriage of justice

and to correct manifest errors, 17 C.W.N. 379; 12 Ind. Cas. 998; 32 C. 180; 15 C. 608 (F.B.); 14 M.L.T. 200; 18 M.L.J. 57; 21 B. 533. The High Court's power can be exercised not only when inferior Courts act without jurisdiction, but also when they commit illegality or material irregularity, 24 C.W.N. 97=21 Cr. L.J. 25=54 Ind. Cas. 169. A District Magistrate has no jurisdiction to order a re-trial by revising the order of a trial Court, 28 Punj. L.R. 166. The High Court will not entertain a revision for setting aside an order of discharge unless the lower Courts are first moved in revision; 14 C. 897; 36 C. 643; 28 A. 268; 43 A. 497; 18 L. W. 651; 14 B. 331 Ratanlal 449, but this rule is not inflexible 2 L.W. 1126; 28 Cr. L.J. 544=102 Ind. Cas. 352; 23 Cr. L.J. 815=104 Ind. Cas. 253. See notes at page 788.

Regularity of any proceeding of such inferior Court.—These words are very general and wide and empowers the calling of records for revision. The power to call for records is no longer restricted to judicial proceedings, Weir II, 538. The words are wide enough to empower the High Court to revise an order made by a Magistrate under S. 517, *infra*. The High Court has also power to revise orders under S. 514, or orders by District Magistrates under S. 515, *infra*, and may also reduce the forfeiture under S. 517, *infra*. Orders under Ss. 143, 144 and proceedings under Chapter XII and S. 176, are now made revisable, Sessions Judges and District Magistrates may now call for records under S. 145, *supra*, and also proceedings under S. 176, *supra*, which relate to inquiries by Magistrates as to cause of death. This section does not apply to proceedings under S. 195, *supra*, as that section is self-contained, 41 C. 816. The High Court cannot interfere by a *writ of certiorari* with the ministerial acts of all inferior tribunals under this section, 39 M. 1165 (F.B.).

May direct suspension of sentence and release on bail.—Power to suspend sentence and to release accused on bail pending revision are now expressly provided for.

Explanation to sub-section (1).—This explanation newly added makes a District Magistrate exercising original or appellate jurisdiction inferior to the Sessions Judge who has therefore jurisdiction to call for the records and make a reference to the High Court 23 A.L.J. 834; 28 Cr. L.J. 1282=89 Ind. Cas. 145.

Sub-section (2).—A Sub-divisional Magistrate specially empowered, if he considers that the proceedings are irregular and the course open to him is to forward the records with such remarks thereon as he thinks fit, to the District Magistrate, who alone can act under Ss. 436, 437 or 438, *infra*. The object of the sub section is to avoid a conflict of orders of District Magistrate and the Sessions Judge, and the words "further application" in this sub-section mean any other application in respect of the order in question made by the inferior Criminal Court, 1 Cr. L. Rev. 359; the principle underlying this is that there should be no judicial action by any inferior Court by way of criticism of its superior Court, 45 A. 831.

Sub-section (3), has been repealed now and thereby extending the revisional jurisdiction of the High Court with regard to orders under S. 144, Chapter XII and S. 176, *supra*. For the effect of the repeal of this sub-section extending the revisional jurisdiction of the High Court see the elaborate judgment in *Cr. R. Case No. 273 of 1929* (M.H.C.) by the Chief Justice and Cornish, J., See notes at pages 215 and 216 under S. 144, *supra*.

Sub-section (4)—This sub-section applies to all cases in which the District Magistrate or Sessions Judge has taken or refused to take action, under this section or S. 436 or S. 437 or S. 438 *infra*, the object of this section being as stated by the Madras High Court the avoidance of a conflict between the order of a District Magistrate and the Sessions Judge and "further application" means any other application in respect of the order in question of the inferior Court, 14 Cr. L.J. 134=18 Ind. Cas. 885. The Sessions Judge and the District Magistrate have co-ordinate jurisdiction. If an application is made to either of them no further application shall be entertained by the other of them and in practice an express statement is required to be made in the application itself to the effect that no similar application has been presented to the other of them. After a Sessions Judge has refused to take action it is not competent to a District Magistrate to entertain an application under this section, 26 M. 477; 21 Cr. L.J. 91=54 Ind. Cas. 491. Once a Sessions Judge has entertained an application a District Magistrate is prevented from dealing with the same matter *suo motu*. In such a case the District Magistrate's action will not invalidate any order passed by the Sessions Judge. To hold that the District Magistrate's action will bar the Sessions Judge from

adjudicating an application which he had already entertained would be to make the law nugatory, 17 Cr. L.J. 497=36 Ind. Cas. 465, *distinguishing* 26 M. 477. Where a Sessions Judge directed the committal to the Court of Session of an accused who was discharged by an inferior Magistrate when the District Magistrate during the pendency of the inquiry before the inferior Magistrate had refused to do so, it was held that the Sessions Judge's order was legal and no question of exercising co-ordinate jurisdiction arose in the case, 43 M. 330. But where a District Magistrate sent a complaint for judicial inquiry to a Subordinate Magistrate when it had been dismissed by a subordinate Magistrate merely considering a police report and the report of the Subordinate Magistrate the Sessions Court set aside the order and directed a further inquiry. A Sessions Judge cannot direct further inquiry under S. 436 after the District Magistrate has refused to do so, and *vice versa*, 22 C. 573; 28 C. 102; 26 M. 477; 17 M.L.J. 153=2 M.L.T. 24=5 Cr. L.J. 132. Under the explanation newly added a Sessions Judge is now empowered to refer the proceedings of the District Magistrate, appellate or original to the High Court under S. 493, *infra*. The powers of the High Court are wide. Even though a Sessions Judge or District Magistrate has refused to take action under this section the High Court is 'entitled to entertain an application and to grant relief in case it finds the order of the inferior Court is not correct, legal or proper. The Code does not empower a District Magistrate to question the decision of a Sessions Judge. It is no part of the duty of the District Magistrate to criticise the judicial decisions of the Sessions Judge, 41 B. 47; 23 C. 250; 18 C. 186; 23 M.L.J. 732; 28 A. 91; 36 A. 378; 24 A.L.J. 224. But if he considers that there has been a miscarriage of justice in proceedings before a Sessions Judge, he should communicate with the Public Prosecutor or move the Local Government for necessary action, but should not report the case to the High Court for necessary action under S. 493, *infra*, 9 A. 362; 12 A. 431, 15 M. 36; Weir II, 565 and 566; 24 A.L.J. 224 where 28 A. 91; 36 A. 378 and 41 B. 47 are followed.

High Court's Power to stay criminal proceedings.—There is no statutory provision for staying criminal proceedings once started. The question is one of expediency and has to be decided on the merits of the particular case keeping in view the undesirability of the conflict of decisions and the necessity of protecting the accused from prejudice in the civil proceedings, 23 Cr. L.J. 700=69 Ind. Cas. 380. The main principle is that the High Court in the exercise of its function of superintendence should not retard the legal work of the subordinate Courts. A criminal Court is in every way as competent as the Civil Court to examine questions of possession or questions involving genuineness of documents and there is no particular reason for giving priority to the Civil Court. Simultaneous trials in both Civil and Criminal Courts may have their disadvantages but when in any circumstances the two Courts must try the same issue, there is no reason to prefer consecutive trials. It is not as though the trial which is taken first would absorb or govern the other. A criminal Court cannot decline to examine a question of forgery because the forged document has been admitted as genuine in a Civil Court; it must try the case sooner or later and on the general principle that judicial work should not be retarded, the sooner the better. 52 M.L.J. 80=25 L.W. 52=1927 M.W.N. 53. In 44 M.L.J. 642=1923 M.W.N. 276=17 L.W. 570=25 Cr. L.J. 280=16 Ind. Cas. 872, it was held that it was undesirable that a complaint of rioting and mischief should remain undisposed of till the Civil Court have pronounced on the question of title but the Civil Court's judgment will not operate as *res judicata* in the Criminal Court. There is no special advantage in delaying a criminal trial when a grave charge has been made against a gentleman and it is desirable both for his own sake and for everybody concerned that it should be disposed of as quickly as possible and if proceedings are postponed until the final decision of the Civil Court witnesses may not be available. If delay would avoid conflicting decisions there might be more to be said for it, but it cannot do that. Conflicting decisions are the inherent risk of the decision of causes into civil and criminal. The least undesirable course is to adhere to the main principle and to let both cases proceed with all possible despatch. The general rule is that the High Court should avoid staying proceedings in the lower Courts, unless there are exceptional circumstances for the interference of the High Court, 50 M. 839; see also 33 C.W.N. 16v. A person against whom Criminal proceedings are

instituted cannot claim as of right that such proceedings shall be stayed pending the result of a civil suit; otherwise it would be easy for criminals to delay disposal of criminal prosecutions by lodging civil suits. In each case the discretion must be exercised and the particular circumstances of the case duly considered. Justice must not unduly be hampered but on the other hand, where there is no particular hurry, the postponement of the Criminal proceedings some times avoids a regrettable conflict of decisions. One point which may sometimes have considerable weight is the question of priority. An man who has already instituted a civil suit may well urge that a subsequent criminal prosecution shall be stayed pending the result of the civil suit, 17 Cr. L.J. 203=34 Ind. Cas. 317; 29 Cr. L.J. 47=106 Ind. Cas. 463; 26 Cr. L.J. 286=84 Ind. Cas. 350; 28 Cr. L.J. 326=100 Ind. Cas. 710; 13 Cr. L.J. 175=13 Ind. Cas. 927 where 5 C.L.J. 223=5 Cr. L.J. 199 and 5 C.W.N. 44 are referred to. Criminal proceedings tend themselves to unscrupulous application of improper pressure with a view to influence the course of justice in civil proceedings and besides there is the further mischief of criminal proceedings being instituted with an imperfect appreciation of facts not been ascertained in the more searching investigation by the civil Court, 24 C.W.N. 418=21 Cr. L.J. 481=36 Ind. Cas. 577, with regard to stay of criminal proceedings pending a civil suit, the test seems to be whether the prosecution is public or private, 33 C.W.N. 969, where it is public the Court, as a rule, in the exercise of its inherent jurisdiction would not stay criminal proceedings but where it is private there would not be the same reluctance on the part of the Court to interfere with the criminal proceedings. This was the statement of the law prior to the enactment of S. 561A *infra*, which now expressly recognizes the inherent power of the High Court to interfere to prevent abuse of the process of the Court or to secure the ends of justice. The High Court has, no doubt on general grounds as well as under S. 561 A, *infra*, has jurisdiction to stay criminal proceedings, 30 Bom. L.R. 932 at 964. Criminal proceedings should not as a rule be stayed pending the decision of a Civil Court in regard to the same subject-matter, but ordinarily it is not desirable that a criminal prosecution should go on if the parties to the two proceedings are the same, especially when the prosecution is a private prosecution and the questions to be decided in the two Courts are identical. The mere pendency of a civil suit or appeal is not in itself a sufficient ground for staying criminal proceedings 18 B. 581; 14 Bom. L.R. 963. If the object of the criminal proceedings by a private prosecutor is to prejudice the trial of a civil suit or to use them as a lever to coerce the accused into a compromise of the civil suit, the criminal proceedings can properly be stayed. The discretion is to be exercised by the High Court in each case. The ordering stay of proceedings cannot be crystallised into a hard and fast rule and it would largely depend upon the circumstances of each case. The test in every case would be whether the accused is likely to be prejudiced seriously by the continuance of the criminal proceedings pending the trial of the civil suit, 30 Bom. L.R. 962, at 965. It is open to the criminal Court having regard to the facts of each case to consider whether it is desirable that the proceedings before it should be stayed till the decision of the civil suit, or for a limited period. The High Court has stayed criminal proceedings in 30 M. 226; 31 M. 510; 23 C. 610; 4 Lah. L.J. 403; 26 Cr. L.J. 286=84 Ind. Cas. 350; 23 Cr. L.J. 326=100 Ind. Cas. 710; 13 Cr. L.J. 175=13 Ind. Cas. 927 where 5 C.L.J. 199 and 5 C.W.N. 44 are followed, 23 Cr. L.J. 595=68 Ind. Cas. 819; 1 Pat. L.T. 697; 22 Cr. L.J. 439=62 Ind. Cas. 183; 21 Cr. L.J. 399=55 Ind. Cas. 1007; 18 A.L.J. 1011; 27 Cr. L.J. 1114=97 Ind. Cas. 426. Pendency of a civil appeal was held not to be a sufficient ground for stay of criminal proceedings, 43 A. 130. The High Court will not interfere with the right exercise of the discretion of the Magistrate who refuses to stay criminal proceedings, 21 Cr. L.J. 332=55 Ind. Cas. 678; 21 Cr. L.J. 353=55 Ind. Cas. 721. The question whether criminal proceedings should be stayed pending the decision of a civil suit is primarily one of discretion of the Magistrate, 30 Bom. L.R. 962.

436. On examining any record under section 435 or otherwise, the High Court or the Sessions Judge may direct the District Magistrate by himself or by any of the Magistrates subordinate to him to make, and the

Power to order
inquiry.

District Magistrate may himself make, or direct any subordinate Magistrate to make further inquiry into any complaint which has been dismissed under section 203 or sub-section (3) of section 204 or into the case of any person accused of an offence who has been discharged :

Provided that no Court shall make any direction under this section for inquiry into the case of any person who has been discharged unless such person has had an opportunity of showing cause why such direction should not be made.

Amendment.—By the amendment Ss. 436 and 437 have been interchanged. To meet the conflicting rulings as to the exact meaning and scope of the terms "accused person" the words "a person accused of an offence" have now been substituted. Certain rulings of the High Court like 20 C. 729; 30 C. 112; 36 C. 163; 23 C. 493; 27 C. 562; 16 B. 661; 33 M. 85 put a very strict interpretation upon the term and explained the term as meaning a person accused of an offence, while other rulings like 35 A. 147; 24 A. 107; 24 A. 149; 35 B. 401 included within the term "accused person" persons against whom proceedings were taken in any shape or form by a criminal Court acting judicially. By the amendment the conflict of opinion is set at rest. Further inquiry can be made now only in cases where a person accused of an offence before a criminal Court has been discharged. The proviso is new and makes it obligatory on the Court to give an opportunity to the discharged person to show cause against the making of the order.

Scope and object of the section.—This section vests no absolute right in the superior Court to direct a further inquiry. The section is limited by the words "on examining any record under S. 435 or otherwise" and that section lays down that a Court may call for and examine any records for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order passed and as to the regularity of any proceeding of an inferior Court. If a Magistrate finds no illegality or impropriety or irregularity and nothing incorrect in the proceedings he is not entitled to set aside the discharge upon other grounds or on no ground at all, e.g., on the opinion tendered to him by the Legal Remembrancer, 16 C.W.N. 1078=13 Cr. L.J. 763=17 Ind. Cas. 73. A Court of revision merely for the reason of disagreement with the conclusion arrived at after a careful inquiry by the trial Court is not entitled to order further inquiry which can be ordered only where the Magistrate has not taken sufficient trouble or has come to a perverse conclusion, 30 Cr. L.J. 783=117 Ind. Cas. 345. The powers with which the Magistrate or Sessions Judge, is clothed are powers of revision, and in exercising those powers of revision the appellate Court has to see whether the evidence is of such a character that it is possible to come only to one conclusion upon it, namely, that the accused has been guilty. It may not be a question of perversity but it must be very near to it. The appellate Court must satisfy itself that there has been a miscarriage of justice, consequent upon the one-sided or perverse view taken by the trial Court, 10 L.W. 630 at 632; 44 A. 691; 1 Lah. 218; 28 Cr. L.J. 342=100 Ind. Cas. 822. In cases where no fresh evidence is likely to be adduced on further inquiry the superior Court should hesitate before exercising its powers under this section unless there are palpable errors in the decision of the lower Court, 38 C.L.J. 206. This section confers an independent power on a District Magistrate to direct a subordinate Magistrate to make a further inquiry into a complaint which has been dismissed or into the case of any person accused of an offence who had been discharged, 30 Cr. L.J. 233=114 Ind. Cas. 50. Where a Magistrate after proper inquiry finds no case made out, the mere fact that the superior Court does not agree with that opinion is no reason to reopen the case by directing a further inquiry especially where no suggestion is made that any further evidence is available or should be taken, 41 A. 691; 23 Cr. L.J. 63=75 Ind. Cas. 978; 26 Cr. L.J. 838=88 Ind. Cas. 822; 23 Cr. L.J. 601=102 Ind. Cas. 777; 9 A. 52 (F.B.); 18 A.L.J. 1133=59 Ind. Cas. 193. The powers of the High Court and Sessions Judges and District Magistrates are co-extensive and are not limited in any way by this section. Where

certain persons were charged by a Magistrate for offences under S. 342 (wrongful confinement) and S. 357 (assault in attempting to unlawfully confine), and the Sessions Judge in revision was of opinion that charges for offences under Ss. 342 and 357, I.P.C., were not the appropriate charges but that the real charge disclosed by the evidence was one of forgery and ordered further inquiry into an offence under S. 467, I.P.C., it was held that the Judge had no jurisdiction under this section to pass the order and it was therefore set aside, 10 Cr. L.J. 534—4 Ind. Cas. 312. The Sessions Judge or District Magistrate cannot under this section himself frame a charge or order the subordinate Magistrate to frame a charge and try the accused, although the District Magistrate may under the latter part of the section make further inquiry himself and frame a charge in the course of the inquiry; the Sessions Judge or District Magistrate is not bound to refer to the High Court in cases of difference of opinion owing to mere misappreciation of evidence but would be justified in ordering a re-consideration of the same evidence, 32 M. 220 (F.B.); 6 M.L.T. 157=10 Cr. L.J. 218—3 Ind. Cas. 29; 19 M.L.J. 157; 5 M.L.T. 233. There is little difference in substance between the case of a person who has been discharged after all the prosecution evidence has been taken and weighed by the Magistrate and that of a person who is acquitted after a charge has been framed. In the former case the Magistrate considers the prosecution evidence as so weak that there is nothing for the accused to meet and in latter case the evidence though sufficiently strong to call upon the accused to meet it has in his opinion been met by the defence. There is no reason why different tests should be applied in revision or why an accused should be in a worse position than one against whom it is strong enough to warrant a charge being framed, 33 M.L.J. 518 at 522. A superior Court should hesitate to order further inquiry under this section unless there are palpable errors in the decision of the trial Court and the judgment of a District Magistrate ordering further inquiry should indicate such palpable errors. Otherwise such an order is liable to be set aside by the High Court, 50 C.L.J. 284. An order of discharge should not be set aside unless it is clearly wrong and it will be a travesty of justice to order a re-trial after lapse of considerable time, say one year from the date of discharge, 29 Cr. L.J. 895=111 Ind. Cas. 575. Further inquiry after a discharge is improper unless the order of discharge is manifestly perverse or foolish or based on a record of evidence obviously incomplete, 12 Cr. L.J. 364=11 Ind. Cas. 132. Once a District Magistrate has refused to interfere with an order of discharge under this section he cannot subsequently direct further inquiry under this section as such an order reversing the earlier order is prohibited by S. 369 *supra*, 13 Cr. L.J. 301=14 Ind. Cas. 765. It is not sufficient for a Court merely to say that the trial Court has not gone fully into the case and declare that a further inquiry is necessary. Before ordering a further inquiry the Court of revision should state in what respect the trial Court's conclusions are either foolish or perverse or otherwise unsatisfactory, and if the case is sent back on the ground that the discharge has been made on incomplete record this should be stated, 26 Cr. L.J. 1393=89 Ind. Cas. 705, where 1 Lah. 216, is followed. See also 24 Cr. L.J. 369=72 Ind. Cas. 369; 22 Cr. L.J. 199=60 Ind. Cas. 59; 23 Cr. L.J. 238 (2)=99 Ind. Cas. 1038 (2); 21 Cr. L.J. 38 at 40=106 Ind. Cas. 334. It is not ordinarily desirable that in the order for further inquiry detailed examination of the evidence and elaborate reasons should be given. Enough should be said in the way of reasons to indicate how the order of discharge is incorrect on a point of law or fact or for want of complete inquiry, 19 Cr. L.J. 14=42 Ind. Cas. 926. The High Court will not as a rule order further inquiry after an order of discharge is made, unless the order of discharge is manifestly perverse or foolish or based upon an obviously incomplete record of evidence. The mere fact that it might take a different view of the evidence and of the probabilities of the case will not justify its interference, 1 Lah. 216; 25 Cr. L.J. 1026=81 Ind. Cas. 802; Weir II, 255; 26 Cr. L.J. 582=85 Ind. Cas. 728; 26 Cr. L.J. 1508=90 Ind. Cas. 292; 26 Cr. L.J. 1393=89 Ind. Cas. 705; 27 Cr. L.J. 565=94 Ind. Cas. 133; 27 Cr. L.J. 661=94 Ind. Cas. 709; 27 Cr. L.J. 771=95 Ind. Cas. 307; 27 Cr. L.J. 1130=97 Ind. Cas. 650; 28 Cr. L.J. 607=102 Ind. Cas. 783 where 12 Cr. L.J. 364=11 Ind. Cas. 132 and 27 Cr. L.J. 561=94 Ind. Cas. 709 are followed. To order fresh inquiry against a discharged co-accused after examining and cross-examining him as a prosecution witness and thus gathering from his own mouth the evidence against him is contrary to the tradition of justice in criminal Courts, 25 Cr. L.J. 311=78 Ind. Cas. 1031.

The jurisdiction of the High Court, Court of Session and District Magistrate is very wide and the discretion thus conferred is a judicial discretion, 15 C. 608 at 622. It is impossible to lay down any general rule or rules which must be applied in every case and it is extremely difficult to arrive at a formula which will be of assistance in all circumstances. The general result of decided cases may be expressed shortly as follows:—(1) That a Magistrate is competent to consider the credibility, weight, and probabilities of the evidence. (2) In this consideration, his discretion is limited. He must not encroach upon the functions of a trial Court while holding a preliminary inquiry with a view to see whether the case should be committed or not. (3) He must keep before him the question whether there are fair grounds for concluding that the accused is guilty upon the evidence, i.e., where there is a *prima facie* case reasonably credible, he must commit and in all cases where he discharges he should give reasons for so doing and it will be proper to consider those reasons when deciding whether the Magistrate had exercised his direction correctly, 4 Ran. 471. The provisions of this section do not apply to proceedings taken under Chapter VIII of the Code demanding security, 2 Ran. 30. The wording of the section is "any person accused of an offence has been discharged" and this will not include a person proceeded against under the security sections. See notes at pp. 155-56 and 171. A District Magistrate has therefore no power to direct further inquiry into a case under S. 107, *supra*, and the proper remedy open for him is to report the result of his examination to the High Court under S. 493, *infra*, 46 A. 235. See also 25 Cr. L.J. 679=81 Ind. Cas. 167; 51 A. 403; 25 Cr. L.J. 89=76 Ind. Cas. 25; 24 Cr. L.J. 825=74 Ind. Cas. 837. Further inquiry may be directed in case of discharge even where no fresh evidence is forthcoming, 14 M. 334 (F.B.); 9 A. 52 (F.B.); 13 B. 376; 21 A. 122; 12 C. 522; 10 C. 207; 15 C. 608; 23 Cr. L.J. 65. Further inquiry does not in all cases mean taking additional evidence but may be re-hearing and re-consideration of the evidence already taken, 26 Cr. L.J. 1537=90 Ind. Cas. 383. Material consideration when ordering further inquiry is the prospect of any public advantage from the case being re-opened two years after the occurrence, 43 M.L.J. 355=16 L.W. 565. The exercise of revisional jurisdiction by the High Court is a matter of discretion and having regard to the length of time that elapsed between the dismissal of the appeal and the application for revision the High Court declined to hear the revision petition, 1907 A.W.N. 203=6 Cr. L.J. 153. It cannot be ordered in the bare possibility of an offence being disclosed on further evidence being taken. There must be something on record to indicate that such an offence was committed or there must be something to show that further evidence which was not taken and would support a charge for that offence is available, 43 M.L.J. 564=16 L.W. 494=(1922) M.W.N. 801. This section does not apply to an acquittal, 20 Cr. L.J. 525=51 Ind. Cas. 633; 2 C.L.J. 622. The power under this section should be sparingly used and with great circumspection, Ratanlal 328; 11 C.W.N. 173, especially when the questions raised are merely matters of fact, 9 A. 52 (F.B.). The powers given to Sessions Judges and District Magistrates under this section to interfere with orders of discharge should be used sparingly and with great caution and circumspection especially in cases where the questions involved are mere matters of fact. If the facts and circumstances and evidence are such that two Courts might take different views of the evidence, the order of discharge is one which cannot be said to be either perverse or *prima facie* incorrect and when there was no suggestion of any further evidence forthcoming, no further inquiry should be directed, 49 A. 879, following 9 A. 52 (F.B.) and 18 A.L.J. 1135. Where a competent Court has dismissed a case after considering the evidence on record and giving thorough and careful reasons, the order should not be interfered with unless there is a miscarriage of justice and an accused person under such circumstance who had stood his trial ought not to be ordered to run the risk again, 14 A.L.J. 1075. This section does not lay down that further inquiry should be directed only when it is found that the judgment is perverse or foolish. As a rule of prudence, however, it has often been held that the superior Court should not lightly discard the estimate of evidence appraised by the Court which heard it and should not set aside the dismissal or discharge simply because a different view of the evidence might be taken. There must be something more than that 23 Cr. L.J. 857=104 Ind. Cas. 633, following 26 Cr. L.J. 886=86 Ind. Cas. 822 and 9 A. 52. The rule of law is firmly established that generally speaking, further inquiry after discharge is improper unless the order of discharge is manifestly perverse or foolish or has been based

upon a record of evidence which is obviously incomplete, 23 Cr. L.J. 850=105 Ind. Cas. 636, following 12 Cr. L.J. 264=11 Ind. Cas. 127; 23 Cr. L.J. 944=105 Ind. Cas. 639. An order of discharge ought not to be set aside and further inquiry ordered if there is irregularity, illegality or impropriety in the proceedings and it should not be ordered in a case where Courts are liable to take different views of the evidence and of the probabilities especially where the Magistrate has disbelieved the evidence for the prosecution. 23 Cr. L.J. 1537=93 Ind. Cas. 355; 26 Cr. L.J. 1323=23 Ind. Cas. 272. Further inquiry does not mean proceeding on the evidence already taken; that evidence or other evidence, if there be any, should be taken *de novo* by the Magistrate who holds the further inquiry. 9 A.L.J. 310=13 Cr. L.J. 235=14 Ind. Cas. 607. See also 27 Cr. L.J. 1130=97 Ind. Cas. 630. A power to order what is practically a re-trial, to give a complainant another opportunity of re-examining his witnesses and adducing fresh evidence, ought not to be presumed as it is unjust to the accused and opens a wide door to perjury and corruption. 31 M. 133 at 135.

On examining the record under S. 435 or otherwise—See notes under B. 437 at p. 802. The words "or otherwise" are significant. In every case of discharge some body must bring the matter to the notice of the superior Court as it cannot be supposed that it is aware of all orders of discharge passed by the Magistrates within its jurisdiction and there is nothing in the Code to limit the persons who can bring the matter to the notice of the superior Court. Thus it is immaterial how the facts were brought to the notice of the superior Court. When once it is brought to its notice it has ample power to deal with the matter. Where a complaint of Court under S. 476, *infra*, ended in a discharge, undoubtedly it is not the intention of the Legislature that a private party should not bring the order of discharge before the Sessions Judge. The Sessions Judge is empowered under S. 435 *supra*, to call for the records in such a case if he is dissatisfied with the correctness, legality or propriety of the finding, and order a further inquiry under this section, 49 A. 230.

High Court or sessions Judge may direct District Magistrate—The High Court has concurrent jurisdiction with the Sessions Judge and District Magistrate, 16 L.W. 494=31 M.L.T. 254=23 Cr. L.J. 592=68 Ind. Cas. 624. The High Court is mentioned in this section for the obvious reason that though S. 430, *infra*, gives the High Court all the powers of a Court of Appeal under S. 423, *supra*, the power mentioned in this section is not included in S. 435, *supra* 9 A. 52 at 55. The controlling power of revision of the High Court in criminal cases is a discretionary power and it must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances which vary greatly, 28 B. 533. This section does not authorise a Sessions Judge to direct further inquiry by a particular Magistrate, whether it be the Magistrate who originally discharged or any other Magistrate. Sessions Judges should conform to the language of the section in ordering further inquiry. The Legislature appears to have contemplated that the Magistrate of the District should exercise a discretion as to the selection of any Magistrate subordinate to him and this discretion seems to have been vested in the District Magistrate and not in the Sessions Judge. 10 C. 207 at 209. Where the dispute between the parties is of a civil nature further inquiry should not be ordered, 1 Bom. L.R. 832. So also where the nature of the case is such that Courts are liable to take different views on the evidence and probabilities of the case, 8 A.L.J. 45=12 Cr. L.J. 45=9 Ind. Cas. 274; 12 Cr. L.J. 110=9 Ind. Cas. 652. Again when the order of discharge is based on a consideration of the whole evidence and is not manifestly perverse or foolish it should not be set aside and further inquiry ordered, 10 Cr. L.J. 214=27 Ind. Cas. 838. But no Court can properly set aside an order of discharge without assigning solid and substantial reasons for so doing, 15 C. 608 at 621; 27 Cr. L.J. 728=95 Ind. Cas. 56; 32 C. 1090; 13 C.W.N. 76; (1914) M.W.N. 46 (s.c.) (1913) M.W.N. 638=14 Cr. L.J. 572=21 Ind. Cas. 172. In cases where there is concurrent jurisdiction *i.e.*, where the relief sought in the High Court could also have been obtained in the lower Court it is the established practice not to interfere with the lower Court's order, 14 C. 887; 20 C. 643; 28 Cr. L.J. 601=102 Ind. Cas. 777; 28 Cr. L.J. 342=102 Ind. Cas. 822; 28 A. 268; 43 A. 497; 14 B. 331; Ratanlal 449; 3 Pat. L.J. 302 but the rule is not inflexible, 2 L.W. 1126; 28 Cr. L.J. 544=102 Ind. Cas. 352; 28 Cr. L.J. 815=104 Ind. Cas. 253.

Make further inquiry.—A District Magistrate when exercising his revisional jurisdiction should ordinarily confine the exercise of his powers of interference on the grounds expressly specified in this Chapter and should not take upon himself the duty of trying the accused himself although such a course would not be illegal, 27 Cr. L.J. 723=95 Ind. Cas. 56. The term "*further inquiry*" means an inquiry before the Magistrate preliminary to a trial which results in a charge or discharge and does not include a trial. The terms "*further inquiry*" "*fresh inquiry*" are used as meaning the same, 15 C. 603 at 620. The term may signify an inquiry in addition to that which has already been held, but may also signify a fresh consideration to the effect of the evidence already recorded and a re-consideration of that evidence. It does not imply that additional evidence must be forthcoming, 14 M. 334 (F.B.); 15 C. 603 (F.B.); 10 B. 131; 9 A.L.J. 310=13 Cr.L.J. 255=14 Ind.Cas. 607. A District Magistrate has no jurisdiction under this section to revise the order of the lower Court and direct a re-trial of accused person for offences different from those for which they were originally convicted (S. 323 I.P.C., into one under S. 330 I.P.C.) at the instance of a private complainant, 23 Cr. L.J. 575 (2)=102 Ind. Cas. 511. Further inquiry cannot be ordered on the bare possibility of an offence being disclosed on further evidence being taken. There must be something to show that further evidence which was not taken which would support a charge is available, 43 M.L.J. 564=16 L.W. 404=31 M.L.T. 254=23 Cr. L.J. 592=68 Ind. Cas. 624. An order for further inquiry is proper where the revising authority finds on the facts that there were enough materials to warrant a conviction or to call upon the accused to enter on his defence. It is not correct to say that further inquiry cannot be ordered on the same facts as has been considered by the Magistrate and to do so will be putting the law too wide. The revising authority is to take into consideration the facts of the particular case before it and taking down any general rule guiding Courts, in ordering further inquiry, is to stultify the language of the section itself, 23 A.L.J. 20=26 Cr. L.J. 736=86 Ind. Cas. 224; 49 A. 230. When further inquiry is ordered and the case is made over to a subordinate Magistrate he is seised of the whole case and he is competent to hold the inquiry and dispose of the complaint by passing final orders thereon, either by dismissing it or putting the accused on his trial and convicting or acquitting him, 21 Cr. L.J. 594=57 Ind. Cas. 162; 27 C. 921; 39 C. 1041. This section does not empower a trial to be held but only a further inquiry. S. 4 (1) (k) *supra* defines '*inquiry*' which is distinct from '*trial*'. Where the Magistrate dismissed a complaint under S. 203 *supra* and a further inquiry is ordered the Magistrate is competent again to hold an inquiry and dismiss the complaint again. The inquiry contemplated by the section is an inquiry of the same nature as was previously held under S. 203 *supra* and cannot mean an inquiry after summoning the accused 29 Cr. L.J. 372=103 Ind. Cas. 323 where 30 C.W.N. 312=26 Cr. L.J. 305=81 Ind. Cas. 419 and 104 Ind. Cas. 633 are referred to. Similarly when a complaint is once dismissed by a sub-divisional magistrate and the District Magistrate sets aside that order under this section and directs further inquiry, the sub-divisional Magistrate cannot at once summon the accused without having held an inquiry and exercised his judgment under S. 203, *supra*, and finding that it was a fit case in which the accused should be summoned. A summons should not issue to the accused from the mere fact that the District Magistrate has set aside the order of dismissal and directed a further inquiry, 29 Cr. L.J. 572=109 Ind. Cas. 508.

Into any complaint Dismissed under S. 203—Ss. 203 and 201 (3) *supra* are the only provisions enabling a Magistrate to dismiss a complaint. Where the accused were tried and convicted of mischief and the Sessions Judge being of opinion that the accused has been rightly dealt with by the Magistrate ordered a further inquiry against the accused and others for an offence under S. 141, I.P.C., (joining an unlawful assembly armed with deadly weapons) it was held that the order was without jurisdiction, as none of the accused had even been discharged of that offence nor was any complaint of such offence against them dismissed under S. 203 or 201 (3), *supra*, 27 C. 538. See also 5 C.W.N. 72. An order of dismissal under S. 203, *supra*, should not be set aside by a District Magistrate on the mere ground that it is possible that on a further inquiry the accused may be convicted, 17 Cr. L.J. 406=33 Ind. Cas. 568. Material consideration when ordering a further inquiry is the prospect of any public advantage

from the case being re-opened, 43 M.L.J. 533=16 L.W. 585. This section as it stands by the amending Act of 1923 clearly makes a distinction between a case in which a complaint is dismissed under S. 203 *supra* and a case in which the accused is discharged under S. 253 *supra* or some other section. In the latter case it is now provided in accordance with the general opinion of all the High Courts that notice should be given to the accused as he was present at the trial Court and no order ought to be made in his absence by the Court in revision but when the order is passed under S. 203 *supra* not only has the accused no right under the law to appear either before the trial Court or before the court of revision and it has been held in several cases (See 21 O.W.N. 127=23 C.L.J. 606; 27 C.W.N. 196=35 C.L.J. 414) that the accused should not be allowed to appear at that stage and in a case where he was allowed by the Magistrate to appear at that stage to cross-examine the witnesses, he acted illegally and this illegal act of the Magistrate does not create a right in the accused to appear at every stage of the proceeding. No doubt it was held in some cases that where the complaint was dismissed under S. 203 *supra*, it was desirable to allow the accused to appear before an order is passed under this section to his prejudice but these cases were before the amendment of 1923. Courts have no right to legislate however desirable a thing may be on general principle, 49 C.L.J. 422 423-24. Dismissal of a complaint is no bar to a rehearing of the same, 29 M. 126 (F.B.); 28 C. 652 (F.B.); 29 A. 7, even after the District Magistrate had refused to order further inquiry, 36 C. 415.

Into the case of any person.....Discharged.—An order of discharge is not a final order, and the offence against an accused who has been discharged may be further inquired into by a Magistrate upon further evidence, if forthcoming. The High Court has full power to reverse an order of discharge at the instance of a private prosecutor and in considering whether to interfere or not is bound to have regard to the injustice to the accused on the ground of prosecution and want of finality and in the event of its coming to a conclusion that proceedings were taken with a view to furthering either of these objects to the exclusion of other matters proper for it to consider, the High Court would refuse such an application. As there is no appeal against an order of discharge, it would be unjust to deny to a private prosecutor the right to have the order of discharge revised where such an order has been improperly made, 4 Ran. 471 *relying on* 2 M. 38; 2 A. 448; 36 C. 994. The section now contains the words "any person accused of an offence" instead of "any accused person" and hence it does not include persons against whom proceedings are taken under Chapter VII of the Code, 2 Ran. 30 at 31. Under this section as amended a District Magistrate has no power to revise an order under S. 119 *supra*, discharging a person who was called upon to furnish security. The conflict of authority which existed before 1923 has been removed now and the view expressed in 33 M. 85 has been adopted by the Legislature. The conduct of a person called upon to furnish security under Part IV of the Code relating to prevention of offences would consist of a number of acts or omission to come within the definition of offences as defined in S. 4 (1) (c) *supra*. The word punishable is not defined in the Code but words not herein defined are to be deemed to have the same meaning attributed to them in the I.P.C. In S. 53 I.P.C., punishments are described by an exhaustive enumeration but giving security is not included in the list of punishments given there, 51 A. 408. See also 22 A.L.J. 129 and 48 A. 233. See notes at page 155-156 and 171. A person accused of an offence must be discharged by a Magistrate before action is taken under this section. It is not applicable to a case where a Magistrate refused to proceed against some of the persons accused of an offence before police as they never had been before the Magistrate and had not therefore been discharged 5 C.W.N. 489; 4 C.W.N. 242. There is no authority to direct further inquiry against a person against whom no process was issued, 39 C. 238. Where a case against a person who was absent at the trial of his co-accused was dismissed under S. 247, *supra* owing to the absence of the complainant no order could properly be passed under this section against the absent accused, 4 C.W.N. 346. A discharge by a Presidency Magistrate can be set aside by the High Court under this section and further inquiry could be ordered, 36 C. 994; 33 M.L.J. 513; 27 B. 84. The expression used in S. 437, *supra*, "is improperly discharged" but we find no such expression in this section.

Proviso.—The Proviso is new and has been enacted to meet the various rulings of the several High Courts as to the necessity of notice being given to the accused in case of discharge.

The *Allahabad High Court* consistently held that notice was necessary, 9 A. 52 (F.B.); 20 A. 339; 25 A. 375; 35 A. 78; 40 A.; 138 and 416. The *Calcutta and Patna High Courts* held that although notice was not imperative yet it was a matter of proper discretion of the Court to give notice, 15 C. 603 (F.B.); 29 C. 457; 32 C. 1090; 39 C. 238; 12 C.W.N. 822. The *Madras and Bombay High Courts* accepted the *Allahabad* view, 26 M. 51; 15 M. 335; see also 10 B. 131; 8 Bom. L.R. 694. See also 1 Lah. 216. Where a District Magistrate acting under this section entertained a revision petition filed by the complainant against an order of discharge, making some of the accused only as parties and committed all the discharged accused including those who were not parties before him and who had no manner of notice of the revision petition, held that the order against those accused who were not parties was clearly wrong as they had no opportunity of showing cause why an order of commitment should not be made against them under this proviso and the order so far as they were concerned was set aside, 48 M. 874. But all the High Courts have agreed that no notice will be necessary in the case of a dismissal under S. 203, 15 C. 603; 29 C. 457; 35 A. 78; 40 A. 138. This proviso cannot apply to a dismissal under S. 203, *supra*. Where no process is issued to the accused at all and he does not appear in Court and the complaint is dismissed summarily under S. 203, *supra*, the accused cannot be said to have been discharged. It is only after he has appeared in court and the evidence against him is found to be insufficient so as to make it unnecessary to call upon him to enter on his defence that he can be discharged. Before the amended Code, Courts were unanimous that in cases of the dismissal of a complaint under S. 203, *supra* notice was not necessary and the amendment left the ruling in 35 A. 78; 40 A. 138 untouched. See also 47 A. 722; 27 Cr. L.J. 302=92 Ind. Cas. 590; 2 Luck. 573. Where the order of dismissal is passed under S. 203 *supra* not only has the accused no right under the law to appear either before the trial Court or before the Court of Revision. It has been held in several cases (See 21 C.W.N. 127=25 C.L.J. 606; 27 C.W.N. 196=36 C.L.J. 414) that the accused should not be allowed to appear at that stage. If the Magistrate allowed the accused to appear at that stage to cross-examine the witness he acted illegally and this illegal act of the Magistrate does not create a right in the accused to appear at every stage of the proceeding. In some cases it was held on general principle that it was desirable to give notice to the accused before the dismissal order under S. 203 *supra* is set aside but those cases were before the amendment of 1923 and Courts have no right to legislate however desirable it may be on principle, 49 C.L.J. 422 at 424. The dismissal of a complaint under S. 203 or under S. 201 (3), *supra* is before the appearance of an accused and no accused person can be said to be discharged when no process has been issued for his appearance. It is only when a Magistrate takes cognizance of an offence and is of opinion that there is sufficient ground for proceeding he issues a summons or a warrant for the accused's appearance. An accused person is said to be discharged when the case against him is thrown out under Ss. 209, 253 or 259, *supra* or when the Advocate-General enters a *nolle prosequi*, under S. 333, *supra*. The expression *person who has been discharged*, occurring herein refers to a person discharged under Ss. 209, 253, or 259. A person against whom no process is issued under S. 204, *supra*, is not a discharged person and therefore no notice is necessary to him when a District Magistrate, Sessions Judge, or the High Court directs a further inquiry into a complaint dismissed under S. 203 or S. 201 (3), *supra* 49 M. 918 (F.B.) following 47 A. 722. See also 23 Bom. L.R. 713 following 47 A. 722. But where a complaint is dismissed under S. 203, *supra* after giving the accused an opportunity of being heard, an order directing further inquiry into the case under this section should not be made without giving notice to him, 27 C.W.N. 532=25 Cr. L.J. 140=76 Ind. Cas. 236. But this decision is of doubtful authority as there is no provision of law for issuing notice before process is issued against the accused. See 49 M. 918 following 47 A. 722. 23 Cr. L.J. 573 (2)=102 Ind. Cas. 511 (2). Where a complaint in a summons case is dismissed for default the order is one under S. 217, *supra*, and is tantamount to an acquittal and falls outside the purview of this section, 25 Cr. L.J. 359=77 Ind. Cas. 293.

✓ **Revision**—The High Court will not entertain an application unless the lower Court has been first moved, 23 A. 268; 43 A. 497; 36 C. 643; 18 L.W. 655; 14 C. 837; 14 B. 331; Ratanlal 419; 23 Cr. L.J. 544=102 Ind. Cas. 352. It is the practice not to interfere in

a commitment of the accused in the midst of a trial before the inferior Court, 27 Cr. L.J. 317-93 Ind. Cas. 435. The mere fact that the superior Court may take a different view of the evidence and the probabilities of the case will not justify its interference by setting aside the order of discharge, 25 Cr. L.J. 1026-81 Ind. Cas. 802; 26 Cr. L.J. 836-83 Ind. Cas. 822; Weir II, 255.

On examining the Record.—These words occur in Ss. 435 and 436 *supra* also, but the expression used in S. 439. *infra*, is "which otherwise comes to its knowledge." A Sessions Judge or District Magistrate must have the records before him when exercising powers under this section or Ss. 436 or 428, *infra*, but there is no such restriction imposed on the High Court when exercising powers of revision under S. 439, *infra*. See 30 C.W.N. 840-43 C.L.J. 113-27 Cr. L.J. 871-56 Ind. Cas. 119. The High Court in revision can also direct the commitment of a case to the Court of Session. This section only empowers the Courts named therein to call for the records but, what they have to do after calling for the records and examining them is stated in Ss. 436 to 439 of the Code, 32 M. 220 at 222. A Sessions Judge or District Magistrate may set aside an order of discharge *suo motu*, 33 M.L.J. 154-10 L.W. 672-21 Cr. L.J. 91-54 Ind. Cas. 491. Discretion given to a Sessions Judge by this section is very wide and if he has exercised that discretion well and committed the accused to the Court of Session, the High Court should be slow to interfere, 13 A.L.J. 111 where 26-A. 563 is followed. But a District Magistrate cannot act *suo motu* when a Sessions Judge had previously refused to interfere with an order of discharge 26 M. 477. Where a District Magistrate refused to call for records and commit an accused person to the Court of Sessions when the charge against him was still pending inquiry before an inferior Magistrate, that order is not an order refusing to revise an order of discharge and a Sessions Judge may act under this section and direct a commitment of the accused to the Court of Session after his discharge by the inferior Magistrate, 43 M. 330.

Under S. 435 or otherwise.—No indication is given of the ways otherwise than S. 435, where the record of the case is to be before the Court. The words "or otherwise" being words of general import following the words "under S. 435" must be construed according to the usual rule that they mean "not in any other way whatever" but "in any other way provided by the Code." For examples, in the case of an appeal, the appellate Court is empowered under S. 423, *supra*, to send for the records and this would be a case in point, 10 C. 268 at 272. The reasons for exercising the powers under this section are reasons which should arise upon materials to be found on record before the Court and not upon any extraneous matter, 1890 A.W.N. 147. The power can also be exercised on matters coming to the knowledge of a Judge on reliable information, e.g., information conveyed by the Famine Commissioner, Weir II, 538. See also 2 M. 38.

Case exclusively triable by Court of Session.—These words mean an offence shown as so triable in the eighth column of the second schedule to the Code, 1904 P.R. (Cr. J.) 60, following 1897 P.R. (Cr. J.) 3. The eighth column mentions what offences are exclusively triable by Court of Session. S. 435 *supra*, gives power to call for records and this section empowers commitment only when the offence is triable exclusively by the Court of Session, 42 M. 561 at 563; 53 C. 643. The case must be exclusively triable by a Court of Session for a Sessions Judge to direct a commitment even where a District Magistrate discharges the accused, 7 A. 853; 12 C. 473; 9 B. 100; 8 M. 18; 19 Cr. L.J. 801 (2)-46 Ind. Cas. 817 (2). A case does not come within this section merely because a Magistrate is of opinion that the offence could not be adequately punished by him, 1908 A.W.N. 189-8 Cr. L.J. 47. A direction to commit the accused for trial in a case where the offence with which the accused was charged is not triable exclusively by the Court of Session is bad in law, 15 M.L.J. 373; Ratanlal 42; 20 C. 633. A direction by a Court of Session to a Magistrate to commit the accused to Sessions for an offence under S. 471, I.P.O., was held to be beyond its power under this section as the offence is not one exclusively triable by the Court of Session, 42 M. 561. But some meaning must be given for the word "considers" used in this section. If a superior Court considers that the case pointing at an offence triable exclusively by the Court of Session was inquired into by the lower Court and the accused discharged, then a commitment may be directed, or at any rate a further inquiry under S. 430, *infra*, may be

ordered. But if the offence which the superior Court thinks made out by the facts was not the subject of an inquiry at all in the lower Court, then no commitment can be ordered under this section and the only course open to the superior Magistrate is to set aside the discharge and direct a further inquiry into the case. It is competent to a Sessions Judge to convict a person on a charge not exclusively triable, *e.g.*, one under S. 427, I.P.C., if it is intimately connected with a charge exclusively triable by the Sessions Court, *e.g.*, a charge under S. 436, I.P.C., and if it forms part of the same transaction, (See 16 Bom. L.R. 80=15 Cr. L.J. 292=23 Ind. Cas. 500), but it is clear that the above requirements are not satisfied in a direction for commitment on a charge under S. 390, I.P.C., the offence thereunder being totally different from the category of offences under Ss. 427 and 436, I.P.C., 53 C. 645 at 649.

Accused has been improperly discharged.—There must be an improper discharge and a commitment should not be ordered merely because the offence is exclusively triable by a Court of Session, Weir II, 260 or that the charge related to the conduct of a police officer and that it was desirable to have the case tried by the Sessions Court without recording a finding on the evidence that the accused was improperly discharged and the offence charged was of such important character which ought to go before the Court of Session, 1 Pat. L.J. 97=17 Cr. L.J. 330=35 Ind. Cas. 506. The fact that a superior Court might be disposed to take the view that the inferior Court discredited the prosecution evidence for insufficient reasons and discharged the accused is no ground for interference, Weir II, 255; 18 M.L.J. 57, but see 32 M. 220 (F.B.) where it was held that a misappreciation of evidence by the lower Court is a good ground for interference under this section. It is the duty of the superior Court under this section to consider all the grounds upon which the order of discharge has been passed including a consideration of the evidence which has not been believed or held to be insufficient to establish a *prima facie* case, 7 C.W.N. 77; 13 B. 376. This section contemplates a discharge of the accused only and not an acquittal of the offence, 20 C. 633; 23 M. 225. Where a Magistrate being of opinion that the facts did not disclose an offence exclusively triable by the Court of Session tried the accused for a minor charge and acquitted in spite of the prosecution pressing for the framing of a charge for the graver offence triable by the Court of Session, it was held that the Sessions Judge was entitled to direct a commitment under this section for the graver offence, 24 M. 136 (F.B.). The principle of this decision was explained in 41 M. 932 thus: The refusal of the Magistrate to frame a charge for the graver offence might be treated as an order of discharge in respect of that offence and this section would therefore give the Sessions Judge and District Magistrate power to direct the Magistrate to commit the accused to the Court of Session on the graver charge. But where the prosecution did not press for the framing of a charge for the graver offence and that offence was not even mentioned in the police charge-sheet on which the Sub-Magistrate took cognisance, the acquittal in such a case would be a bar to an order under this section, 41 M. 932 at 934. The acquittal of an accused on a charge framed does not necessarily imply that the Magistrate discharged him in respect of any other charge which might have been framed. The Magistrate must consciously do something or make some order which shows that in his opinion on the materials before him the accused should not be discharged for that offence—*Per Richardson, J.*, in 22 C.W.N. 117, following 23 M. 225 and 20 C. 633 and distinguishing 24 M. 136 (F.B.) but Teunon, J., took a different view and held that the order acquitting the accused of the minor offences was tantamount to an order discharging the accused of the graver offence and the fact that no charge was framed and the Magistrate was not asked to frame a charge under the graver section was immaterial.

Instead of directing a fresh inquiry.—This refers to the power conferred on superior officers under S. 436, *supra*, to order further inquiry into a case of discharge. The power of a Sessions Judge or District Magistrate is not restricted to order a commitment of the accused in a case triable exclusively by a Court of Session, 15 C. 608 (F.B.). If the evidence on record is sufficient then the discharge may be set aside and a commitment may be ordered. If fresh evidence is available or the evidence on record established some other offence than the one with regard to which a discharge has been made, in such cases a further inquiry will be the proper order, 14 M. 334 at 337. When a further inquiry is ordered the

discretion of the subordinate Magistrate to commit or not to the Court of Session is not to be fettered, 15 M. 39.

Upon the matter of which he has been discharged.—A commitment is to be upon the matter in respect of which there has been a discharge. This is in accordance with the decision in 19 W.R. (Cr.) 30. If the trial is to be on any other matter the power under S. 436, *supra*, or under proviso (b) of this section should be exercised.

Order him to be committed.—It is open to the superior Court to make a commitment itself or direct a subordinate Magistrate to make a commitment and there is nothing to show that the commitment should be made by the discharging Magistrate only. The words "order him to be committed" in this section do not mean more than to pass an order for commitment, 31 M. 40. No intervention of a Magistrate is necessary, 10 B. 319.

Proviso (a).—The accused must be given an opportunity to show cause and omission to do so vitiates the proceedings, 15 M L.J. 373 ; 6 M. 372 ; 7 C. 662. The opportunity must be a reasonable opportunity, *Ratanlal* 538. But where the District Magistrate failed to give notice to show cause and the committing Magistrate before committing the accused gave notice to the accused of showing cause it was held the omission of the District Magistrate to give notice was only an irregularity cured by S. 537, *infra*, *Ratanlal* 899. The language of this proviso shows that the commitment may be made by the Sessions Judge or District Magistrate as the power happens to be exercised by the one or the other, 10 B. 319 ; 28 C. 397. An order of commitment made without affording the accused an opportunity to show cause is illegal and vitiates the proceedings, 14 Cr. L.J. 603 (1) = 21 Ind. Cas. 377 (1).

Proviso (b).—This proviso refers to an inquiry into some offence other than the offence which was inquired into and which ended in a discharge. The Sessions Judge or District Magistrate is empowered to direct the Magistrate to inquire into this other offence.

Revision.—An order of commitment made under this section unlike an order under S. 213, *supra*, can be quashed by the High Court under Ss. 435 and 439, on points of law as well as on facts. S. 215, *supra*, empowers the High Court to quash commitment made under S. 213 only on a point of law. The High Court is entitled to go into facts as well as the law involved when called upon to revise an order of commitment under this section, 30 M. 224 ; 15 C. 603 at 621 ; 27 M. 54 ; 12 C.W.N. 117 = 6 C.L.J. 760 ; 25 Cr. L.J. 1689 = 81 Ind. Cas. 913 ; 7 C.W.N. 727 ; 15 Cr. L.J. 373 = 23 Ind. Cas. 731 ; 21 Cr. L.J. 328 = 53 Ind. Cas. 600. But the High Court should be most unwilling to interfere and should require strong grounds for setting aside an order of commitment made by a Sessions Judge to whom the widest discretion is given by this section, 26 A. 564 ; 13 A.L.J. 111 = 16 Cr. L.J. 139 = 27 Ind. Cas. 203.

438. (1) The Sessions Judge or District Magistrate may, if he

thinks fit, on examining under section 435 or other-

Report to High Court

wise the record of any proceeding, report for the

orders of the High Court the result of such examination, and, when such report contains a recommendation that a sentence be reversed or altered, may order that the execution of such sentence be suspended, and, if the accused is in confinement, that he be released on bail, or on his own bond.

(2) An Additional Sessions Judge shall have and may exercise all the powers of a Sessions Judge under this Chapter in respect of any case which may be transferred to him by or under any general or special order of the Sessions Judge.

Amendment.—In sub-section (2) the words "by or under the general or special order of the Sessions Judge" have been added. In addition to the Sessions Judge and District Magistrate, an Additional Sessions Judge is also empowered to report under this section, but his powers are restricted to cases transferred to him by the Sessions Judge by special or general order.

Scope of the section.—Under this section a Sessions Judge or a District Magistrate has no power to refer a case for the opinion of the High Court although such a power is conferred by S. 432, *supra*, on a Presidency Magistrate. Although the High Court has jurisdiction under S. 433, *infra*, to exercise its powers of revision whatever the source of its knowledge, it would not as a rule exercise its revisional powers in a case where the reporting officer has jurisdiction to dispose of the matter himself, 23 Cr. L.J. 978=105 Ind. Cas. 802; 15 Cr. L.J. 472 (2)=24 Ind. Cas. 352 (2). A District Magistrate cannot similarly report to the High Court a case of acquittal asking the High Court to set aside the acquittal in revision; he is entitled to move the Local Government to prefer an appeal to the High Court against the acquittal under S. 417 *supra*, 23 Cr. L.J. 672=110 Ind. Cas. 224. But the Patna High Court has taken a slightly different view. "It is obvious that the Local Government can only deal with a very small proportion of erroneous acquittals. It can therefore be reasonable to refuse to entertain a reference by the District Magistrate only when it is clear that the case is one in which the Local Government would be expected to move on account of its special importance to the administration but has failed to do so. This section covers all cases of irregularity and injustice including acquittals which come to the notice of the eyes and ears of the High Court. Manifestly it must cover at least cases of erroneous acquittals with which the High Court would interfere under S. 439, *infra* at the instance of a private party who comes direct to the High Court. The greatest caution must be exercised in whittling down a provision of law which is itself clear. The High Court will interfere in a reference by the Sessions Judge even though it may not do so at the instance of the District Magistrate," 7 Pat. 579 at 581-582. See 43 C. 703 at 703 where the report of a District Magistrate to reverse an acquittal when through the Local Government an appeal could be filed if the acquittal was improper was considered to be a revision at the instance of a private party. See also 56 C. 925, which follows, 43 C. 703. The Code does not contemplate that a representation made by the Police to the District Magistrate in the form of an official letter should be taken into consideration by the High Court as ground for setting aside an order passed by a criminal Court and the District Magistrate is wrong in treating such representation as affording ground for his reference under this section, 26 A L.J. 76=23 Cr. L.J. 846=105 Ind. Cas. 658.

Sessions Judge or District Magistrate may report.—In making reports to the High Court under this section the wholesome rule of conduct for the observance of District Magistrates in their relation with Subordinate Magistrates as stated in the *Report of the Indian Police Commission, 1902-03 para 127* is worth noting. "If in regard to any case the District Magistrate thinks it necessary to interfere, he should proceed in open Court in the formal manner prescribed by the Criminal Procedure Code. If he thinks it is enough to merely point out any comparatively unimportant mistake to the Subordinate Magistrate he should do so in a courteous memorandum or in a personal interview after perusal of the records. He should also show himself ready to give praise for good work as to police mistakes or failure. Nothing is more important than to preserve the importance of the Magistracy while aiming at their improvement and to prevent their having any ground for believing that their work will be condemned on an *ex parte* statement by the Police." The District Magistrate has two functions. (1) Head of the police responsible for the punishment of criminals; (2) Magistrate and as such subordinate to the Sessions Judge. In his capacity as head of the police he might well apply for revision of an inadequate sentence passed by the Sessions Judge. To allow a subordinate to get his superior's orders modified by applying to an authority superior to both, would be, in most cases improper. It was for that reason that High Courts have invariably refused to act on letters of reference from District Magistrates asking for revision of orders of the Sessions Judges. The proper course in such cases for the District Magistrate, is to

more the Public Prosecutor, but that is not enough. The sanction of the Local Government should also be obtained, not necessarily before filing such application, but before proceeding with it. The power of revision in such cases is useful and must be exercised to prevent judicial idiosyncrasies working harm, 26 Cr. L.J. 177=83 Ind. Cas. 881. Where a District Magistrate is of opinion that an order of acquittal is wrong and should be set aside, he should request the Local Government to prefer an appeal to the High Court under S. 417 *supra*, and should not report the case for the orders of the High Court under this section, *Mad. Cr. Rules, of Pr. Rule. 374*. And such reports stand in no higher footing than one by a private prosecutor for revision, 56 C. 924, *following*, 41 C. 703. This section authorises a District Magistrate to report to the High Court on examination of the records of the proceedings of inferior Courts, but such reports should only be made in cases where the proceedings are not in themselves the subject of a revision or appeal pending before him; his duty is therefore to pass a judicial order. This section is not intended to enable the District Magistrate to get the opinion of the High Court on a question of law arising in a case pending before him or to transfer the decision of a difficult case pending before him to the High Court, 3 Cr. L. Rev. 356=15 Cr. L.J. 472=24 Ind. Cas. 352. A District Magistrate has no power to question the propriety of a judgment or sentence passed by a Sessions Judge and to make a report to the High Court for orders under this section, 23 C. 250; 41 B. 47; 5 Lah. 11. There should be no judicial action by way of criticism by an inferior Court of the superior Court, 46 A. 551. It would be contrary to every principle to allow a District Magistrate to report to the High Court against an order made by a Sessions Judge to whom he is subordinate. The words "or otherwise" occurring in this section were not intended to confer on a Magistrate the power to question the propriety of an order of a Sessions Judge, 28 A. 91; 27 Cr. L.J. 327=92 Ind. Cas. 743. The entertainment of such reports by District Magistrates would lead to nothing but friction between the local authorities and would be apt to prove detrimental to the administration, 36 A. 378; 2 Cr. L.J. 515; 8 Cr. L.J. 161, *followed in* 27 Cr. L.J. 1253=95 Ind. Cas. 101. The only way in which a District Magistrate could challenge the decision of a Sessions Judge is to communicate with the Public Prosecutor and it is open to the Public Prosecutor after receiving proper instructions from the Local Government to place the matter before the High Court on his own initiative, 23 C. 239; 18 C. 186; 6 C. L. R. 245; 36 A. 378; 49 A. 413; 9 A. 362; 41 B. 47; 27 Cr. L.J. 327=92 Ind. Cas. 743; 27 Cr. L.J. 430=93 Ind. Cas. 159; 23 M. L. J. 732=(1912) M. W. N. 812=12 M. L. T. 170=13 Cr. L. J. 714=16 Ind. Cas. 522; 6 Bom. L. R. 1099. But on the other hand the Sessions Judge is authorised to report for orders to the High Court the order of a District Magistrate, 3 Lah. 23; 26 M. 477; 17 M. L. J. 153. Where a Sessions Judge finds that a Magistrate empowered under S. 30, *supra*, has in fact tried a case which he is not competent to try he should report the case to the High Court for an order that the accused be committed to the Court of Session for trial, 27 Cr. L. J. 543=95 Ind. Cas. 766. A Sessions Judge ought not to refer a case for enhancement unless he has heard the appeal and come to the conclusion that the conviction is justified and then only he should make a reference under this section, 6 A. L. J. 421; 10 Cr. L. J. 27=2 Ind. Cas. 475. Reference for enhancement should be made promptly. The High Court declined to enhance the sentence nine months after conviction even though the sentence originally passed was inadequate, (1912) M. W. N. 50=13 Cr. L. J. 121=13 Ind. Cas. 777; see also 11 Cr. L. J. 93=4 Ind. Cas. 980; 14 Cr. L. J. 595=31 Ind. Cas. 471. It is the duty of the High Court when a case is reported to it for enhancement of sentence to see whether on the record, the sentence passed by the lower Court is clearly inadequate to the offence, 25 Cr. L. J. 821=88 Ind. Cas. 469. If a police officer of several years standing cannot be trusted to investigate a simple case of theft without taking bribes there would be no security whatever for detection of crime or the administration of justice. The purity of the police force is a matter of vital importance to the community and a case of corruption by a police officer cannot be passed over with a light sentence. On the report of the District Magistrate two months' simple imprisonment was enhanced to ten months' rigorous imprisonment by the High Court under this section, 10 Cr. L. J. 217. A District Magistrate is not competent to make a reference under this section for enhancement of sentence passed by a Sessions Judge, 25 Cr. L. J. 923=81 Ind. Cas. 544; 5 Lah. 11. Ordinarily the High Court will not entertain a reference the object of which is to have an

order of acquittal passed by an inferior Court set aside, 5 Lah. 16. A District Magistrate making a reference to the High Court under this section has no power to take evidence and if he has power, it is only for the purpose of recommendation to the High Court and the evidence so recorded could not form the basis of an order by the High Court, for example, to award maintenance for children under S. 438, *infra*, 3 Cr. L. Rev. 430. When a revision petition filed by the accused was dismissed without notice to the public prosecutor that fact will not preclude a reference by the District Magistrate for enhancement of sentence. The order dismissing the revision by the accused dealt with the legality of the conviction and could not be construed as an adjudication on the adequacy or otherwise of the sentence, 26 Cr. L.J. 583=53 Ind. Cas. 727. A Sessions Judge or a District Magistrate is not bound to refer every case in which he detects an error to the High Court. It is only discretionary, 23 W.R. (Cr.) 30. No report is to be made where the recommendation would be merely to alter the conviction of an offence into another cognate offence, 9 C. 847. A reference should not be made to the High Court under this section merely for obtaining the opinion of the High Court on a question of law especially when the referring officer does not really dissent from the conclusion of the trial Court, 47 A. 409. Nor can a report be made by a District Magistrate after taking fresh evidence, 12 A.L.J. 461. When on examining the records a District Magistrate finds that a Subordinate Magistrate has wrongly decided a question of jurisdiction he is not entitled to quash the proceedings in the exercise of his revisional powers but the proper procedure for him is to report the case to the High Court under this section after giving notice to the parties and giving them an opportunity of being heard, 49 C.L.J. 62. A District Magistrate is not competent to refer to the High Court a point of law nor can he transfer the decision of a difficult case on his file to the High Court, 15 Cr. L.J. 472=24 Ind. Cas. 352. In an appeal under S. 515 *infra*, before the District Magistrate, the Magistrate cannot make a reference under this section to the High Court ostensibly because he doubts the correctness of certain rulings of the High Court. It is his business to dispose of the appeal before him and he cannot divest himself of his powers as an appellate Court merely because he either misunderstands or disapproves of certain decided cases. The appreciation of rulings though a necessary part of his equipment is of less importance than a thorough knowledge of the Code by which he is bound, 15 Cr. L.J. 433 at 437=24 Ind. Cas. 573. When there is an illegality the case should be reported to the High Court and it must be left to the High Court to determine whether the illegality requires correction, Weir II, 564. A case should not be reported to the High Court merely because the conviction is bad on the merits unless it is very clear that the conviction is manifestly wrong and there is no reasonable doubt about it. The power of the High Court to interfere on the merits is undoubted but it will not exercise its power so as virtually to give a right of appeal and the reporting officers must bear in mind the limitation which exists in practice as regards the exercise of powers under this section, 49 A. 554. The mere fact that a different conclusion might have been come to on the evidence is no sufficient ground for interference, 28 Cr. L.J. 946=105 Ind. Cas. 638. See also 33 M.L.T. 15=28 Cr. L.J. 207=99 Ind. Cas. 943; 26 M.L.J. 160; 22 C. 998; 4 Bom. L.R. 686; Weir II, 255. Cases of acquittal are not to be reported under this section to the High Court, 24 A. 346; 15 M. 36 and such a reference cannot be entertained by the High Court, 25 A. 128, where a reporting officer could himself dispose of the matter no report should be made to the High Court, Ratanlal 290. When reporting to the High Court there should be a definite recommendation by the reporting officer, 27 A. 23. Where there has been a conviction and substantial sentence also was passed, the High Court will not entertain a reference under this section from the District Magistrate on the ground that the trial was irregular and therefore the accused should be re-tried, 23 Cr. L.J. 757=103 Ind. Cas. 837. A brief abstract of the case and the grounds on which the reference is made should be stated, 9 Cr. L.J. 502=2 Ind. Cas. 159. A reference should be made in the form prescribed by the High Court Circulars, 30 C.W.N. 646=26 Cr. L.J. 1055=87 Ind. Cas. 975.

Or otherwise.—These words are put in this section to meet exceptional cases. Where the Sessions Judge at first refused to make a reference but he did so subsequently when certain new facts were brought to his notice, the reference made by the Judge is within jurisdiction and is in proper form, 29 Bom. L.R. 480=28 Cr. L.J. 896=104 Ind. Cas. 912.

move the Public Prosecutor, but that is not enough. The sanction of the Local Government should also be obtained, not necessarily before filing such application, but before proceeding with it. The power of revision in such cases is useful and must be exercised to prevent judicial idiosyncrasies working harm, 26 Cr. L.J. 177=83 Ind. Cas. 881. Where a District Magistrate is of opinion that an order of acquittal is wrong and should be set aside, he should request the Local Government to prefer an appeal to the High Court under S. 417 *supra*, and should not report the case for the orders of the High Court under this section, *Mad. Cr. Rules. of Pr. Rule. 274*. And such reports stand in no higher footing than one by a private prosecutor for revision, 56 C. 924, *following*. 43 C. 703. This section authorises a District Magistrate to report to the High Court on examination of the records of the proceedings of inferior Courts, but such reports should only be made in cases where the proceedings are not in themselves the subject of a revision or appeal pending before him; his duty is therefore to pass a judicial order. This section is not intended to enable the District Magistrate to get the opinion of the High Court on a question of law arising in a case pending before him or to transfer the decision of a difficult case pending before him to the High Court, 3 Cr. L. Rev. 356=15 Cr. L.J. 472=24 Ind. Cas. 352. A District Magistrate has no power to question the propriety of a judgment or sentence passed by a Sessions Judge and to make a report to the High Court for orders under this section, 23 C. 250; 41 B. 47; 5 Lah. 11. There should be no judicial action by way of criticism by an inferior Court of the superior Court, 46 A. 851. It would be contrary to every principle to allow a District Magistrate to report to the High Court against an order made by a Sessions Judge to whom he is subordinate. The words "*or otherwise*" occurring in this section were not intended to confer on a Magistrate the power to question the propriety of an order of a Sessions Judge, 28 A. 81; 27 Cr. L.J. 327=92 Ind. Cas. 743. The entertainment of such reports by District Magistrates would lead to nothing but friction between the local authorities and would be apt to prove detrimental to the administration, 36 A. 378; 2 Cr. L.J. 515; 8 Cr. L.J. 161, *followed* in 27 Cr. L.J. 1253=98 Ind. Cas. 101. The only way in which a District Magistrate could challenge the decision of a Sessions Judge is to communicate with the Public Prosecutor and it is open to the Public Prosecutor after receiving proper instructions from the Local Government to place the matter before the High Court on his own initiative, 23 C. 249; 18 C. 186; 6 C. L. R. 245, 36 A. 378; 49 A. 433; 9 A. 362, 41 B. 47; 27 Cr. L.J. 327=92 Ind. Cas. 743; 27 Cr. L.J. 430=93 Ind. Cas. 158; 23 M. L.J. 732=(1912) M.W.N. 812=12 M.L.T. 170=13 Cr. L.J. 714=16 Ind. Cas. 522; 6 Bom. L.R. 1099. But on the other hand the Sessions Judge is authorised to report for orders to the High Court the order of a District Magistrate, 3 Lah. 23; 26 M. 477; 17 M.L.J. 153. Where a Sessions Judge finds that a Magistrate empowered under S. 80, *supra*, has in fact tried a case which he is not competent to try he should report the case to the High Court for an order that the accused be committed to the Court of Session for trial, 27 Cr. L.J. 845=95 Ind. Cas. 766. A Sessions Judge ought not to refer a case for enhancement unless he has heard the appeal and come to the conclusion that the conviction is justified and then only he should make a reference under this section, 6 A.L.J. 421; 10 Cr. L.J. 27=2 Ind. Cas. 475. Reference for enhancement should be made promptly. The High Court declined to enhance the sentence nine months after conviction even though the sentence originally passed was inadequate, (1912) M.W.N. 50=13 Cr. L.J. 121=13 Ind. Cas. 777; see also 11 Cr. L.J. 99=5 Ind. Cas. 980; 14 Cr. L.J. 589=21 Ind. Cas. 471. It is the duty of the High Court when a case is reported to it for enhancement of sentence to see whether on the record, the sentence passed by the lower Court is clearly inadequate to the offence, 25 Cr. L.J. 821=86 Ind. Cas. 469. If a police officer of several years standing cannot be trusted to investigate a simple case of theft without taking bribes there would be no security whatever for detection of crime or the administration of justice. The purity of the police force is a matter of vital importance to the community and a case of corruption by a police officer cannot be passed over with a light sentence. On the report of the District Magistrate two months' simple imprisonment was enhanced to ten months' rigorous imprisonment by the High Court under this section, 10 Cr. L.J. 217. A District Magistrate is not competent to make a reference under this section for enhancement of sentence passed by a Sessions Judge, 25 Cr. L.J. 928=81 Ind. Cas. 644; 5 Lah. 11. Ordinarily the High Court will not entertain a reference the object of which is to have an

order of acquittal passed by an inferior Court set aside, 5 Lah. 16. A District Magistrate making a reference to the High Court under this section has no power to take evidence and if he has power, it is only for the purpose of recommendation to the High Court and the evidence so recorded could not form the basis of an order by the High Court, for example, to award maintenance for children under S. 488, *infra*, 3 Cr. L. Rev. 430. When a revision petition filed by the accused was dismissed without notice to the public prosecutor that fact will not preclude a reference by the District Magistrate for enhancement of sentence. The order dismissing the revision by the accused dealt with the legality of the conviction and could not be construed as an adjudication on the adequacy or otherwise of the sentence, 26 Cr. L.J. 583=85 Ind. Cas. 727. A Sessions Judge or a District Magistrate is not bound to refer every case in which he detects an error to the High Court. It is only discretionary, 23 W.R. (Cr.) 30. No report is to be made where the recommendation would be merely to alter the conviction of an offence into another cognate offence, 9 C. 847. A reference should not be made to the High Court under this section merely for obtaining the opinion of the High Court on a question of law especially when the referring officer does not really dissent from the conclusion of the trial Court, 47 A. 409. Nor can a report be made by a District Magistrate after taking fresh evidence, 12 A.L.J. 461. When on examining the records a District Magistrate finds that a Subordinate Magistrate has wrongly decided a question of jurisdiction he is not entitled to quash the proceedings in the exercise of his revisional powers but the proper procedure for him is to report the case to the High Court under this section after giving notice to the parties and giving them an opportunity of being heard, 49 C.L.J. 62. A District Magistrate is not competent to refer to the High Court a point of law nor can he transfer the decision of a difficult case on his file to the High Court, 15 Cr. L.J. 472=25 Ind. Cas. 352. In an appeal under S. 515 *infra*, before the District Magistrate, the Magistrate cannot make a reference under this section to the High Court ostensibly because he doubts the correctness of certain rulings of the High Court. It is his business to dispose of the appeal before him and he cannot divest himself of his powers as an appellate Court merely because he either misunderstands or disapproves of certain decided cases. The appreciation of rulings though a necessary part of his equipment is of less importance than a thorough knowledge of the Code by which he is bound, 15 Cr. L.J. 485 at 487=25 Ind. Cas. 573. When there is an illegality the case should be reported to the High Court and it must be left to the High Court to determine whether the illegality requires correction, Weir II, 564. A case should not be reported to the High Court merely because the conviction is bad on the merits unless it is very clear that the conviction is manifestly wrong and there is no reasonable doubt about it. The power of the High Court to interfere on the merits is undoubted but it will not exercise its power so as virtually to give a right of appeal and the reporting officers must bear in mind the limitation which exists in practice as regards the exercise of powers under this section, 49 A. 551. The mere fact that a different conclusion might have been come to on the evidence is no sufficient ground for interference, 28 Cr. L.J. 946=103 Ind. Cas. 658. See also 33 M.L.T. 15=28 Cr. L.J. 207=99 Ind. Cas. 943; 26 M.L.J. 160; 22 C. 998; 4 Bom. L.R. 686; Weir II, 235. Cases of acquittal are not to be reported under this section to the High Court, 24 A. 346; 15 M. 36 and such a reference cannot be entertained by the High Court, 25 A. 128, where a reporting officer could himself dispose of the matter no report should be made to the High Court, Ratanlal 290. When reporting to the High Court there should be a definite recommendation by the reporting officer, 27 A. 25. Where there has been a conviction and substantial sentence also was passed, the High Court will not entertain a reference under this section from the District Magistrate on the ground that the trial was irregular and therefore the accused should be re-tried, 28 Cr. L.J. 757=103 Ind. Cas. 837. A brief abstract of the case and the grounds on which the reference is made should be stated, 9 Cr. L.J. 502=2 Ind. Cas. 159. A reference should be made in the form prescribed by the High Court Circulars, 30 C.W.N. 646=28 Cr. L.J. 1053=87 Ind. Cas. 975.

Or otherwise.—These words are put in this section to meet exceptional cases. Where the Sessions Judge at first refused to make a reference but he did so subsequently when certain new facts were brought to his notice, the reference made by the Judge is with jurisdiction and is in proper form, 29 Bom. L.R. 480=28 Cr. L.J. 896=104 Ind. Cas. 912.

revision with a finding of fact when the occasion requires it and it will do so when it is satisfied that the finding of the lower Court is manifestly erroneous and a miscarriage of justice would result from it if left uncorrected, 17 C.W.N. 379=16 C.L.J. 453=13 Cr. L.J. 897=17 Ind. Cas. 993. In the ordinary course of things, findings of fact are accepted by the Revisional Court as binding upon it. But revision would be an idle farce if the Revisional Court had not the power, which has been exercised a hundred, possibly a thousand times throughout the High Courts in India, to look into the evidence itself and see if those findings can be justified by what appears upon the record. A Revisional Court does not decide the balance of credibility between two conflicting sets of witnesses or two conflicting issues of fact which are either perverse or have been arrived at contrary to well-established principles of law. Much injustice may be done by applying to criminal proceedings the precise and pedantic requirements of Civil Procedure. There is no such language as "pleadings" in a Criminal Court, 48 A. 64; 39 C.L.J. 236=23 Cr. L.J. 1258=82 Ind. Cas. 266; 23 Cr. L.J. 1368=82 Ind. Cas. 760; 25 Cr. L.J. 435=77 Ind. Cas. 723. It is not generally speaking within the function of the High Court to go behind the findings of fact, in revision, 27 Cr. L.J. 74=91 Ind. Cas. 250; 29 Cr. L.J. 86=106 Ind. Cas. 678. It is not the practice in the High Court to interfere in revision merely because the evidence has not been properly appreciated by the trial Court. The law does not contemplate that a revision case is to be argued as if it were a criminal appeal on the facts, 28 Cr. L.J. 207=99 Ind. Cas. 843. Ordinarily the High Court will not in revision go into facts in order to satisfy itself as to the correctness and propriety of the findings arrived at by the lower Court. The conclusions of the lower Court may be wrong; it may be that the High Court trying the case, on appeal may have come to a different conclusion but the Legislature has made the lower Courts the Courts of appeal and the High Court cannot admit a second appeal in a criminal matter on the ground of misappreciation of evidence, Ratanlal 177. But in exceptional cases it is not only open to the High Court to examine the evidence but it is its duty to do so as the High Court is not debarred from going into the evidence, 26 Cr. L.J. 113=83 Ind. Cas. 673; 26 Cr. L.J. 393=84 Ind. Cas. 937. There is ample authority for the position that the High Court as a Court of Revision may re-examine the evidence if there are *prima facie* grounds for so doing, more especially when the accused has been given a non-appealable sentence and has no means of vindicating his character except by way of revision, 19 Cr. L.J. 386=43 Ind. Cas. 1002; 23 C.W.N. 438, or when the interests of justice require such interference, *eg*, where the dispute between the parties is purely of a Civil nature and the conviction had is one of cheating, 28 Cr. L.J. 834=104 Ind. Cas. 450; 29 Cr. L.J. 86=106 Ind. Cas. 678; or where there is no evidence on record to sustain a finding or an order, 9 C.W.N. 829, 5 C.W.N. 411; 34 C. 840; 25 M.L.T. 173; 2 A.L.J. 53; 9 L.B.R. 203, or when there is a substantial error of law to justify interference, 28 Cr. L.J. 207=99 Ind. Cas. 813; 27 Cr. L.J. 74=91 Ind. Cas. 250; 29 Cr. L.J. 86=103 Ind. Cas. 678.

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For myself I say emphatically that this discretion ought not to be crystallised, as it would become in course of time, by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion, which the Legislature has committed to them. This discretion, like all other judicial discretions ought, so far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case.' These weighty words appear to me to breathe the spirit that should guide us in the exercise of our discretionary power of revision. This may perhaps increase our responsibility and add to our labours, but no one would shrink the one or grudge the other." The power of revision is to be exercised in exceptional cases and as a last resort after all other available remedies have been exhausted. 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of Subordinate Courts and it is safer to ascertain a broad and comprehensive view of the facts and then to ascertain whether there has been a failure of justice. This was the course adopted in 2 C.L.J. 524. Where a discretion has been exercised by a Court of competent jurisdiction which is not on the face of it arbitrary, the practice of the High Court as a Court of Revision is not to inquire into the reasons given by the lower Court to interfere in revision, 2 Pat. 708. Mere illegality of procedure of the lower Court is not a ground for interference under this section unless it is proved that the accused had suffered a hardship through such illegality, 27 Cr. L.J. 475-93 Ind. Cas. 699; 27 Cr. L.J. 727-93 Ind. Cas. 55. The High Court will not interfere in revision where the illegality in the trial is purely technical and has not prejudiced the petitioner, 27 Cr. L.J. 558-93 Ind. Cas. 1054. The High Court is not bound to interfere in revision with an order under S. 562, *infra*, even in a case where it is illegal, 27 Cr. L.J. 624-94 Ind. Cas. 368. The powers of the High Court under this section are wholly discretionary and in 28 B. 533 at 566, *Jenkins, C.J.*, observes thus: "If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion, and when it is argued that judicial decisions have, deprived us of the power that the Legislature has given us, I recall the words of an eminent English Judge, 'I desire to repeat' he said, 'what I have said before, that this controlling power of this Court is a discretionary power and must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances which vary greatly. For myself I say emphatically that this discretion ought not to be crystallised, as it would become in course of time, by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion, which the Legislature has committed to them. This discretion, like all other judicial discretions ought, so far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case' These weighty words appear to me to breathe the spirit that should guide us in the exercise of our discretionary power of revision. This may perhaps increase our responsibility and add to our labours, but no one would shrink the one or grudge the other." The power of revision is to be exercised in exceptional cases and as a last resort after all other available remedies have been exhausted. It is essentially a discretionary power of control not to be crystallised under hard and fast rules, but to be left untrammelled by the exigencies of each case, 9 Cr. L.J. 211-1 Ind. Cas. 239, relying on 28 B. 533 22 C. 998. See also 26 Cr. L.J. 466-85 Ind. Cas. 145 and 26 Cr. L.J. 1101-88 Ind. Cas. 189. 'Discretion' says Lord Mansfield when applied to Courts of Justice, 'means sound discretion guided by law. It must be governed by rule, and not by human caprice. It must not be arbitrary, vague and fanciful but legal and regular.' The controlling power of the High Court in revision is by its terms entirely discretionary and the Court is not bound in revision to set aside a conviction in every case in which an illegality has been committed especially where no prejudice is shown to have been caused by such illegality, 4 Cr. L.J. 75-1306 P.R. (Cr.) 5, followed in 29 Cr. L.J. 905-111 Ind. Cas. 685. It is not imperative on the High Court to set aside every void order which comes to its notice when the person aggrieved does not move it to do so, 7 Cr. L.J. 422-4 L.B.R. 143. When a point is not taken in the Court of first instance or in the appellate Court it has been the rule of the High Court not to interfere in revision unless a miscarriage of justice has been occasioned, 21 Cr. L.J. 56-54 Ind. Cas. 528. Absence of evidence necessary to support a finding or order of the lower Court is a ground for revision, 9 C.W.N. 829; 5 C.W.N. 411; 34 C. 840; 25 M.L.T. 175; 2 A.L.J. 53; 9 L.B.R. 398. Interference in revision in criminal cases is purely discretionary and the Court will not interfere in belated applications for revision as the finality of criminal orders left in doubt for a long time, 13 Cr. L.J. 531-15 Ind. Cas. 893. Although the High Court has a very wide discretion under this section when it is satisfied that a conviction has been obtained in bad law, it is not necessarily bound to go into the question whether on the facts the conviction for a lesser offence might or might not be recorded, 41 A. 867. It has been the long practice of the High Court not to interfere on facts in absolute rule, 20 A.L.J. 276; 9 Bom. L.R. 703; 8 B. 197; 24 Cr. Cas. 897; 25 Cr. L.J. 274-76 Ind. Cas. 870; 25 Cr. L.J. 1028-84 Ind. Cas. 476-72 Ind. Cas. 892; 24 Cr. L.J. 203-71 Ind. Cas. 667; 26 Cr. L.J. 527-85 Ind. Cas. 357; 22 L.W. 631.

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The High Court is not bound to interfere in revision with an order under S. 562, *infra*, even in a case where it is illegal, 27 Cr. L.J. 624=94 Ind. Cas. 353. The powers of the High Court under this section are wholly discretionary and in 28 B. 533 at 566, *Jenkins, C.J.*, observes that: "If we have been entrusted with the responsibility of a wide discretion, we should be the last to attempt to fetter that discretion, and when it is argued that judicial decisions have, deprived us of the power that the Legislature has given us, I recall the words of an eminent English Judge, 'I desire to repeat' he said, 'what I have said before, that this controlling power of this Court is a discretionary power and must be exercised with regard to all the circumstances of each particular case, anxious attention being given to the said circumstances which vary greatly. For myself I say emphatically that this discretion ought not to be crystallised, as it would become in course of time, by one Judge attempting to prescribe definite rules with a view to bind other Judges in the exercise of the discretion, which the Legislature has committed to them. This discretion, like all other judicial discretions ought, so far as practicable, to be left untrammelled and free, so as to be fairly exercised according to the exigencies of each case.' These weighty words appear to me to breathe the spirit that should guide us in the exercise of our discretionary power of revision. This may perhaps increase our responsibility and add to our labours, but no one would shrink the one or grudge the other." The power of revision is to be exercised in exceptional cases and as a last resort after all other available remedies have been exhausted. It is essentially a discretionary power of control not to be crystallised under hard and fast rules, but to be left untrammelled by the exigencies of each case, 9 Cr. L.J. 211=1 Ind. Cas. 238, relying on 28 B. 533 22 C. 998. See also 26 Cr. L.J. 466=85 Ind. Cas. 143 and 26 Cr. L.J. 1101=86 Ind. Cas. 189. 'Discretion' says Lord Mansfield when applied to Courts of Justice, 'means sound discretion guided by law. It must be governed by rule, and not by human caprice. It must not be arbitrary, vague and fanciful but legal and regular.' The controlling power of the High Court in revision is by its terms entirely discretionary and the Court is not bound in revision to set aside a conviction in every case in which an illegality has been committed especially where no prejudice is shown to have been caused by such illegality, 4 Cr. L.J. 75=1706 P.R. (Cr.) 5, followed in 29 Cr. L.J. 905=111 Ind. Cas. 665. It is not imperative on the High Court to set aside every void order which comes to its notice when the person aggrieved does not move it to do so, 7 Cr. L.J. 422=4 L.B.R. 143. When a point is not taken in the Court of first instance or in the appellate Court it has been the rule of the High Court not to interfere in revision unless a miscarriage of justice has been occasioned, 21 Cr. L.J. 66=84 Ind. Cas. 496. Absence of evidence necessary to support a finding or order of the lower Court is a ground for revision, 9 C.W.N. 829, 5 C.W.N. 411; 34 C. 840; 25 M.L.T. 178; 2 A.L.J. 83; 9 L.B.R. 208. Interference in revision in criminal cases is purely discretionary and the Court will refuse to interfere in belated applications for revision as the finality of criminal orders should not be left in doubt for a long time, 13 Cr. L.J. 531=15 Ind. Cas. 801. Although the High Court has a very wide discretion under this section when it is satisfied that a conviction had in bad in law, it is not necessarily bound to go into the question whether on the facts found a conviction for a lesser offence might or might not be recorded, 41 A. 587. Although it has been the long practice of the High Court not to interfere on facts in revision yet it is not an absolute rule, 20 A.L.J. 278; 9 Bom. L.R. 703; 8 B. 197; 25 Cr. L.J. 1973=81 Ind. Cas. 897; 25 Cr. L.J. 273=76 Ind. Cas. 870; 25 Cr. L.J. 1026=81 Ind. Cas. 802; 24 Cr. L.J. 476=72 Ind. Cas. 892; 24 Cr. L.J. 203=71 Ind. Cas. 667; 26 Cr. L.J. 878=84 Ind. Cas. 669; 25 Cr. L.J. 527=85 Ind. Cas. 367; 22 L.W. 831. Objection

illegality of a conviction

e.g., misjoinder, can be raised in revision for the first time even though no objection was taken in the Courts below. If the trial is bad no question of prejudice arises and there is no obligation cast on an accused person when the trial is illegal to prove prejudice, 25 Cr. L.J. 807=81 Ind. Cas. 343. It is necessary in revision to see whether there has been any error in the law, any irregularity, any abuse or failure to exercise judicial discretion which would justify interference in revision, 23 A. 249. Ordinarily a finding of fact cannot be interfered with in revision. 14 Cr. L.J. 565=21 Ind. Cas. 467; 27 Cr. L.J. 1233=93 Ind. Cas. 47; 27 Cr. L.J. 74=91 Ind. Cas. 250. Where the accused was convicted by a Magistrate of an offence when the facts proved disclosed the commission of an offence exclusively triable by a Court of Session, the High Court in revision set aside the conviction and directed a commitment, 30 C.W.N. 840=43 C.L.J. 113=27 Cr. L.J. 871=96 Ind. Cas. 119, where 5 C. 717 is referred to. Similarly in 6 M. 396, the High Court interfered in revision and ordered a retrial in a case against a Head Constable of many years service who was convicted on a summary trial of criminal intimidation in preventing a person giving evidence of a serious crime holding that the case was not a fit one for summarily depriving the right of appeal to the accused. But in 30 Cr.L.J. 869=118 Ind. Cas. 312, it was held that where a Railway watchman was convicted of theft of a silver topped stick from a Railway carriage in a summary trial, the trial was held not bad and the reasoning in 6 M. 396 no longer applied since the amendment in, 1923 of S. 414, *supra*, gave a right of appeal when any sentence of imprisonment is passed.

The object of the Legislature in conferring this revisional jurisdiction is, that superior Courts should have a kind of parental or supervisory jurisdiction to correct miscarriage of justice arising from misconception of law irregularities in procedure, neglect of proper precautions or apparent harshness of punishment, 29 Cr. L.J. 446=108 Ind. Cas. 567. Only in cases of (1) of defective investigation, (2) of failure to consider important evidence, (3) of consideration of evidence from a wrong point of view, (4) of contravention of any express provision of law, (5) of conviction upon facts which will not support the same, will the revisionary powers of the High Court be exercised, 31 M. 133 at 135. Absence of evidence on record to support a conviction is good ground for revision, 2 A.L.J. 53=2 Cr. L.J. 22; 11 Cr. L.J. 97=4 Ind. Cas. 978. Power of revision will be exercised when there is a misreading of the documentary evidence and the fundamental errors in principle which vitiate the conduct and disposal of the case, 28 B. 479 at 501. Powers of revision are to be exercised in exceptional cases and as the last resort when all other available remedies have been exhausted, 1884 A.W.N. 293; 22 C. 993; 28 B. 533. Great delay in applying to the High Court for revision will be a ground for not exercising the same, 8 A. 514, and in proper case the High Court may exercise its powers of revision even after the expiry of the sentence, 7 A. 135. Once a revision petition is dismissed on the merits or for default, the rules of justice equity and good conscience require that no other petition of the same matter should be entertained, (1915) M.W.N. 786=15 Cr. L.J. 697=30 Ind. Cas. 743 where 23 M.L.J. 371 is followed. The High Court rarely interferes in revision in pending cases except where it is *prima facie* vexatious and interference is clearly required to prevent abuse of process of Court 9 Cr. L.J. 151=1 Ind. Cas. 93. If a charge is framed by the Magistrate where none should have been framed it might be said without violence to the language of the Code that the procedure is irregular and the High Court has power to interfere, 23 A.L.J. 21; 25 Cr. L.J. 749=86 Ind. Cas. 294; 39 M. 561. An order passed by a District Magistrate or Chief Presidency Magistrate under S. 7 of the Indian Extradition Act XV of 1903 is a *judicial* order and not an *executive* order and can therefore be revised by the High Court under this section or under S. 561 A, *infra*, or can be interfered with under S. 491, *infra*, 31 Bom. L.R. 62 following 7 B.H.C.R. 483; 41 C. 493; 1 Pat. 97 and dissenting from 42 C. 793. The High Court cannot interfere under this section with orders of Village Panchayat Courts established under Act II of 1920, but the remedy is under S. 107 of the Government of India Act under which the High Court can interfere in revision, (1925) M.W.N. 603. The High Court has power to revise the order of the Chief Presidency Magistrate under the provisions of the *Maintenance Orders Enforcement Act, 1921*. The Chief Presidency Magistrate is an *inferior Criminal Court* within the meaning of S. 435, *supra*, and the revisional

powers of the High Court are further declared by S. 107 of the Government of India Act and by the provisions of the Letters Patent, and Act XVIII of 1921, nowhere says that orders by Presidency Magistrate under the Act are final 52 B. 282. Where a youthful offender of fourteen and a half years was illegally sentenced to six months' rigorous imprisonment, under S. 411, I.P.C., and in lieu of this sentence the offender had been ordered to be detained in the Reformatory School, the High Court has jurisdiction in revision to interfere with the order of detention, 25 Cr. L.J. 1312=82 Ind. Cas. 490. It is very difficult for the High Court in revision under this section to interfere with orders passed under S. 110, *supra*. But when a person is sentenced to imprisonment for failure to furnish security the High Court has to be satisfied that the evidence is of such a character as will support an inference that it is necessary in the interests of public peace and security to send the person to prison or to bind him over, 22 A.L.J. 678=23 Cr. L.J. 1172=82 Ind. Cas. 33. It must be noticed that this section as amended makes no mention of S. 195, *supra*. Therefore the High Court will take a very wide view of its powers under this section and it would therefore be competent to revise an order made by an appellate authority directing the withdrawal of a complaint under S. 476B, *infra*. But such power will be exercised only in very exceptional cases, 43 B. 401. Where an Assistant Sessions Judge agreeing with the unanimous verdict of the Jury convicts an accused person and on appeal to the Sessions Judge the conviction is confirmed on the ground that there was no misdirection by the trial Court, a revision does lie against the Sessions Judge's order and in revision the petitioner starts with a heavy onus on him to show that the Sessions Judge had decided wrongly. It is not the intention of the law that the revision should be heard by the High Court as an appeal; if that were the case, there would be no object in giving a right of appeal to the Sessions Judge at all (1923) Pat. 109. The High Court has power to interfere at an interlocutory stage and quash proceedings, ordinarily it will not interfere at an interlocutory stage and quash proceedings but when it appears that on the face of the proceedings that the accused cannot be held guilty, it will interfere to prevent further harassment of the accused, 52 B. 151 at 155; 1 Luck 49; 28 Cr. L.J. 814=104 Ind. Cas. 25; 29 Cr. L.J. 532=109 Ind. Cas. 336. The power of interference should be exercised with great caution and it is only when the allegations of the gravest departure from procedure occur, the High Court takes the conduct of a case out of the hands of a trial Court, 51 M. 84. In 22 C. 131; 26 C. 786; 39 M. 551, the High Court quashed the proceedings after a charge had been framed, while in 38 C. 68; 20 B. 543; 23 Cr. L.J. 429=67 Ind. Cas. 589; 29 Cr. L.J. 1009=112 Ind. Cas. 224, the High Court interfered upon issue of summons to the accused. It is well established that the power of the High Court to take action under this section by quashing proceedings at any stage is undoubted though such power will be exercised only in exceptional cases. The High Court quashed the charge framed against the accused and set aside the proceedings in, 30 Cr. L.J. 162=113 Ind. Cas. 535, following 12 Cr. L.J. 50=8 Ind. Cas. 1161; 23 Cr. L.J. 1040=106 Ind. Cas. 224; 28 Cr. L.J. 755=103 Ind. Cas. 835; 29 Cr. L.J. 1078=112 Ind. Cas. 224. The High Court has power to quash a charge and dismiss a complaint where on the facts proved no offence is disclosed against the accused, 28 Cr. L.J. 1040=106 Ind. Cas. 224; 52 B. 151; 39 M. 561; 23 A.L.J. 21=26 Cr. L.J. 748=86 Ind. Cas. 234. See also 47 M. 722; 25 C. 233; 1852 A.W.N. 102; 14 A.L.J. 851; 16 A.L.J. 433; 21 Cr. L.J. 379=55 Ind. Cas. 839; 39 Cr. L.J. 236=25 Cr. L.J. 1259=92 Ind. Cas. 266; 24 Cr. L.J. 591=73 Ind. Cas. 335; 24 Cr. L.J. 118=71 Ind. Cas. 245; 26 Cr. L.J. 421=85 Ind. Cas. 37; 26 Cr. L.J. 743=86 Ind. Cas. 234; 26 Cr. L.J. 1033=89 Ind. Cas. 181; 26 Cr. L.J. 1303=89 Ind. Cas. 247. The High Court has power to correct an erroneous order under S. 476, *infra*; where it stated "sanction to prosecute Hugal," the High Court altered it into "make a complaint against Hugal," 27 Cr. L.J. 523=93 Ind. Cas. 937. Suspicion is not sufficient to base a conviction and mere suspicion will not warrant harassment of the suspected person by criminal proceedings and the High Court interfered in revision and quashed proceedings instituted on mere suspicion, 29 Cr. L.J. 532=103 Ind. Cas. 335. Where the Court denied the accused his right of cross-examination of the prosecution witnesses before charge and framed a charge, the High Court interfered in revision and quashed the charge framed and sent back the case for the cross-examination of the prosecution 49 L.W. 391=25 Cr. L.J. 556=81 Ind. Cas. 44.

Proceedings—The word "*Judicial*" had been properly omitted in the Code of 1832 and thereby widening the powers of revision of the High Court. Where an illegal order has been passed by a subordinate officer and action is taken by the High Court which involves matters coming within the purview of law and justice and within the scope and authority of the Courts, such authority cannot be ousted by the mere *ipse dixit* of the officer that he was not acting as a judicial officer more particularly when no authority other than as a judicial officer for the action is cited, 7 Cr. L. J. 202 at 203. The omission of sub-section (3) from S. 435, *supra*, has still more enlarged the powers of the High Court to revise practically all proceedings had under the Code.

Record has been called for by itself.—Power to call for records of inferior Courts is given specially by the provisions of S. 435, *supra*.

Which has been reported for orders.—The report is made under S. 438, *supra*, by the Sessions Judge or by the District Magistrate and in special cases by the Additional Sessions Judges also.

Which otherwise comes to its knowledge.—The words are very wide and enable the High Court to exercise its revisional jurisdiction unfettered. The intention of the Legislature in framing this section is to make the terms thereof sufficiently wide and comprehensive to cover all cases which were not included in S. 435, *supra*, where the words used are "or otherwise," 27 B. 84 at 87. A record may be before the High Court on appeal from a conviction and the High Court may and infrequently does act in revision, say, to enhance the sentence, without necessity of calling for the records of the case, under S. 435 *supra*. See also 13 Bom. L.R. 1183. Although this section gives the High Court power to call for cases not only in judicial information but also which comes to its knowledge, yet in most cases it is the right practice that the Judges should be moved in open Court; publicity is thus secured and a further hearing in open Court of the reason which moves the Government is thus afforded in the interests of the public order or a private party in his right. It is, therefore, desirable that such matters should be made in the required usual manner however wide the powers of Judges may be to interfere on knowledge or otherwise, 16 B. 580 at 582.

May in His Discretion.—"Discretion" says Lord Mansfield when applied to a Court of justice "means sound discretion guided by law." It must be governed by rule and not by humour or caprice. It must not be arbitrary, vague and fanciful but legal and regular. The following passage from *Maxwell on Interpretation of Statutes*, clearly brings out what is meant by "discretion." "Whereas, in a multitude of statutes, something is left to be done according to the discretion of the authority on whom the power of doing it is conferred, the discretion must be exercised honestly and in the spirit of the statute, 'may in his discretion' means according to the rules of reason and justice, not private opinion; according to law and not humour; it is to be, not arbitrary, vague and fanciful but legal and regular, to be exercised not capriciously but on judicial grounds and for substantive reasons. And it must be exercised within the limits to which an honest man competent to the discharge of his office ought to confine himself, that is, within the limits and for the objects intended by the Legislature. These dicta may be summed up in the statement of Lord Esher, 'that the discretion must be exercised without taking into account any reason which is not a legal one. If people who have to exercise a public duty by exercising the discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion.' The discretion of the Court is not arbitrary, but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal, See, S. 22 of Eg. Relief Act, I of 1877. Interference is discretionary even where the Magistrate's order is illegal. The party aggrieved must show prejudice, for the High Court to interfere in revision. See on this point the weighty observations of Jenkins, C.J., in 23 B. 333 at 566 noted above at p. 811. The word "may" can only be used in the section and its use is not conclusive, 13 Cr. L. J. 235=23 Ind. Cas. 493. When a point was never taken in the Court of first instance or before the appellate Court on appeal the High Court as a rule will not interfere in revision on that ground unless there has been a miscarriage of justice, 21 Cr. L. J. 96=54 Ind. Cas. 498.

Exercise any of the Powers conferred on a Court of Appeal.—S 423 *supra*, enumerates the powers of the appellate Court and in 6 A. 40 at 42 it was contended that those powers were confined to cases where there has been an acquittal or conviction, and there must be the same limitations to the High Court when it exercises the powers of revision under this section. This contention was overruled as this section mentions the words "in the case of any proceeding" which are wide and comprehensive enough to cover a case in which a man has been improperly discharged. The decision in 6 A. 40 was followed in 36 C. 995, where it was held that it was not necessary that there should be a right of appeal in order that the High Court may exercise its revisional powers conferred by this section. The High Court when exercising powers of revision is also entitled to make any amendment or any incidental or consequential order that may be just or proper as such a power is given to the appellate Court by S. 423 (1) (d), 27 A. 415; 36 C. 41; 5 C. L.J. 229. The High Court can under this section direct a committal of the accused to the Court of Session for an offence *prima facie* made out exclusively triable by a Court of Session, when setting aside a conviction had, 30 C.W.N. 840 following 5 C. 717. This section confers on the High Court all the powers conferred on a Court of appeal by S. 423, *supra*, and one of these powers is to direct an accused person to be committed for trial after setting aside the order of discharge passed by the lower Court, 85 M.L.J. 674—28 L.W. 651, following 15 C. 608; 6 A. 43; 27 B. 84. The powers that a Court of revision has under the Code are confined to the powers of an appellate Court and S. 423 (2) *supra* says that the Court cannot alter or reverse the verdict of a Jury until the Court is of opinion that such verdict is erroneous owing to a mis-direction by the Judge or to a mis-understanding on the part of the Jury of the law as laid down by the Judge. So the High Court in revision cannot interfere with the verdict of the Jury except on the grounds mentioned in S. 423 (2) *supra*, 30 Cr. L.J. 622 (2)=116 Ind. Cas. 297. Similarly the High Court has power under this section to order the detention of a youthful offender in a Reformatory and it is not the intention of the Legislature to limit the exercise of this power merely to a case which comes before the High Court on appeal, 30 Bom. L.R. 932=29 Cr. L.J. 1016=112 Ind. Cas. 334. It is contended that none of the sections specified in this section gives the High Court power to set aside or quash proceedings in a pending trial. The answer is simple. The sections dealing with the powers of a Court of appeal necessarily deal with those orders only, from which under the Code there is an appeal provided. With reference to such orders, the sections lay down the powers of a Court of appeal. *Ex hypothesi* the revisional powers of the High Court are invoked when no right of appeal exists and although in some cases, the High Court may by exercising the powers conferred on a Court of appeal be able to correct an error it does not follow, having regard to the variety of orders or proceedings which it may be called on to revise or deal with in its revisional jurisdiction, that it can by exercising those powers only redress a wrong or do complete justice. In other words S. 439 does not say, that the High Court shall exercise only those powers that are conferred on a Court of appeal. But on the other hand, it enacts that among the powers possessed by the High Court, are the powers conferred on an appellate Court. Sections dealing with the powers of an appellate Court necessarily describe and define the powers of the Court, with reference to orders that are appealable. The Legislature in enumerating the powers of the Court of appeal had before its mind only a certain class of orders and in the nature of things that enumeration cannot be found complete or exhaustive, when the Court is called on to deal with orders of a different kind, orders not in the contemplation of the Legislature when it was defining the powers of a Court of appeal, 47 M. 722. S. 426 deals with suspension of sentence pending appeal and releasing the appellant on bail. This power can be exercised in revision by the High Court. S. 427 refers to arrest of accused pending appeal against acquittal and S. 428 deals with power of taking further evidence or directing it to be taken by a Magistrate. S. 533 deals with power to direct tender of pardon to approver. These powers are expressly conferred on the High Court under this section. In cases of difference of opinion the procedure contained in S. 429, *supra*, hearing before a third Judge, is made applicable. The new sub-section (5A) to S. 345, *supra*, empowers the High Court in revision to allow any person to compound an offence which he is legally competent to compound, 30 Cr. L.J. 860 118 Ind. Cas. 63. The decisions in 37 A. 127; 43 C. 1143; 39 M. 604; 18 C.W.N. 1212; 29 M.L.J. 521; 42 A. 474 which took a different view are no longer law.

Proceedings.—The word "*Judicial*" had been properly omitted in the Code of 1883 and thereby widening the powers of revision of the High Court. Where an illegal order has been passed by a subordinate officer and action is taken by the High Court which involves matters coming within the purview of law and justice and within the scope and authority of the Courts, such authority cannot be ousted by the mere *ipse dixit* of the officer that he was not acting as a judicial officer more particularly when no authority other than as a judicial officer for the action is cited, 7 Cr. L.J. 202 at 204. The omission of sub-section (3) from S. 435, *supra*, has still more enlarged the powers of the High Court to revise practically all proceedings had under the Code.

Record has been called for by itself.—Power to call for records of inferior Courts is given specially by the provisions of S. 435, *supra*.

Which has been reported for orders.—The report is made under S. 435, *supra*, by the Sessions Judge or by the District Magistrate and in special cases by the Additional Sessions Judges also.

Which otherwise comes to its knowledge.—The words are very wide and enable the High Court to exercise its revisional jurisdiction unfettered. The intention of the Legislature in framing this section is to make the terms thereof sufficiently wide and comprehensive to cover all cases which were not included in S. 435, *supra*, where the words used are "or otherwise," 27 B. 84 at 87. A record may be before the High Court on appeal from a conviction and the High Court may and infrequently does act in revision, say, to enhance the sentence, without necessity of calling for the records of the case, under S. 435 *supra*. See also 13 Bom. L.R. 1183. Although this section gives the High Court power to call for cases not only in judicial information but also which comes to its knowledge, yet in most cases it is the right practice that the Judges should be moved in open Court; publicity is thus secured and a further hearing in open Court of the reason which moves the Government is thus afforded in the interests of the public order or a private party in his right. It is, therefore, desirable that such matters should be made in the required usual manner however wide the powers of Judges may be to interfere on knowledge or otherwise, 16 B. 530 at 532.

May in his Discretion.—'Discretion' says Lord Mansfield when applied to a Court of justice "means sound discretion guided by law." It must be governed by rule and not by humour or caprice. It must not be arbitrary, vague and fanciful but legal and regular. The following passage from *Maxwell on Interpretation of Statutes*, clearly brings out what is meant by 'discretion.' "Whereas, in a multitude of statutes, something is left to be done according to the discretion of the authority on whom the power of doing it is conferred, the discretion must be exercised honestly and in the spirit of the statute, 'may in his discretion' means according to the rules of reason and justice, not private opinion; according to law and not humour; it is to be, not arbitrary, vague and fanciful but legal and regular, to be exercised not capriciously but on judicial grounds and for substantive reasons. And it must be exercised within the limits to which an honest man competent to the discharge of his office ought to confine himself, that is, within the limits and for the objects intended by the Legislature. These dicta may be summed up in the statement of Lord Esher, that the discretion must be exercised without taking into account any reason which is not a legal one. If people who have to exercise a public duty by exercising the discretion take into account matters which the Courts consider not to be proper for the guidance of their discretion, then in the eye of the law they have not exercised their discretion." The discretion of the Court is not arbitrary, but sound and reasonable, guided by judicial principles and capable of correction by a Court of appeal. See S. 23 of Sp. Raffles Act, I of 1877. Interference is discretionary even where the Magistrate's order is illegal. The party aggrieved must show prejudice, for the High Court to interfere in revision. See on this point the weighty observations of Jenkins, C.J., in 23 B. 533 at 555 noted above at p. 811. The word "may" can only be used in the section and its use is not conclusive. 15 Cr. L.J. 235=23 Ind. Cas. 493. When point was never taken in the Court of first instance or before the appellate Court on appeal High Court as a rule will not interfere in revision on that ground unless there has been miscarriage of justice, 21 Cr. L.J. 66=54 Ind. Cas. 495.

Exercise any of the Powers conferred on a Court of Appeal—S 423 *supra*, enumerates the powers of the appellate Court and in 6 A. 40 at 42 it was contended that those powers were confined to cases where there has been an acquittal or conviction, and there must be the same limitations to the High Court when it exercises the powers of revision under this section. This contention was overruled as this section mentions the words "in the case of any proceeding" which are wide and comprehensive enough to cover a case in which a man has been improperly discharged. The decision in 6 A. 40 was followed in 36 C. 994, where it was held that it was not necessary that there should be a right of appeal in order that the High Court may exercise its revisional powers conferred by this section. The High Court when exercising powers of revision is also entitled to make any amendment or any incidental or consequential order that may be just or proper as such a power is given to the appellate Court by S. 423 (1) (d), 27 A. 415; 36 C. 41; 5 C L.J. 229. The High Court can under this section direct a committal of the accused to the Court of Session for an offence *prima facie* made out exclusively triable by a Court of Session, when setting aside a conviction had, 30 C.W.N. 840 following 5 C. 717. This section confers on the High Court all the powers conferred on a Court of appeal by S. 423, *supra*, and one of these powers is to direct an accused person to be committed for trial after setting aside the order of discharge passed by the lower Court, 55 M.L.J. 674=28 L.W. 651, following 15 C. 608; 6 A. 43; 27 B. 84. The powers that a Court of revision has under the Code are confined to the powers of an appellate Court and S. 423 (2) *supra* says that the Court cannot alter or reverse the verdict of a Jury until the Court is of opinion that such verdict is erroneous owing to a mis-direction by the Judge or to a mis-understanding on the part of the Jury of the law as laid down by the Judge. So the High Court in revision cannot interfere with the verdict of the Jury except on the grounds mentioned in S. 423 (2) *supra*, 30 Cr. L.J. 622 (2)=116 Ind. Cas. 297. Similarly the High Court has power under this section to order the detention of a youthful offender in a Reformatory and it is not the intention of the Legislature to limit the exercise of this power merely to a case which comes before the High Court on appeal, 30 Bom. L.R. 952=29 Cr. L.J. 1016=112 Ind. Cas. 344. It is contended that none of the sections specified in this section gives the High Court power to set aside or quash proceedings in a pending trial. The answer is simple. The sections dealing with the powers of a Court of appeal necessarily deal with those orders only, from which under the Code there is an appeal provided. With reference to such orders, the sections lay down the powers of a Court of appeal. *Ex hypothesi* the revisional powers of the High Court are invoked when no right of appeal exists and although in some cases, the High Court may by exercising the powers conferred on a Court of appeal be able to correct an error it does not follow, having regard to the variety of orders or proceedings which it may be called on to revise or deal with in its revisional jurisdiction, that it can by exercising those powers only redress a wrong or do complete justice. 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S. 427 refers to arrest of accused pending appeal against acquittal and S. 428 deals with power of taking further evidence or directing it to be taken by a Magistrate. S. 333 deals with power to direct tender of pardon to approver. These powers are expressly conferred on the High Court under this section. In cases of difference of opinion the procedure contained in S. 429, *supra*, hearing before a third Judge, is made applicable. The new sub-section (5A) to S. 345, *supra*, empowers the High Court in revision to allow a person to compound an offence which he is legally competent to compound, 30 Cr. L.J. 118 Ind. Cas. 63. The decisions in 37 A. 127; 43 C. 1148; 39 M. 604; 18 C.W.N. 121 M.L.J. 521; 42 A. 478 which took a different view are no longer law.

Proceedings.—The word "*Judicial*" had been properly omitted in the Code of 1882 and thereby widening the powers of revision of the High Court. Where an illegal order has been passed by a subordinate officer and action is taken by the High Court which involves matters coming within the purview of law and justice and within the scope and authority of the Courts, such authority cannot be ousted by the mere *ipse dixit* of the officer that he was not acting as a judicial officer more particularly when no authority other than as a judicial officer for the action is cited, 7 Cr. L.J. 202 at 204. The omission of sub-section (3) from S. 435, *supra*, has still more enlarged the powers of the High Court to revise practically all proceedings had under the Code.

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Exercise any of the Powers conferred on a Court of Appeal—S 423 *supra*, enumerates the powers of the appellate Court and in 6 A. 40 at 42 it was contended that those powers were confined to cases where there has been an acquittal or conviction, and there must be the same limitations to the High Court when it exercises the power of revision under this section. This contention was overruled as this section mentions the words "*in the case of any proceeding*" which are wide and comprehensive enough to cover a case in which a man has been improperly discharged. The decision in 6 A. 40 was followed in 36 C. 993, where it was held that it was not necessary that there should be a right of appeal in order that the High Court may exercise its revisional powers conferred by this section. The High Court when exercising powers of revision is also entitled to make any amendment or any incidental or consequential order that may be just or proper as such a power is given to the appellate Court by S. 423 (1) (d), 27 A. 415; 36 C. 41; 5 C.L.J. 229. The High Court can under this section direct a committal of the accused to the Court of Session for an offence *prima facie* made out exclusively triable by a Court of Session, when setting aside a conviction had, 30 C.W.N. 850 following 5 C. 717. This section confers on the High Court all the powers conferred on a Court of appeal by S. 423, *supra*, and one of those powers is to direct an accused person to be committed for trial after setting aside the order of discharge passed by the lower Court, 35 M.L.J. 674—28 L.W. 631, following 15 C. 808; 6 A. 43; 27 B. 83. The powers that a Court of revision has under the Code are confined to the powers of an appellate Court and S. 423 (2) *supra* says that the Court cannot alter or reverse the verdict of a Jury until the Court is of opinion that such verdict is erroneous owing to a mis-direction by the Judge or to a mis-understanding on the part of the Jury of the law as laid down by the Judge. So the High Court in revision cannot interfere with the verdict of the Jury except on the grounds mentioned in S. 423 (2) *supra*, 30 Cr. L.J. 822 (2)—116 Ind. Cas. 297. Similarly the High Court has power under this section to order the detention of a youthful offender in a Reformatory and it is not the intention of the Legislature to limit the exercise of this power merely to a case which comes before the High Court on appeal, 30 Bom. L.R. 932—29 Cr. L.J. 1018—112 Ind. Cas. 344. 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S. 427 refers to arrest of accused pending appeal against acquittal and S. 428 deals with power of taking further evidence or directing it to be taken by a Magistrate. S. 433 deals with power to direct tender of pardon to approver. These powers are expressly conferred on the High Court under this section. In cases of difference of opinion the procedure contained in S. 429, *supra*, hearing before a third Judge, is made applicable. The new sub-section (5A) to S. 345, *supra*, empowers the High Court in revision to allow any person to compound an offence which he is legally competent to compound, 27 Cr. L.J. 822—118 Ind. Cas. 63. The decisions in 37 A. 127; 43 C. 1143; 33 M. 674; 18 C.W.N. 1217; M.L.J. 821; 42 A. 478 which took a different view are no longer law.

Revision against acquittal.—It has been laid down in a long series of cases what should be the guiding principle to be acted upon by the High Court in dealing with the applications for revision against acquittal. The principle has been clearly laid down by *Jenkins, C. J.*, in 42 C. 612 upon a review of the practice in almost all the High Courts in India and that decision has been followed since in 47 C. 818; 41 B. 560; 45 M. 913 (F.B.); the High Court has jurisdiction to interfere but it will do so only sparingly and when it is urgently demanded in the interests of public justice, 56 C. 924. The general principle of criminal law is that a person is entitled to the benefit of doubt and if he has been properly tried by a competent Court and acquitted the least that can be said is that there is a reasonable doubt as to his guilt and the usual practice is not to encourage the prosecution to have a second shot unless there is very strong ground in the public interest, 14 A. L. J. 1073. Although the High Court has undoubtedly the jurisdiction to set aside an order of acquittal that power is to be exercised in rare and exceptional cases, 27 Cr. L. J. 1407=58 Ind. Cas. 719, 29 Cr. L. J. 343=108 Ind. Cas. 162; 63 B. 563. In 14 M. 363 the law is stated thus. An appeal against acquittal by way of revision is not contemplated by the Code, and should on public grounds be discouraged. In the case of an acquittal the law allows an appeal on behalf of the Local Government and the reason for such provision is obvious, but a private prosecutor should not be allowed to put the Court in motion to revise an acquittal deliberately arrived at by the lower Court. See also 43 M. 913 (F.B.); 42 M. 103; 15 M. L. J. 225; 39 M. 803; 38 M. 1028; 20 Cr. L. J. 101; 43 Ind. Cas. 881; 42 C. 612; 23 C. 243; 25 A. 128; 24 A. 348; 21 Cr. L. J. 564, 39 C. 786; 8 Pat. 25; 9 Bom. L. R. 156; 40. A. 84; (1915) M. W. N. 411=17 M. L. T. 437=18 Cr. L. J. 553=29 Ind. Cas. 830; 41 B. 560; 47 A. 403; 25 Cr. L. J. 1383=83 Ind. Cas. 341; 25 Cr. L. J. 1266=82 Ind. Cas. 274; 45 M. 936; 24 Cr. L. J. 186=71 Ind. Cas. 602; 22 A. L. J. 820 at 822; 20 L. W. 327; 14 Cr. L. J. 177=19 Ind. Cas. 177; 27 Cr. L. J. 854=95 Ind. Cas. 934; 29 Cr. L. J. 833=109 Ind. Cas. 362; 28 Cr. L. J. 523=102 Ind. Cas. 219; 53 B. 563; 56 C. 924. The general question whether the High Court has power to interfere in revision with an order of acquittal according to the decisions of the various High Courts in India has not been considered and decided by the Privy Council in 50 A. 722 (P.C.) though the reasons given in the judgment might suggest a contrary inference but their Lordships were considering the powers of the High Court under S. 439 (4) which excludes the power to convert a finding of acquittal into one of conviction in revision. 53 B. 564 where 9 A. 134 (F.B.) and 50 A. 722 (P.C.) are referred to. It is unquestionable that the preponderance of authority is in favour of the proposition that the High Court may revise an order of acquittal at the instance of the Public Prosecutor, 4 Ran. 471, but in the case of a private party, the proper remedy for setting aside an acquittal is to approach the District Magistrate to move the Local Government to prefer an appeal against the acquittal under S. 417, *supra*, and if he refuses to move in the matter then the party may seek remedy in the High Court in revision, 26 Cr. L. J. 93=83 Ind. Cas. 659; 26 Cr. L. J. 1596=90 Ind. Cas. 668; 25 Cr. L. J. 511=83 Ind. Cas. 235; 26 Cr. L. J. 516=85 Ind. Cas. 355; 26 Cr. L. J. 1349=89 Ind. Cas. 388; 5 Pat. 23; 33 C. W. N. 576. When it interferes it can only order a new trial. When the offences are so essentially of a personal character and a failure of justice has been occasioned but the Local Government is loathe to appeal from such an acquittal, the matter being of no public interest, the High Courts have entertained revision at the instance of private parties. When an acquittal was made without taking the evidence of witnesses present in Court but upon the result of a local inspection by the Magistrate, the acquittal was set aside, 39 C. 931. Where the judgment of acquittal proceeded entirely on a mistaken view of the law and the matter was one of great importance to the complainant in his position as the author of the book which if the judgment stood will be pirated by another who will secure for himself the gains which ought legitimately to go to the complainant, the acquittal was set aside in revision and a retrial was ordered, 51 M. 180. See also 6 A. L. J. 733, 29 Cr. L. J. 416=108 Ind. Cas. 567. Similarly when the trial was wrongly held to be barred by the provisions of S. 403, *supra*, the acquittal was interfered with, 12 Bom. L. R. 228; mere error of procedure by itself is no good ground for setting aside an acquittal. But if it is of a grave character and not mere error of improper admission of evidence it would afford a ground for interference, 21 Cr. L. J. 1255=82 Ind. Cas. 274; 25 Bom. L. R. 433=21 Cr. L. J. 731=73 Ind. Cas. 974. Errors of law committed by a

Magistrate by which some inadmissible evidence was let in, cannot afford sufficient grounds for interfering in revision against acquittal especially when such inadmissible evidence does not form a material portion of the facts relied on by the Magistrate for his conclusion, 3 Cr. L. Rev. 309. For instances where the High Court interfered in revision against acquittals, see 15 M. L. J. 225; 41 M. 683; 5 M. L. T. 238; 9 Bom. L. R. 156; 4 Bom. L. R. 686; 11 C. L. J. 113; 39 C. 931; 27 C. 323; 6 A. L. J. 758; 18 A. L. J. 846; 13 Cr. L. J. 771; 18 Cr. L. J. 732; 20 Cr. L. J. 708; 21 Cr. L. J. 564.

May enhance the Sentence.—As a Court of revision, the High Court has all the powers of a Court of appeal and in addition the power to enhance the sentence, 30 Bom. L. R. 952=29 Cr. L. J. 1016=112 Ind. Cas. 344. Enhancement of sentence is a very serious proceeding and when there is a proposal to that effect, it ought, if it is a sound proposal to be supported by the Government Pleader under instructions which will enable him to place before the High Court cogent reasons as to why there should be an enhancement, 16 Bom. L. R. 202=15 Cr. L. J. 385=23 Ind. Cas. 733. Ordinarily the High Court will not exercise its power of enhancement except on the motion of the Local Government, 29 Cr. L. J. 313=107 Ind. Cas. 912. Such applications are entirely a matter for the Crown. It is not for a private individual to move the High Court for enhancement of a sentence passed on an accused person. Such applications are rarely made and should not be encouraged, 28 Cr. L. J. 802=104 Ind. Cas. 242; 16 Bom. L. R. 202=15 Cr. L. J. 385=23 Ind. Cas. 733. The High Court has power to entertain an application for enhancement of sentence by a private party but it has been adopted to be a safe working rule not to interfere at the instance of a private party but when a rule has been issued at the instance of a private party the Court must deal with the case on the merits, 55 C. 964. The High Court will naturally be loath to act on the motion of a private individual for enhancement of sentence but it undoubtedly has the power to do so in extreme cases 30 Cr. L. J. 218=113 Ind. Cas. 766. See also 30 Cr. L. J. 240=114 Ind. Cas. 72. The mere fact that the High Court if it acted as a Court of first instance would have passed a heavier sentence is by itself no ground for enhancing a sentence in revision especially when the sentence passed is substantial 29 Cr. L. J. 276=107 Ind. Cas. 759, but it will interfere only when the sentence passed is grossly inadequate, 29 Cr. L. J. 784=110 Ind. Cas. 796, where 29 Cr. L. J. 276=173 Ind. Cas. 769 and 29 Cr. L. J. 291=167 Ind. Cas. 773 are followed. Where no question of principle is involved and a sentence apparently right has been passed by the lower Court on a consideration of all the circumstances of the case, the High Court will not enhance the sentence, 29 Cr. L. J. 446=108 Ind. Cas. 567. Even in cases of communal riots and disturbances, the Local Government should refrain from applying for enhancement unless violence has been done to some general principle which requires immediate and authoritative correction by the High Court in revision, 29 Cr. L. J. 448=103 Ind. Cas. 567. The High Court will be extremely reluctant to enhance the sentence passed by a Sessions Court except on very serious grounds, 26 Cr. L. J. 177=83 Ind. Cas. 831; 26 Cr. L. J. 1364=89 Ind. Cas. 452. A District Magistrate, a Sessions Judge or a Public Prosecutor may draw the attention of the High Court to a sentence with a view to its being enhanced; or the High Court can of its own motion send for the record and take action with a like object. If a private complainant considers the sentence unduly lenient, he may, draw the attention of the Government to the fact, 27 Cr. L. J. 818=95 Ind. Cas. 594. It is very undesirable to trust exclusively to the powers of the High Court of correcting sentences of the lower Courts where the authorities ought to be deterrent. In such cases where the prosecuting authorities are of opinion that a sentence ought to be deterrent they ought to put before the lower Court those circumstances on which they rely on and they ought to ask the trying Court to impose a sentence which will serve the purpose that they think should be served. If this is done, there will be fewer references to the High Court for enhancing the sentences, 16 Bom. L. R. 202=15 Cr. L. J. 385=23 Ind. Cas. 735. Even when the District authorities consider the sentence passed to be adequate, there are occasions when the High Court enforced its own opinion contrary to that of the District authorities and enhanced the sentence, 30 Cr. L. J. 276=113 Ind. Cas. 766. It has been the practice of the High Court that when an accused person has committed his sentence of imprisonment not to enhance the sentence and when the sentence is not

only in exceptional circumstances, 1 Lah. 433; 2 Cr. L. Rev. 389; 30 Cr. L.J. 300=114 Ind. Cas. 442. See also 1919 P.R. (Cr. J.) 7; 10 Sind. L.R. 207. The principles upon which this Court habitually acts as a Court of revision in relation to the enhancement of sentences are that it would not interfere if the sentence passed involves substantial punishment and should interfere if the sentence is manifestly inadequate in after the lapse of, say, nine months even in a case where the sentence is inadequate, 13 Cr. L.J. 121=(1912) M.W.N. 50=13 Ind. Cas. 777. "The Court is in particular, slow to interfere where interference would involve the imprisonment of persons already discharged from jail though this circumstance is no insuperable obstacle. Again the Court frequently declines to interfere, in order to enhance a sentence, on the mere ground that it would itself have passed a heavier sentence contenting itself with pointing out that the sentence is so light that far heavier sentence would have been maintained" 1889 P.R. (Cr. J.) 6. The High Court is slow to interfere where interference would involve the imprisonment of persons already discharged from jail after serving out the sentence imposed by the lower Court; the High Court is not always bound to interfere even when the order of the lower Court is clearly wrong in law 15 Cr. L.J. 599=21 Ind. Cas. 471 where 11 Cr. L.J. 389=6 Ind. Cas. 639 and 1889 P.R. (Cr. J.) 7 are followed. It is not the practice of the High Court to enhance the sentence in revision after the accused person had served out the whole sentence and has come out of jail. As a general practice a convict is not to be sent back to jail after he has undergone the sentence and been released, 30 Cr. L.J. 2=112 Ind. Cas. 769. In all cases where the sentence is considered inadequate, the District Magistrate or a Sessions Judge as the case may be should be moved by the Police at the earliest possible moment after the trial, and certainly where possible, before the accused has served his sentence. There are many cases where a very short sentence is imposed in which it is impossible to move the High Court before the sentence has expired and the fact that the sentence has expired before such action is taken, is in itself no reason for refusing to interfere. At the same time where an accused has been released after being imprisoned say for six weeks or more and no action is taken during that period to move for an enhancement, he may reasonably expect that no further action will be taken and that he has expiated his crime and it is an additional hardship upon him if he should find afterwards that he has to go back to prison again for a further term. Where there is regrettable delay on the part of the Police to bring the matter to the notice of the authorities for them to report to the High Court and the delay has not been accounted for, the High Court will not interfere in revision and enhance the sentence, 29 Cr. L.J. 261=107 Ind. Cas. 536. But it cannot be laid down as an invariable proposition that in no case can the High Court pass a substantive period of imprisonment if the accused has served out the sentence passed on him by the Court below. When the accused was sentenced to a nominal sentence of one day's imprisonment which was served out at the end of the day's sitting, such a practice would not prevent the High Court from passing a substantive term of imprisonment in a suitable case and the High Court in the particular case sentenced the accused to six months' imprisonment in addition to the sentence already served out, 27 Cr. L.J. 657=93 Ind. Cas. 1053 where 1 Lah. 433 is distinguished. The High Court alone has got under the Code the power to enhance the sentence in revision; power to enhance the sentence is expressly given in this section while this power is expressly excluded in B. 423, clause (1) (b), where we find the words "not so as to enhance the same." The power of enhancement of sentence is subject to the limitation contained in sub-section (4) of this section. Where a case comes to the notice of the High Court by way of an appeal proffered by the accused, it is not desirable under this section if the appeal is admitted, to issue a notice to show cause why the sentence should not be enhanced. It is absolutely incongruous that the Court should in the same breath admit an appeal and issue notice why the sentence should not be enhanced. The appeal should be heard first and then the question of enhancement should be considered, 49 B. 430 at 432 followed in 27 Cr. L.J. 338=93 Ind. Cas. 851. As a matter of practice the High Court will not entertain a revision application for the enhancement of sentence at the instance of a private complainant 30 Cr. L.J. 300=114 Ind. Cas. 442; 29 Cr. L.J. 313=108 Ind. Cas. 162; 28 Cr. L.J. 802=104 Ind. Cas. 242; 15 Cr. L.J. 385=23 Ind. Cas. 733; 30 Cr. L.J. 219=113 Ind. Cas. 768; 30 Cr. L.J. 240=114 Ind. Cas. 72.

But where the Crown has not thought necessary in the interests of public justice either to apply for enhancement or on the matter being brought to the notice of the High Court by the complainant to appear in support of the rule issued by the High Court it cannot be laid down as an absolute rule that the complainant cannot move the Court where there is manifestly a ground for interference beyond all reasonable doubt. In such a case it matters not whether the case comes before the High Court on its own motion or at the instance of a private prosecutor or through any other channel. From the mere fact that an *ex parte* rule has been issued it cannot be held that there was nothing to be done, but to consider whether or not the sentence should be enhanced for instance, *ex parte* the contentions urged on behalf of the accused, the attitude of the Crown and other possible contingencies should be taken into consideration, 50 C. L. J. 176; 55 C. 964. The remedy of a private complainant is to draw the attention of Government to that fact and the District Magistrate, Sessions Judge or Public Prosecutor may draw the attention of the High Court to the inadequacy of a sentence with a view to its being enhanced. The High Court, may also, of its own motion send for the records and take such action as it thinks necessary. 48 B. 358; 27 Cr. L. J. 818=93 Ind. Cas. 594; where an appellate Court reduced the sentence passed by the trial Court the High Court in revision restored the sentence of the trial Court, 28 Cr. L. J. 31=99 Ind. Cas. 63; where an accused was convicted of cheating in having obtained fraudulently large sums of money and sentenced to imprisonment till the rising of the Court and a fine, the High Court in revision held that sentence was unwarranted and grossly inadequate, 25 L. W. 220=28 Cr. L. J. 235=99 Ind. Cas. 1035; where the law says that on conviction for certain offences like S. 193 or 471 I. P. O., the accused shall be punished with imprisonment it means that the offender should be sent to jail and not awarded imprisonment till the rising of the Court and the High Court in such a case enhanced the sentence in revision to one of six months' imprisonment, 1929 M. W. N. 114=30 Cr. L. J. 247=114 Ind. Cas. 234. The fact that an accused person is a man of education and position and member of the Legislative Council cannot be urged for the imposition of a fine only on conviction and the High Court in revision enhanced the sentence to three months' simple imprisonment.

Sub-section (2).—The language of this sub-section is mandatory and is clearly an exception to S. 440, *infra*, 47 M. 428 at 432. It is here expressly enacted that notice to the accused is necessary before an order is passed by the High Court in revision, to his prejudice. When an order of enhancement is made by a single Judge without affording the petitioner an opportunity of being heard, the order so passed is a nullity and the matter could be re-heard after giving the accused a reasonable opportunity to show cause, 31 C. W. N. 96; 47 M. 428 at 432, 437, 438, followed in 26 Cr. L. J. 543=85 Ind. Cas. 383. Where the High Court on a reference under S. 433, *supra*, for enhancement of sentence on an accused who had been released on probation of good conduct under S. 562, *infra*, by the lower Court accepted the reference without giving notice to the accused and affording him an opportunity of being heard, the High Court being under the mistaken impression that notice to show cause had been given to the accused, the order passed was held to be one per *incuriam* bordering to a nullity and there was no bar to the order being vacated and re-hearing the reference in the presence of the parties under the amended Code and the High Court had ample powers in cases of this description to vacate the original order, 55 C. 417.

Sub-section (3).—The maximum term of imprisonment which the High Court is empowered to pass in cases tried by Magistrates cannot exceed the sentencing power of a Presidency Magistrate or Magistrate of the first class, namely, two years. Such a sentence could be passed even in cases where the accused was originally tried by a third-class Magistrate who could inflict only a maximum sentence of one month's imprisonment, 1 L. W. 453, following, 18 Cr. L. J. 712=39 Ind. Cas. 1000, and in enhancing the sentence the High Court cannot pass a higher sentence than is prescribed for the offence by the Penal Code. The Magistrates empowered under S. 30 *supra* can pass any sentence under S. 31, *supra*, except a sentence of death or transportation for a term exceeding seven years or imprisonment for a term exceeding seven years. Sentence should not be enhanced when the convicted person has duly served out the sentence before the enhancement is made, 11 Cr. L. J. 93=5 Ind. Cas. 520. See Notes under heading 'May enhance sentence.'

Sub-section (4).—S. 273, *supra*, relates to an entry in the High Court Sessions by the presiding Judge that any charge is clearly unsustainable against the accused. It has not the effect of an acquittal, but such entry shall have the effect of staying proceedings upon the charge. Such an order cannot be revised by the High Court under this section. Notwithstanding the reference to S. 273 this section does not empower the High Court to revise the judgment of one or more of its own Judges, 46 M. 382 at 387. Where an accused was convicted under Ss. 420 and 507, I.P.O., and on appeal the conviction was altered into one under Ss. 385 and 508, I.P.O., holding that Ss. 420 and 507 were not applicable to the case it was open to the High Court in revision to find the accused guilty of an attempt to cheat under Ss. 420 and 511, I.P.O., as the prohibition under this clause did not apply to such a case. The case was one in which it was difficult to say what offence was committed and it was doubtful whether the alteration of one section into another can be said to be an acquittal within this sub-section, 48 M. 774 at 780.

Convert a finding of acquittal into one of conviction.—This sub-section deprives the High Court of the power which it would otherwise have had under sub-section (1) of this section read with S. 423 (1) (a) *supra*. It prohibits only converting a finding of acquittal into one of conviction. Where there is no acquittal of the accused of an offence say, grievous hurt under S. 325, I.P.O., the accused being tried under S. 302, I.P.O., and convicted of hurt under S. 323, I.P.O., the High Court is not precluded by reason of this sub-section from recording a conviction and sentence for grievous hurt under S. 325, I.P.O., 27 Cr. L.J. 564—94 Ind. Cas. 132, but there is nothing here to prevent the High Court from setting aside the acquittal and ordering a re-trial of the case. The only method of securing a conviction in a case of acquittal is that provided in S. 417, *supra*, viz., an appeal by Local Government against the order of acquittal, 44 A. 332; 40 A. 84; 20 L.W. 327; 2 Pat. 708 at 710; 22 A.L.J. 820 at 822. There was a conflict of decisions between the various High Courts as to the power of the High Court to alter a conviction under S. 304, I.P.O., into one under S. 302 I.P.O. and then sentence the accused for the offence under S. 300 I.P.O., with which he was originally charged and tried. The question was whether the High Courts can itself convict the accused who was charged with the major offence of murder under S. 302 I.P.O., but was acquitted expressly or impliedly of that offence and convicted of a minor offence under S. 304 or S. 325, I.P.O., and then enhance the sentence in revision, 37 M. 119; 1 Ran. 436 8 Lah. 138; 27 Cr. L.J. 1121—87 Ind. Cas. 641; 27 Cr. L.J. 566—94 Ind. Cas. 134; 6 Pat. 217 took one view but 50 M. 259; 44 A. 332; 4 Ran. 140 and 48 B. 510, took a different view, but this conflict of authority has now been set at rest by the decision of the Privy Council, in 50 A. 722 (P.C.) where it was held that the High Court in revision has no power to alter a conviction under S. 304, I.P.O., into one under S. 302 I.P.O., and then sentence the accused to death under S. 302 I.P.O., as the trial Court must be taken to have acquitted the accused to the charge under S. 302 I.P.O. and the Local Government having a right of appeal under S. 417 *supra* has not chosen to appeal. Their Lordships in the course of the judgment in 50 A. 722 (P.C.) observed that if the learned Judges who decided 37 M. 119, intended to hold that the prohibition in this sub-section refers only to a case where the trial has ended in a complete acquittal of the accused in respect of all the charges or offences and not to a case where the accused charged with murder but acquitted of that charge and convicted of a lesser offence under S. 304 I.P.O., their Lordships were unable to agree with that part of the decision as the words of this section are clear and there can be no doubt as to their meaning and there was no justification for the qualification which the learned Judges in 37 M. 119, attached to this sub-section. See also 53 B. 564 and 30 Cr. L.J. 552(2)—116 Ind. Cas. 854 following 50 A. 722 (P.C.) Altering a finding of acquittal into one of conviction is permissible only through the medium of an appeal by the Local Government as pointed out in 44 A. 332 and 48 B. 510 quoted with approval in 50 A. 722 (P.C.), 30 Cr. L.J. 552 (1)—116 Ind. Cas. 79. It is a well-settled view of all the High Courts in India that as a general rule it is not expedient to interfere in an acquittal at the instance of a private party and such application should be discouraged, 41 M. 613; 42 M. 107; 39 M. 505; 38 M. 1028; 23 M.L.J. 652; 14 M. 363; 42 C. 612; 38 C. 786; 41 B. 860; 41 A. 332; 40 A. 84; 2 Pat. 709; 4 Ran. 140. In 14 M. 363 the Madras High Court refused to hear Counsel for private,

complainant in a case of revision against acquittal, but in, 50 C. 159. Counsel for private complainant was heard in spite of objection raised on the facts of the case. There is deeper and fundamental reason for non-interference which turns upon the position of a private prosecutor in prosecutions for cognizable offences. The private prosecutor has no position at all in the litigation. The Crown is the prosecutor and custodian of the public peace and if it decides to let an offender go, no other aggrieved party can be heard to object because he has not taken his full dose of private vengeance, 2 Pat. 703 at 710. See 56 C. 924.

Sub-section (5).—This sub-section precludes the High Court from entertaining any proceeding by way of revision, when an appeal is specially provided and no appeal is brought by the party seeking revision 30 Cr. L.J. 765=117 Ind. Cas. 309. So at the instance of the Local Government no revision for a mere enhancement of sentence may lie when the Local Government could have appealed to the High Court. Where the accused is charged with dacoity and murder and acquitted of the latter offence but convicted of the former, it is not open to the Local Government to apply to have the conviction under S. 895 altered to one under S. 396 I.P.C. The High Court will not exercise its revisional powers to enhance the sentence unless it is manifestly inadequate and it is not enough to show that if the trial Court had imposed a more severe sentence the High Court in appeal would have maintained it, 26 Cr. L.J. 1364=89 Ind. Cas. 452, following 2 C. 273. The prohibition contained in this section is to the entertaining an application for revision at the instance of a party who could have appealed. Having regard to this sub-section when an appeal lies and no appeal is brought, no proceedings by way of revision can be entertained at the instance of the party who could have appealed, and if proceedings by way of revision are instituted by such party, the High Court cannot interfere even of its own motion under sub-section (1) *supra*, 25 Cr. L.J. 1362=82 Ind. Cas. 754; 46 A. 769. A reference under S. 438 *supra*, say by a District Magistrate against an acquittal stands on no higher footing than an application by a private party for revision against an order of acquittal, 56 C. 924 following 43 C. 703 at 709 where the reference by a District Magistrate against an acquittal was put on the same footing as a revision by a private party as he could have moved the Local Government to prefer an appeal under S. 417 *supra*. But in a case where the effect of allowing the revision in the case of those who could have appealed, and did not appeal would be to sustain a sentence of eight and ten years imprisonment, when they could only be convicted under S. 113, I.P.C. (maximum sentence being only six months' imprisonment), it is right to hear the case under the general powers of revision and the High Court interfered with the conviction in revision, 20 L.W. 914=26 Cr. L.J. 747=86 Ind. Cas. 283. It will be still open to the High Court, if it so desired to act, whenever the matter comes to its knowledge otherwise than by an application for revision, by the person who could have appealed but did not choose to do so, or on reference from the lower Court under S. 438 when the matter otherwise comes to its knowledge under this section, (see 9 C. 513,) to interfere in revision in a matter falling within this sub-section. Where a District Magistrate did not move the Local Government to prefer an appeal against an acquittal but sent up a case direct to the High Court for revision by it was held to be inexpedient to exercise the High Court's powers of revision, 24 A. 346, see also 25 A. 128 and 38 M. 1028. An application by a private complainant direct to the High Court when the Local Government had not chosen to appeal against the acquittal does not come within the prohibition contained in this sub-section, 33 C. 785. In 2 Bom. L.R. 334 certain convicted persons did not appeal but others who were tried with them and convicted appealed from the conviction and they were acquitted on appeal, and the High Court, when moved by the District Magistrate for setting aside the conviction of those who did not appeal refused to interfere on the ground that the accused did not choose to have recourse to the proper remedy open to them, namely, to appeal. The High Court can under this section deal in revision with the case of an accused person who has not appealed when hearing an appeal from others jointly tried and convicted when it found that the entire prosecution evidence was unworthy of credit, 6 C.W.N. 330. This sub-section does not preclude the High Court from interfering in revision with the conviction of an accused who has not appealed when the Court deals with an appeal preferred by a co-accused convicted along with him, 29 Cr. L.J. 325 at 334=106 Ind. Cas. 81. District Magistrates should not exercise their

powers of revision within the period allowed for appeal. Since this sub-section directs that where an appeal lies and no appeal is brought, no proceedings by way of revision should be entertained at the instance of the party who could have appealed, it is clearly desirable that District Magistrates should not place difficulties in the way of persons entitled to appeal by calling for the records of the proceedings and taking action in revision within the period allowed for appeal, 10 Bur. L.T. 187.

Sub-section (6).—This sub-section is new. The main reason for the introduction of this new sub-section was the provision in sub-section (5) *supra*, to the effect that 'when under the Code an appeal lies and no appeal is brought, no proceedings by way of revision shall be entertained at the instance of the party who could have appealed.' In the case of an accused to whom a notice has been issued and who has not appealed or if no appeal lay, has not applied for revision of his conviction, naturally it would be contended that he could not question the correctness of the conviction. It was presumably to overrule this view (See 32 B. 162) that this new sub-section was inserted. So this sub-section is primarily intended to operate as an exception to what is otherwise laid down or implied in this section. Importance should be attached to the *opening words of this sub-section*, viz., '*notwithstanding anything contained in this section*' 50 B. 783. The provisions of this sub-section do not override the time honoured practice of the High Courts in India not to upset save in exceptional circumstances concurrent findings of fact of the Courts below. This sub-section must be interpreted consistently with the practice. While it is open to the accused in showing cause against the conviction, the High Court will not lightly interfere with the conviction if supported by findings of fact of the lower Courts, 27 Cr. L.J. 1233=98 Ind. Cas. 49, followed in 29 Cr. L.J. 936=111 Ind. Cas. 836. See also 10 Lah. 241 where 50 B. 783 and 8 Lah. 521 are followed. The effect of enactment of this sub-section is that the High Court when adjudicating upon an application for enhancement of sentence is converted into a Court of appeal against the conviction and the accused person is now entitled to show that his conviction is unsustainable, 27 Cr. L.J. 380=92 Ind. Cas. 892. When a notice under sub-section (2) of this section is issued to the accused to show cause why the sentence passed on him should not be altered, then sub-section (6) of this section becomes applicable and the accused is entitled to show cause against the conviction, 27 Cr. L.J. 593=94 Ind. Cas. 257. It was held in 32 B. 162, that it has been the invariable practice of the High Court of Bombay in cases that come before it for enhancement to accept the conviction as conclusive and to consider the question of enhancement of the sentence on that basis; it was open to the accused to apply for revision of the conviction, but having failed to avail himself of that, he cannot be permitted to assail the conviction in a proceeding where the sole question is whether the sentence passed was adequate. This ruling has now been overruled by the new sub-section and is no longer law. The accused is now entitled to question the propriety and legality of the conviction when he has been called upon to show cause why the sentence should not be enhanced. It is in accordance with justice that the accused should be entitled to show cause not only against the sentence being enhanced, but also against the conviction. But in the case of an appeal preferred by the accused it is absolutely incongruous that the Court should admit the appeal and issue notice calling upon him to show cause why the sentence should not be enhanced especially in a case of murder when transportation for life is awarded, 49 B. 450 at 452. But a practical difficulty may arise in practice. An application for enhancement of sentence can be heard even after the disposal of the appeal by the convicted person. In the judgment confirming the conviction and rejecting the appeal, the Court saw no reason to reduce the sentence. That in no way was a decision that the sentence should not be enhanced and so far as the judgment went, there was nothing which in any way tied the hands of the High Court hearing an application for enhancement. The provisions of Ss. 309 and 430, *supra*, show clearly that the judgment pronounced was final and though this sub-section entitles the accused in showing cause to question the legality and propriety of the conviction, the accused will not be entitled to re-open the correctness of the conviction as he is debarred from asking the same Bench which heard and disposed of his appeal and much less another Bench to go into of the merits of the conviction. The observation in, 49 B. 450 are merely obiter, 50 B. 783. The

principle of the decision in 50 B. 783 applies equally to a previous order on revision and a previous order on appeal and to the dismissal of the revision by the accused against his conviction, the right which he had under this sub-section to question the correctness and propriety of the conviction also vanished on account of the inherent incapacity of any Judge of the High Court to re-consider his own decision much less the decision given by another Judge, 8 Lah. 521, followed in 10 Lah. 241. When a revision petition against the conviction had been dismissed *in limine* or after notice, the right of the accused to show that the conviction is illegal on receipt of notice for enhancement is lost, 30 Cr. L. J. 815=117 Ind. Cas. 669. The language of this sub-section is very wide and it is open to an accused person when called upon to show cause why his sentence should not be enhanced to raise any question that might be urged against his conviction; thus it is competent under this sub-section to an accused person to object to the legality of his trial on the ground of mis-joinder of charges, 49 B. 892. There was a difference of opinion among the Judges 33 C.W.N. 599; 49 C.L.J. 432 as to the right of the accused to show cause against the conviction when he was convicted and sentenced on his own plea of guilty under S. 271 (2) *supra* but the majority view was that the accused cannot go beyond his plea of guilty and re-open the propriety and correctness and legality of his conviction as he could do under this sub-section in an ordinary case of conviction on a trial on the evidence. The word 'conviction' in the sub-section in its relation to a case where the accused pleaded guilty, limits the accused from impugning the judgments on the merits and the accused can show cause only against the enhancement of the sentence and cannot go beyond the plea of guilty. The words 'show cause against the conviction' apply only where the accused had been convicted on the evidence and in that case and that case only, he is entitled to show that the conviction is wrong either upon the facts or through some error of law. See also 33 C.W.N. 695=50 C.L.J. 176. It is competent to the accused to show from the whole record that he ought to have been acquitted and he cannot be restricted with any consideration that the application was in revision only not an appeal, 30 Cr. L. J. 693=116 Ind. Cas. 883.

Dismissal for default.—When the High Court dismissed a criminal revision petition for default of appearance, it has no power to restore it to file subsequently, 23 M.L.J. 499. This ruling was followed in 44 M.L.J. 27=17 L.W. 23 where it was held that it was an universal principle of law in the absence of direct statutory provision, that when a matter has been finally disposed of by the Court, the Court is *functus officio* and cannot entertain a fresh prayer for the same relief, unless or until the previous order of final disposal has been set aside, and therefore a second revision petition cannot lie to re-hear a previously disposed of petition though the latter petition was dismissed for default of appearance. But a different view has even been expressed in 43 M. 382. In the case of a criminal appeal or revision petition there is no provision in the Code for dismissing an appeal or revision petition for default of appearance. In a criminal matter the question is not one between party and party. It is the duty of the Court to go into the matter and dispose of it on the merits, and if a case has been dismissed for default, it is not a legal disposal and must be considered to be still pending, and the party can in such a case move to have the petition heard and disposed of on the merits, 46 M. 382 at 401, where 23 M.L.J. 371 is disapproved. See also 47 M. 402 and 26 Cr. L. J. 543=85 Ind. Cas. 393. See also 27 C.W.N. 947. The High Court has power under this section to set aside the judgment of a Court below merely on the ground that the accused's Counsel was prevented from being present in the Court by unavoidable circumstances, say a railway strike and therefore could not appear, 27 Cr. L. J. 118=71 Ind. Cas. 246. The High Court has power under this section to set aside the order of a Sessions Judge rejecting an appeal filed by a practitioner on the ground that the appellant was not present in Court, and to allow a subsequent appeal from jail by the convicted accused has been dismissed, 10 C. 502 on the ground that the accused's Counsel was prevented from being present in Court by unavoidable circumstances, say a railway strike and therefore could not appear, 27 Cr. L. J. 118=71 Ind. Cas. 246. The High Court has power under this section to set aside the order of dismissal directed the Sessions Judge to re-hear the appeal and to give the appellant an opportunity of being heard, 43 A. 293; 25 Cr. L. J. 157=71 Ind. Cas. 246.

Revision against decision of a single Judge of the High Court.—The powers of a single Judge of the High Court in a matter in which he has made a decision are the powers of the Court and cannot in any way be limited by the provisions of the Code, 43 A. 293; 25 Cr. L. J. 157=71 Ind. Cas. 246.

a Full Bench of the Court. As no appeal lies from the decision of a single Judge in a criminal matter, there can be no revision. Both procedure imply subordination or inferiority which does not exist. Except on a reference by the Judge under S. 434, *supra*, the proceedings of a single Judge of the High Court cannot be revised 1909 P.R. (Cr. J.) 1=9 Cr. L.J. 306; 1909 P.R. (Cr. J.) 4, see also 14 C. 42 (F.B.)

Limitation for presenting revision petitions.—That an application to the High Court for revision against the order of the Court below should be made within 60 days from the date of the order, time allowed for criminal appeals under Art. 155, Sch. II of the Limitation Act is now well established by the authorities. It is a question of practice, no doubt, but the practice is uniform and only in special circumstances it can be departed from. 54 C. 393 following 43 C. 1029; 25 C.L.J. 564=18 Cr. L.J. 694=40 Ind. Cas. 694. The well-known practice of the Calcutta High Court is that an application for revision must be made within 60 days from the date of the order complained of. The practice of the Patna High Court is the same as that of the Calcutta High Court, 8 Pat. 468. The Madras High Court insists that Revision petitions should be presented as expeditiously as possible and a new rule in the Criminal Rules of Practice fixing a period of 90 days for presentation of revision petitions is in contemplation. The Court has allowed in addition to the 60 days, the time which is necessary for obtaining copies. This is not a question of limitation but a rule of practice of the Court to the effect that an application for revision must be made within a reasonable time. It is not an inflexible rule, and in exceptional circumstances the rule might be departed from 43 C. 1029. See 8 A. 514; 27 A. 483; 6 A. 485. The fact that an *ex parte* rule was issued by a Bench of the High Court in revision will not preclude another Bench hearing the revision finally, from disposing of the application as being made very late and therefore barred 54 C. 394; 50 C. 323. Persons who move the High Court in revision say, against an order under S. 107, *supra*, should do so with the utmost promptitude and at any rate within 30 days of the order complained against 49 A. 228.

Power to expunge Remarks in a Judgment.—The High Court as the supreme Court of Revision must be deemed to have the power to see that Courts below do not unjustly and without any lawful excuse take away the character of a party or a witness or a Counsel before it. Such Jurisdiction however, can be exercised when there is no foundation whatever for the remark objected to and not where it is a matter of inference from evidence. 49 A. 254. This Jurisdiction of the High Court is of an extraordinary nature and should be exercised with care and caution, 9 Lah. 269. The right of a Magistrate to make disparaging remarks on persons who appear or are named in the course of the trial is one that should be exercised with great reserve and moderation especially when the person disparaged has no opportunity of explaining or defending himself and the High Court has inherent power to expunge such offending passages in the judgment of the lower Court, 9 Lah 269. A Magistrate is not empowered to make observations in his judgment concerning a person who was not a party to the proceedings before him and who had no opportunity of being heard on materials not admissible in evidence and which would not justify the observations in question and such a course amounts to an abuse of judicial privilege. It would be denial of justice to allow the reflection upon the character of the person to stand, and the High Court in revision directed that portion of the offending judgment to be expunged, 8 Lah. 166. See notes under S. 501A *infra* and see also 1104 P.L.R. (Cr. J.) 29; 27 Cr. L.J. 510=13 Ind. Cas. 174; 13 Cr. L.J. 258=14 Ind. Cas. 643; 12 Cr. L.J. 464=11 Ind. Cas. 1000, 5 Lah. 476; 6 Lah. 166; 29 Cr. L.J. 1102=112 Ind. Cas. 636; 15 Cr. L.J. 420=24 Ind. Cas. 150.

Power to award cost.—The question of awarding cost in revision petitions filed not by the Crown but by a private prosecutor against an acquittal came for consideration in 43 M. 913 (F.B.) and the power of the High Court to award costs was negatived as there was no general provision in the code like the Civil Procedure code providing for costs except in certain specific instances, referred to in Es. 148, 483, 488, 490, 545 etc. where power is expressly given for awarding costs. The suggestion was also thrown out that it was for the Legislature to consider whether it should not be safeguarded by arming the High Court with power at least in revisions against acquittals by private prosecutors of mulcting them in proper cases by awarding costs 442 p. 971.

Optional with Court
to hear parties.

440. No party has any right to be heard either personally or by pleader before any Court when exercising its powers of revision :

Provided that the Court may, if it thinks fit, when exercising such powers, hear any party either personally or by pleader, and that nothing in this section shall be deemed to affect section 439, sub-section (2).

Scope of the section.—This rule enacted by this section is the general rule provided by the Legislature and must be taken to be a legislative rescission of the general principle that persons are entitled to be heard before any order affecting them prejudicially can be made, 10 C. 208. Whether the matter is one of importance must be left to the discretion of the Judge. It is a good practice and one which may usefully be followed 25 A.L.J. 1010 = 29 Cr. L.J. 88 = 106 Ind. Cas. 680. In an appealable case, there would be no right at all for a complainant to be heard. The right of appeal would be in the Crown. In revision although the High Court has wide powers under Ss. 435 and 439, *supra*, this section enacts that the Court has a discretion to hear parties and this applies to an accused and therefore still more strongly to a complainant and hear him in order to see what his case is about, 1 Bom. L.R. 1145.

No party has a right to be heard in revision.—This section does not affect the provisions of section 446, proviso (a) and S. 439 (2) *supra*. In 14 M. 363 the High Court refused to hear Counsel in a petition filed to revise an acquittal by the lower Court acting under the provisions of this section but in matters of importance the Calcutta High Court always hears Counsel, 15 C. 380. In the Allahabad High Court the Judges make a practice of hearing Pleaders in revision but at the same time professional gentlemen ought to be extremely careful that this privilege is not abused, 8 A.L.J. 237. In 1 B. 64 the Bombay High Court refused to hear Counsel in a reference under S. 438, *supra*. The Court may under this section determine the points raised without hearing Counsel or pleader on either side, but where it has not been done so but merely disposed of the case in default of appearance, the Court has power to restore the case and to hear and determine it, 10 C.L.J. 80, where 14 C. 42 and 10 B. 176. are distinguished, see also 46 M. 332 ; 50 C. 159. but in matters of importance, the High Court though it acts as a Court of Reference and Revision always hears Counsel, 19 C. 380. Where in a reference to the High Court for revision the Sessions Judge has written a complete order setting forth his view and a reply has been submitted by the Magistrate concerned and the facts are clear beyond all doubt, it may not be necessary to hear Counsel. Such a practice will be a direct conflict with the provisions of this section which allows a discretion to the High Court and such practice would prevent revisional References being decided in chambers. Each case must depend on its merits, 25 A.L.J. 1010 at 1012 = 29 Cr. L.J. 88 = 106 Ind. Cas. 680 where 43 A. 11 ; 19 C. 380 ; 8 A.L.J. 237 are referred to. Where an accused person applied in revision to the High Court and pending the revision the High Court released him on bail and subsequently he disappeared, it was held, that the High Court would not hear his application for revision, 24 Cr. L.J. 240 = 71 Ind. Cas. 704.

441. When the record of any proceeding of any Presidency Magistrate is called for by the High Court under

Statement by Presidency Magistrate of grounds of his decision to be considered by High Court.

section 435, the Magistrate may submit with the record a statement setting forth the grounds of his decision or order and any facts which he thinks material to the issue ; and the Court shall consider

such statement before overruling or setting aside the said decision or order.

This section evidently applies to cases in which a Presidency Magistrate passes a non-appealable sentence. Under S. 370, *supra*, a Presidency Magistrate need not write a judgment in non-appealable cases but is only required to record certain particulars and even reasons for conviction need not be stated. The High Court may call for the records under S. 425, *supra*, and the Magistrate may then give his reasons for his conclusion under this section. A statement submitted under this section by a Presidency Magistrate, supplies the defect, if any, in the record and is conclusive as against affidavits filed in support of the revision, 12 B. 377, but this section is not enacted to enable a Presidency Magistrate to give fresh reasons for his decision contrary to those already given; but to enable him to supply reasons where in the exercise of his privilege under S. 370, *supra*, he has given no reasons at all, 1929 M.W.N. 893 at 894. Mere omission by the Magistrate to give reasons before referring a case for police investigation under S. 202, *supra*, and dismissing the complaint under S. 203, *supra*, is only an irregularity which can be rectified by a statement submitted under this section, 5 M.L.T. 79-2 Ind. Cas. 618. This section permits the Magistrate to supplement his reasons but does not abrogate the terms of S. 263 or S. 370, *supra*, and a Bench of Presidency Magistrates imposing a sentence of imprisonment for the offence must record the reasons for the conviction, 1929 M.W.N. 893: the omission to do so especially where there is no record of evidence, is a grave irregularity entitling the High Court to interfere in revision, 46 M. 253; 18 B. 97; 6 C. 579.

442. When a case is revised under this Chapter by the High Court it shall, in manner hereinbefore provided by section 425, certify its decision or order to the Court by which the finding, sentence or order revised was recorded or passed, and the Court or Magistrate to which the decision or order is so certified shall thereupon make such orders as are conformable to the decision so certified; and, if necessary, the record shall be amended in accordance therewith.

High Court's order to be certified to lower Court or Magistrate.

This section provides for the High Court's order in revision to be certified to the Court below to enable that Court to make such orders as are conformable to the decision of the High Court. S. 425, *supra*, relates to the order of the High Court on appeal being certified to the Court below and the manner of certifying is specified there. The provision in this and S. 425 *supra* that the High Court is to certify its decision or order to the lower Court negatives the idea that the High Court can revise its own findings. In such a case it has to certify to itself which could not be done, 1909 P.R. (Cr. J.) 4=9 Cr. L.J. 278-1 Ind. Cas. 747.

PART VIII.

SPECIAL PROCEEDINGS.

CHAPTER XXXIII.

SPECIAL PROVISIONS RELATING TO CASES IN WHICH EUROPEAN AND INDIAN BRITISH SUBJECTS ARE CONCERNED.

Scope and Object of the Chapter.—This Chapter has been newly introduced at the suggestion of the Racial Distinctions Committee by the Criminal Law Amendment Act, XII of 1927 in substitution of the old Chapter which applied only to European British subjects and other Europeans and Americans. It lays down the procedure in respect of the trial of summons and warrant cases, concerning European British subjects and the same right is now extended to Indian British subjects. In this Chapter, some attempt is made at equality before the law irrespective of race and colour. According to the procedure laid down in this

Chapter cases are divided into summons and warrant cases punishable with imprisonment and it applies only to cases arising outside the Presidency towns. The word 'complainant' is specially defined and the procedure in summons and warrant cases is specially laid down. In cases not falling under this Chapter the procedure is that laid down in Chapters XX to XXII, *supra* (Sec S. 528A). This Chapter deals with special provisions relating to cases in which European and Indian British subjects are concerned. By S. 443 to which Ss. 444, 445 and 446 refer, the provisions are applicable to a trial outside a Presidency Town; S. 447 enjoins on a Magistrate to forthwith inform the accused of his rights under this Chapter when he appears to be one which is, or might be held to be one which ought to be tried under this Chapter. S. 448 relates to references made in trial in Rangoon and S. 449 makes certain special provisions as to appeals. The special procedure laid down in the Chapter is available if the trial is outside the Presidency Town, of offences punishable with imprisonment and if the condition mentioned in Cl. (a) or (b) of S. 443, (1) is satisfied and a claim is made under this Chapter, either at the accused's own instance or on his being apprised of his rights by the Magistrate. If the claim is rejected the person may appeal to the Sessions Judge whose decision shall be final and not open to further appeal or revision. The stage at which this claim is to be preferred is specifically mentioned in sub-section (1) of S. 443, where it is put forward by the accused on his own initiative. But such a restriction does not exist where the Magistrate informs him about it, which the law enjoins the Magistrate shall forthwith do, at any stage of the inquiry or trial at which the case appears to him to be of such a nature. A claim to be tried under the provisions of this Chapter is wholly different from a claim to be tried as an European British subject, or an Indian British subject or European, not being an European British subject or an American, and it is the latter claim only which is dealt with in Chapter XLIVA of the Code in which Ss. 528A and 528B occur. So far as the former claim is concerned the question of status of the claimant does not always arise as is evident from the provisions of S. 443 (1) (b); whereas in a claim to be dealt with as an European British subject, or an Indian British subject or an European, not being an European British subject, or an American, the claimant has to prove his own status, in a claim to be tried under this Chapter, the claimant may or may not have to do so. If the latter claim is based upon clause (a) of S. 443 (1), the claimant will have to prove that the complainant and the accused persons or any of them are respectively European and Indian British subjects or Indian and European British subjects. If it is based upon clause (b) of S. 443 (1), the claimant will have to prove that in view of the connection with the case of both an European British subject, and an Indian British subject, it is expedient for the ends of justice that the case should be tried under this Chapter which may or may not involve a question of the claimant's own status. It will also be seen that S. 528A is expressly limited in its operation to a case to which the provisions of this Chapter do not apply and S. 528B applies only to such cases as are contemplated by S. 528A and S. 449 under which the right of appeal is claimed under this Chapter; consequently Ss. 528A and 528B can have no application to S. 443, *infra*, 52 C. 347. The mere fact of a person being a European British subject, does not entitle him to the benefit of this Chapter which is devised for the benefit of both European and Indian British subjects. An Indian British subject has certain privileges just like a European British subject under this Chapter. The distinctive rights of a European British subject are detailed in Chapter XLIVA which also deals with the distinctive rights of an Indian British subject. The determination of this question of the class of British subjects, is necessary for the application of the provisions of S. 275, *supra*, in the case of Jury and of S. 284A in the case of Assessors. When a person has been found by a Magistrate under the provisions of Chapter XLIVA to be an European British subject, he is entitled to have the majority of the Jury to be European British subjects, and all the Assessors in Assessor trials to be European British subjects. That is the necessity for the determination of the question whether an accused person is an European British subject or not, 26 Cr. L. J. 1217=83 Ind. Cas. 833. The fact that an accused person made no claim to the status of a European British subject under Chapter XLIVA of the Code will not debar him from urging that the conditions mentioned in clause (a) or (b) of this section exist. The clauses do not refer only to the status of the accused person, but to the status of two persons. Where an accused person claims to be tried under this Chapter the duty of the Magistrate is

to satisfy himself that (1) the complainant and the accused are respectively European and Indian British subjects and *vice versa* (2) that in view of such status of complainant and accused respectively it is expedient in the interest of justice that the case should be tried under the provisions of this Chapter. If the Magistrate is so satisfied he must record a finding that the case should be tried under this Chapter and the trial is to take place under S. 446, *infra*, which provides for a trial in accordance with S. 375, *supra*, and other provisions of Chapter XXIII so far as they are applicable, i. e., the accused must be tried by Jury the majority of whom if he so requires must be of the category within which the accused comes. But the trial in the Sessions Court would be in the ordinary course, i. e., in the absence of a claim by accused to be tried under this Chapter or in the absence of a government notification under S. 269, *supra*, with the aid of Assessors and the accused has the right under S. 466 to be tried by Assessors all of whom shall be Europeans, Americans or Indians according to the category within which the accused comes, 5 Lah. 515 (F.B.).

443. (1) *Where, in the course of the trial outside a presidency*

town of any offence punishable with imprisonment, the accused person, at any time before he is committed for trial under section 213 or is asked to show

Determination re-
garding applicability of
this Chapter

cause under section 242 or enters on his defence under section 256, as the case may be, claims that the case ought to be tried under the provisions of this Chapter, the Magistrate inquiring into or trying the case, after making such inquiry as he thinks necessary, and after allowing the accused person reasonable time within which to adduce evidence in support of his claim, shall, if he is satisfied—

(a) *that the complainant and the accused persons or any of them are respectively European and Indian British subjects or Indian and European British subjects, or*

(b) *that, in view of the connection with the case of both an European British subject and an Indian British subject, it is expedient for the ends of justice that the case should be tried under the provisions of this Chapter,*

record a finding that the case is a case which ought to be tried under the provisions of this Chapter, or, if he is not so satisfied, record a finding that it is not such a case.

(2) *Where the Magistrate rejects the claim, the person by whom it was made may appeal to the Sessions Judge, and the decision of the Sessions Judge thereon shall be final and shall not be questioned in any Court in appeal or revision.*

(3) *Where the Magistrate rejects the claim, he shall stay the proceedings until the expiration of the period allowed for the presentation of the appeal or, if an appeal is presented, until it has been decided.*

Scope of the section.—The procedure herein prescribed applies to European and Indian British subjects alike. A claim under this section by the accused and a finding by the Magistrate are necessary ingredients for the application of the provisions of this

Chapter. If no claim is made prior to commitment and no finding is recorded by the Magistrate, the question cannot be raised in the Sessions Court. If a claim is made and found in accused's favour the Sessions Judge is bound to accept it and act under the provisions of this Chapter and cannot go behind it, holding that the provisions of the Chapter cannot apply. A finding by the Magistrate in favour of the accused is final, and any adverse finding is also final unless appealed against to the Sessions Judge. The matter could not be re-agitated again in the High Court after a prolonged trial in the Sessions Court, 26 Cr L J. 1217=88 Ind. Cas. 833. There is no provision in the Code enabling a person to put forward a claim to be dealt with under the provisions of this Chapter either before a Magistrate holding an inquiry or trial in a Presidency town or before the High Court Sessions during the trial of the case. It is unreasonable to suppose that the Legislature ever intended that where there was no knowing whether there would be a conviction or an acquittal and both open to appeal under S. 449, (*infra*) any inquiry might be asked for and the Court required to decide on the question as to whether, if the accused be tried outside the Presidency town the case would have been triable under this Chapter. The only object of such inquiry being that the result of it may be availed of, for an appeal by the accused when convicted and by the Crown when acquitted. The proper time to raise the question is when leave to appeal is applied for and that is when appellant has raised it, 25 C. 347. An application for the determination of the prisoner's status must necessarily precede an application for leave to appeal. There are no doubt three stages in cases of this kind (1) the question of the determination of the prisoner's status, (2) application for leave to appeal, (3) admission of the appeal itself, no application for leave to appeal can be presented if the time for presenting the appeal had expired and the application for determining the prisoner's status so far as to enable him to apply for leave to appeal must necessarily be out of time as well, 53 C 746. For definition of European British subject, see S. 4 (1) (i) *supra*, newly given at p. 25. There is no definition of the term "Indian British subject" in the Code.

Trial outside a Presidency Town.—The special provisions of this Chapter do not apply to trial by Magistrates in a Presidency town. See S. 3 (4) of Act X of 1837 (general clauses) which defines 'Presidency Town' as the local limits for the time being of the ordinary original civil jurisdiction of the High Court of Judicature at Fort William, Madras, or Bombay, as the case may be. The trial must relate to an offence punishable with imprisonment and not to other offences. The complainant and the accused persons or any of them are to be European and Indian British subjects or Indian and European British subjects. The applicability of the provision of this Chapter must be determined preliminary to the trial and from such determination as to the non-applicability of the provisions of this Chapter, an appeal is provided for to the Sessions Court and the decision of the Sessions Judge shall be final and the Magistrate is bound to stay proceedings until the expiration of the period allowed for appeal and pending the disposal of the appeal presented. The Magistrate is bound to allow the accused person reasonable time to adduce evidence in support of his claim to be tried under this Chapter and on the evidence he is to be satisfied that the claim is well founded and the ends of justice require that the accused should be tried under the provisions of this Chapter. It is the duty of the accused to claim to be tried under this Chapter.

See Art. 150A of Sch. II, Limitation Act, which prescribes seven days' time for preferring an appeal under sub-section (2), from the date of the finding of the Sessions Judge rejecting a claim under this section. See S. 42, Act XII of 1923.

444. For the purpose of section 443, "Complainant" means

any person making a complaint or, in relation to any case of which cognizance is taken under clause (b) of section 190, sub-section (1), any person who has given information relating to the commission of the offence within the meaning of section 154:

Definition of "Complainant."

Provided that a Public Prosecutor, a public servant, a member, officer or servant of any local authority, a railway servant as defined in section 3 of the Indian Railways Act, 1890, or an officer or servant of any company, association or other body to which the Local Government may, by general or special order published in the local official Gazette, declare the provisions of this section to apply, shall not, by reason only of the fact that he has made a complaint of, or given information of, an offence in his capacity as such Public Prosecutor public servant, railway servant, member, officer or servant, be deemed to be a complainant within the meaning of this section, nor shall a police-officer be so deemed by reason only of the fact that a report under section 173 relating to a case has been made by or through him.

The word "Complainant" has been specially defined here for the purposes of the previous section and the proviso excludes a Public Prosecutor, a public servant, member, officer or a servant of any local authority, a railway servant or an officer or servant of any company from the definition, merely by reason of the fact that he has made a complaint in his capacity as such Public Prosecutor, public servant, etc. A police-officer making a report under S. 173, *supra*, is also excluded under this section.

Proviso.—This proviso enacts that where a public servant makes a complaint under the orders of Government as such public servant the provisions of this Chapter do not apply, 27 Cr. L. J. 1051=97 Ind. Cas. 17. Every case in which a public servant, etc., filed a complaint or lodged information before the police would not become triable under the provisions of this Chapter, if the accused was a European British subject and the complainant or informant an Indian or *vice versa*. It was not contemplated by the Legislature in framing this proviso that in every case it would be open to the accused to allege that the formal complainant, a public servant, etc., had a personal knowledge of the facts of the case or a personal knowledge therein and in every such case the Magistrate would be obliged to institute an inquiry into the truth or otherwise of the allegations, 27 Cr. L. J. 770=95 Ind. Cas. 306.

445. (1) *Where a Magistrate or a Sessions Judge decides under section 443 that a case ought to be tried under the provisions of this Chapter and the case is a summons case, the Magistrate trying the same shall direct that the case be referred to a Bench of two Magistrates and shall send a copy of such order to the district Magistrate who shall forthwith provide for the constitution of a Bench of two Magistrates of the first class, of whom one shall be an European and the other an Indian for the trial of the case.*

(2) *Where the Magistrates constituting the Bench by which a case is tried under this section differ in opinion, the case, together with their opinions thereon, shall be laid before the Sessions Judge, who may examine any party or recall and examine any witness who has already given evidence in the case, and may call for and take any further evidence, and shall thereafter pass such judgment, sentence or order in the case as he thinks fit and as is according to law.*

(3) *Any person convicted by a Bench under this section shall have the same right of appeal as if he had been convicted by a Magistrate of the first class, and any person convicted by a Sessions Judge under sub-section (2) shall have the same right of appeal to the High Court as if he had been convicted by the Sessions Judge at a trial held by the Sessions Judge under this Code.*

(4) *In any case in which it is impracticable to constitute a Bench in accordance with the provisions of sub-section (1) in any district, the District Magistrate shall transfer the case for trial by a like Bench to such other district as the High Court may, by general or special order, direct.*

(5) *Notwithstanding anything contained in this section, the Local Government may, by notification in the local official Gazette, direct that all summons-cases tried under the provisions of this Chapter in any district specified in the notification shall be tried as if they were warrant-cases in accordance with the provisions hereinafter in this Chapter laid down for the trial of warrant-cases.*

This section prescribes the procedure in summons-cases before Magistrates and Benches in which European and Indian British subjects are concerned. When members of the Bench differ in opinion the case is to be laid before the Sessions Judge, who is to pass such judgment, sentence or order as he thinks fit according to law. From a conviction by a Bench and by the Sessions Judge an appeal will lie to the Sessions Court and the High Court, respectively.

446. (1) *Where a Magistrate or a Sessions Judge decides under section 443 that a case ought to be tried under the provisions of this Chapter and the case is a warrant-case, the Magistrate inquiring into or trying the case shall, if he does not discharge the accused under section 209 or section 253, as the case may be, commit the case for trial to the Court of Session, whether the case is or is not exclusively triable by that Court.*

(2) *Where an accused is committed to the Court of Session under sub-section (1), the Court shall proceed to try the case as if the accused had required to be tried in accordance with the provisions of section 275, and the provisions of that section and the other provisions of Chapter XXIII, so far as they are applicable, shall apply accordingly:*

Provided that where the trial before the Court of Session would in the ordinary course be with the aid of assessors and the accused, or all of them jointly, require to be tried in accordance with the provisions of section 284A, the trial shall be held with the aid of assessors all of whom shall, in the case of European British subjects, be persons who are Europeans or Americans or, in the case of Indian British subjects, be Indians.

Procedure in Warrant-cases.

This section prescribes the procedure to be followed, viz., that prescribed for warrant-cases. Where the Magistrate decides under S. 443, *supra*, that the case ought to be tried under the provisions of this Chapter and the case is a warrant-case, the Magistrate enquiring into the case shall, if he does not discharge the accused under S. 209 or S. 233 *supra*, commit the case for trial to the Court of Session whether the case is or is not one exclusively triable by the Court of Session. The provisions of this section are mandatory and if a Magistrate after once deciding that he has no jurisdiction cannot assume jurisdiction by discharging the European British subject and the wording of the section does not permit of such assumption of jurisdiction when a discharge is made obviously with a view to assume jurisdiction; the Magistrate acts illegally and without jurisdiction, in so acting, 27 A.L.J. 183=30 Cr L.J. 128=113 Ind. Cas. 754. A Magistrate therefore is entitled to commit the case for trial to the Court of Session whether the case is or is not triable exclusively by that Court. The trial in the Sessions Court is to be conducted in accordance with S. 275 and the provisions of this Chapter. When an accused committed to the Sessions Court under this section had not required to be tried by European Assessors but claimed to be tried by a Jury of his own nationality and the Sessions Judge refused the prayer in the absence of a notification by the Local Government under S. 269, *supra*, it was held, that the object of the Legislature was to place Indian and European British subjects on the same footing by enacting this Chapter. The trial ought to be by Jury unless he required to be tried by European Assessors under this section. By the words "in the ordinary course" is meant the course which would be followed in the absence of a notification by the Local Government under S. 269, *supra*, 5 Lah 515 (F.B.). When an European British subject is committed to the Court of Session before the amended Code came into force, he having a substantive right under the law as it stood to be tried by a Jury, such substantive right cannot be taken away by the amendment of the law taking away his right of trial by Jury and substituting in its place a trial by the Court of Session with the aid of Assessors. The right which a person had to be tried by Jury when committed for trial, could not be taken away by subsequent amendment of the law, the right being a substantive right and not one of procedure only, 6 Lah. 262.

447. *If at any stage of an inquiry or trial under this Code it appears to the Magistrate that the case is or might be held to be a case which ought to be tried under the provisions of this Chapter, he shall forthwith inform the accused person of his rights under this Chapter.*

Court to inform accused persons of their rights in certain cases.

See the new S. 531, *infra*, which enacts that the omission to inform a person of his rights will not affect the validity of the proceedings. Omission on the part of the Magistrate to inform the accused under this section of his rights under Chapter XXXIII is cured by the new section S. 534 which enacts, that such omission shall not affect the validity of any proceeding. When a case triable under this Chapter has been actually tried in the High Court Session under Chapter XXIII, without a claim on the accused's part under S. 275, *supra* for a trial under this Chapter no appeal will lie in such a case, 3 Ran. 220. See S. 347 *supra*, which corresponds to this section.

References to Sessions Judge to be construed as references to High Court in Rangoon.

448. *For the purpose of the trial in Rangoon of any person under the provisions of this Chapter, references to the Sessions Judge shall be construed as references to the High Court of Judicature at Rangoon.*

Special provisions
relating to appeal.

449. (1) Where—

(a) a case is tried by jury in a High Court or Court of Session under the provisions of this Chapter, or

(b) a case which would otherwise have been tried under the provisions of this Chapter is under this Code committed to or transferred to the High Court and is tried by jury in the High Court, or

(c) a case is tried by jury in the High Court in a Presidency-town and the High Court grants leave to appeal on the ground that the case would, if it had been tried outside a Presidency-town, have been triable under the provisions of this Chapter, then, notwithstanding anything contained in section 418 or section 423, sub-section (2), or in the Letters Patent of any High Court, an appeal may lie to the High Court, on a matter of fact as well as on a matter of law.

(2) Notwithstanding anything contained in the Letters Patent of any High Court, the Local Government may direct the Public Prosecutor to present an appeal to the High Court from an original order of acquittal passed by the High Court in any such trial as is referred to in sub-section (1).

(3) An appeal under sub-section (1) or sub-section (2) shall, where the High Court consists of more than one Judge, be heard by two Judges of the High Court.

Scope of the section.—In ordinary cases tried by Jury there is no appeal except on a matter of law under S. 418, *supra*, but when a case is tried by Jury under the special provisions of this Chapter an appeal is provided for by this section to the High Court on matters of fact as well as on matters of law and the finding of the Jury on a question of fact is no longer final, 26 Cr. L.J. 1241=88 Ind. Cas 857. When a case triable under this Chapter has been tried by the High Court Sessions under Chapter XXIII without any claim by the accused under S. 275, *supra*, for a trial under this Chapter, no appeal would lie under this section. The claim to be dealt with under this Chapter must be made before the first Juror is called and accepted, 3 Ran. 220. This section gives a right of appeal against the decision of the High Court in three classes of cases: (1) cases tried by the High Court by Jury under this Chapter; (2) cases which would otherwise be tried under this Chapter but are committed or transferred to the High Court and tried by Jury. In these two classes of cases an absolute right of appeal is given; (3) cases tried by the High Court by Jury in Presidency Towns. The necessity of granting leave to appeal under clause (c) is due to the fact that in cases falling under clause (b) the question, whether Chapter XXXIII is applicable or not has been decided before the case is committed to or transferred to the High Court. In cases falling under cl. (c) this question, has not arisen, and it was necessary for the Legislature to provide for a decision of this question. The clause is not well drafted, but its meaning is that the question of *status* is to be decided by the High Court before leave to appeal is granted, and that, if that is decided in the accused's favour, he is entitled as of right to appeal. The wording of cl. (c) also supports this view, since it states the ground on which leave to appeal may be granted. This ground would not be stated in this manner if other grounds be considered

by the Court when granting leave to appeal. Power to grant leave to appeal also includes power to refuse leave to appeal, but if the power to grant leave to appeal is limited to a single ground, all that follows is, that the Court which has power to grant leave to appeal on that ground can refuse leave to appeal when that ground is not established. Therefore the Court to which an application for leave to appeal is made has only to decide whether the case would, if it had been tried outside the Presidency town, have been triable under the provisions of this Chapter. The conditions that would make a case, if it had been tried outside a Presidency-town triable under this Chapter are set out in sub-section (1) (a) and (b) of S. 443, *supra*, 52 C. 636. As a matter of convenience and expediency the application for leave to appeal should be made to the Judge who tried the case, 52 C. 347 and 52 C. 636. It is desirable that applications for leave should be made to the trial Judge who is better qualified than any one else to decide whether circumstances which had nothing to do with the guilt of the accused, exist or not. Notice should be given of such applications to the Crown. The right of appeal confined herein is at best a qualified right and very different from that conferred by S. 410, *supra*, 52 C. 347. In this country it is unusual for the Legislature to make a provision for leave to appeal to be granted by the Court against which an appeal is sought to be preferred, although in England it is frequent. On general grounds it is better in the interests of justice that the application is heard by a Bench of two Judges, 52 C. 636. In the cases reported in 52 C. 347 and 52 C. 636, special leave to appeal was granted from a conviction had at the High Court Sessions and the High Court interfered on the merits also. The proper and the only permissible course in a case under this new section where a new right of appeal is given by the Code to the subject is for this right of appeal to be exercised so long as the present rules of the High Court remain unchanged in the way laid down by the Rules of the Original Side of the High Court, *viz.*, on the footing it is part of the business of the Court which as the Rules stand Vakils are excluded, 53 C. 858.

Sub-section (1).—When a claim to be tried as a European British subject was asserted before the Magistrate and such claim was allowed and it was not clear whether the claim was to be tried according to the provisions of this Chapter and the Crown did not take any steps to get the order of the Magistrate set aside or corrected, it was held that on an appeal from a conviction by the Sessions Court, the appellant was entitled to appeal under this section both on matters of fact and matters of law, 29 C.W.N. 260=41 C.L.J. 87=26 Cr. L.J. 662=88 Ind. Cas. 38. There is no reason for thinking that Art. 155 of the 2nd Schedule to the Limitation Act is only limited to appeals to the High Court from Sessions Judges in the *mufassal* or from other Courts from which appeals will lie direct to the High Court. An appeal under this sub-section preferred from a conviction and sentence is governed by Art. 155 of the 2nd Schedule to the Limitation Act, *i.e.*, sixty days from date of conviction and sentence. The question of limitation arises on an application for leave to appeal under Cl. (c) of this sub-section because if the appeal is barred, the application for leave is necessarily out of time, 53 C. 746. When leave to appeal is granted to a European British subject under this section, an Indian British subject jointly tried and convicted along with the European British subject is also entitled to have leave to appeal by the application of S. 415 *supra*, as the judgment by which both of them were convicted was found to be appealable, 54 C. 52, *following* 53 C. 746.

Affidavit of the applicant in support of an application for leave to appeal under this section is admissible and the provisions of S. 342 (4) apply only to an accused person while he is under trial, 54 C. 52 at 55.

Sub-section (2).—An appeal against an original order of acquittal under this Chapter passed by the High Court in the exercise of its original criminal jurisdiction is provided—a power similar to that contained in S. 417 of the Code.

CHAPTER XXXIV.

LUNATICS.

464. (1) When a Magistrate holding an inquiry or a trial has reason to believe that the accused is of unsound mind and consequently incapable of making his defence, the Magistrate shall inquire into the fact of such unsoundness, and shall cause such person to be examined by the Civil Surgeon of the district or such other medical officer as the Local Government directs and thereupon shall examine such Surgeon or other officer as a witness, and shall reduce the examination to writing.

(1A) Pending such examination and inquiry, the Magistrate may deal with the accused in accordance with the provisions of section 466.

(2) If such Magistrate is of opinion that the accused is of unsound mind and consequently incapable of making his defence, he shall record a finding to that effect and shall postpone further proceedings in the case.

Amendment.—Sub-section (1A) is new and empowers the Magistrate to release the accused alleged to be a lunatic on bail pending his examination and inquiry into the fact of lunacy. The addition of the words "shall record a finding to that effect and" in sub-section (2) makes it obligatory on the Magistrate to record a finding as to unsoundness of mind and consequent incapability of making defence.

Scope of the section.—This section contemplates a case in which an accused person appears to be unsound when a Magistrate is holding a preliminary inquiry or trial while the next section deals with a case in which a person committed for trial to the Court of Session, appears at the Sessions trial to be of unsound mind. The section has nothing whatever to do with the question whether the accused was or was not of unsound mind at the time when he is alleged to have committed the offence of which he is accused, 1906 A.W.N. 47. See 42 A. 137, 12 M. 359; 10 B. 512; 24 W.R. (Cr.) 5; See 9 Lah. 371.

When an accused person appears to be of unsound mind the Court should inquire into the fact of such unsoundness before calling upon him to answer the charge. 1905 A.W.N. 2= 2 Cr. L.J. 91. If after holding the inquiry into the fact of the unsoundness of mind of the accused person, the Magistrate finds the accused to be of unsound mind, then he should follow the procedure under this section and not S. 311, *supra*, and then act under S. 466, *infra*, Ratanlal 832; see 9 Lah. 371. The procedure laid down in this Chapter will not strictly apply to maintenance proceedings under Ch. XXXVI because the person proceeded against under the amended S. 483, *infra*, is not an accused person. The word "accused" used in the old section is avoided in the new section evidently with deliberation. However the provisions of this section as well as those which a Court of equity and good conscience would naturally follow, i.e., if it finds that the person proceeded against is insane and incapable of understanding the questions put to him and giving rational answers, further proceedings must be postponed and this is all the more necessary in a maintenance case in which he will be an important witness and has the right of offering terms, 48 M. 388 at 390-391. Where a Magistrate is of opinion that the accused is of unsound mind and therefore incapable of making his defence, he cannot legally acquit him but he is bound to postpone further proceedings in the case, Welf II, 581; 11 M. L.T. 24=13 Cr. L.J. 24=13 Ind. Cas. 215; 10 W.R. (Cr.) 37; 1 W.R. (Cr.) 11. A Magistrate

cannot act on his own opinion and consign a person to an asylum. He must have before him the statement of a medical officer reduced to writing; a mere written certificate of a medical officer is not sufficient evidence of a prisoner being of unsound mind, Weir II, 580 and 582; 9 W.R. (Cr.) 23. When the evidence of a medical witness reduced to writing cannot be considered to be decisive on the question of the prisoner's state of mind, then the Magistrate should take further evidence of regarding the prisoner's ordinary habits both before and after the commission of the alleged offence, 5 C. 826. The postponement contemplated by this section must be *sine die* after recording a finding that the accused is of unsound mind incapable of making his defence and the Magistrate may be required to resume the inquiry under S. 467 *infra*.

465. (1) If any person committed for trial before a Court of Session or a High Court appears to the Court at his trial to be of unsound mind and consequently incapable of making his defence, the Jury, or the Court with the aid of assessors, shall, in the first instance, try the fact of such unsoundness and incapacity, and if the jury or Court, as the case may be, is satisfied of the fact, the Judge shall record a finding to that effect, and shall postpone further proceedings in the case and the Jury if any, shall be discharged.

(2) The trial of the fact of the unsoundness of mind and incapacity of the accused shall be deemed to be part of his trial before the Court.

Amendment.—In sub-section (1) it is enacted that if the Jury or Court is satisfied of the fact of unsoundness, the Judge shall record a finding to that effect and shall then postpone further proceedings and discharge the Jury.

Scope of the section.—The provisions of this section are mandatory. It is incumbent on the Sessions Judge himself to hold an inquiry on the question whether the accused was capable of making his defence when the case comes before him after commitment. He is also to take the opinion of the Assessors on that question and come to a decision before proceeding further with the trial. The question whether when the accused was brought up for trial, was of sound mind, is entirely different from the one whether he was of unsound mind at the time of alleged offence and non-compliance with the provisions of this section vitiates the trial, 7 Lah. 315; 44 C.L.J. 285=27 Cr. L.J. 896=96 Ind. Cas. 160. Where in the course of the trial an accused person showed signs of insanity, the Judge instead of raising a preliminary issue as to the soundness of mind of the accused and his capacity to understand the proceedings to be tried by the Jury first asked the Jury to observe the accused closely and to form their own opinion and proceeded with the trial and the Jury found the accused not insane it was held the procedure adopted was improper and re-trial was ordered to try the issue of insanity, first, 44 C.L.J. 235. Under this section the issue of unsoundness should be tried first and the trial of that question shall be deemed to be part of the trial before the Court, 27 Cr. L.J. 896=96 Ind. Cas. 160; 15 A.L.J. 239=18 Cr. L.J. 470=39 Ind. Cas. 310; 1905 A.W.N. 2, and should be submitted to the Jury first, 19 W.R. (Cr.) 45; 10 W.R. (Cr.) 37; 1892 A.W.N. 109. See also 9 Lah. 371. The Sessions Judge should not merely question the accused but should try the fact of his unsoundness of mind by examining the Civil Surgeon or some other medical officer and by taking evidence of persons resident in the accused's village to ascertain whether the accused had at any time prior to the commission of the offence exhibited symptom of insanity, 1 B.H.C.R. (Cr. Ca.) 33; the Judge alone cannot try the preliminary question, but the trial is to be by Judge and Jury or by the Judge with the aid of Assessors as the case may be, 10 B.L.R. Appx. 10=19 W.R. (Cr.) 15; 19 W.R. (Cr.) 26.

Under this section the onus is on the prosecution to show that the accused was at the time, of sound mind capable of making a defence, 51 C. 584. The most satisfactory method to adopt is that if the inquiry is to be commenced under this section it should be regarded not so much as an issue joined between the parties but as a preliminary issue which is conducted for the satisfaction of the Court and in that view the prosecution ought to commence and to give their evidence, See 9 Lsh. 371; 51 C. 827. The preliminary inquiry cannot be held to be tried in the sense of ascertaining the guilt or not of the offence charged, 3 Pat. L.J. 291 (F.B.)=19 Cr. L.J. 135=43 Ind. Cas. 423.

Sub-section (2)—This sub section is merely an enabling enactment giving the Court which should subsequently try the accused, power to take into consideration the earlier proceedings as if they were part of the record in the trial without the necessity of formal proof and does not make it necessary to hold a preliminary inquiry first and then a subsequent trial with a consequence that the personnel of the Court must remain throughout as originally constituted, 3 Pat. L.J. 291 (F.B.)=19 Cr. L.J. 135=43 Ind. Cas. 423. If as a result of such trial the Court is satisfied that the accused is capable of making his defence the trial shall proceed upon the charge on which the accused stands committed, 15 A.L.J. 239=18 Cr. L.J. 470=39 Ind. Cas. 310. Failure to record a finding on this point vitiates the entire proceeding in the Sessions Court as the provisions of this section are obligatory, 21 Cr. L.J. 83=54 Ind. Cas. 483.

466. (1) Whenever an accused person is found to be of unsound mind and incapable of making his defence, the Magistrate or Court, as the case may be, *whether* the case is one in which bail may be taken or not, may release him on sufficient security being given that he shall be properly taken care of and shall be prevented from doing injury to himself or to any other person, and for his appearance when required before the Magistrate or Court or such officer as the Magistrate or Court appoints in this behalf.

(2) *If the case is one in which, in the opinion of the Magistrate or Court, bail should not be taken, or if sufficient security is not given, the Magistrate or Court, as the case may be, shall order the accused to be detained in safe custody in such place and manner as he or it may think fit, and shall report the action taken to the Local Government:*

Provided that no order for the detention of the accused in a lunatic asylum shall be made otherwise than in accordance with such rules as the Local Government may have made under the Indian Lunacy Act, 1912,

Amendment.—This section is amended so as to allow bail to be granted at the discretion of the Court, in any case in which the accused is a lunatic and the amendment also permits the accused to be kept in custody. The object in view is to delegate the power of the Local Government and to do away with the existing distinction in respect of bailable and non-bailable cases. *St. of Objects and Reasons.*

The object of the preliminary inquiry provided by this section is to determine whether the accused is then in a fit state to be tried. The preliminary inquiry is to ascertain the guilt of the accused. If the inquiry results in the accused making his defence then the trial will proceed and if not, the trial will be adjourned. The word "adjournment" in S. 295 and other sections implies the trial. The word "postponement" used here indicates something different.

Pat. 87. Where the accused is found to be of unsound mind and the trial is postponed, the Magistrate or Court may release the accused on bail or report the case to the Local Government, Weir II, 531. The jurisdiction of the Court over the lunatic accused ceases after his transmission to the place of safe custody appointed by the Local Government and does not revive until the accused is sent back with a certificate that he is capable of making his defence under S. 473 *infra*, 2 C. 356.

467. (1) Whenever an inquiry or a trial is postponed under section 464 or section 465, the Magistrate or Court, Resumption of inquiry or trial. as the case may be, may at any time resume the inquiry or trial, and require the accused to appear or be brought before such Magistrate or Court.

(2) When the accused has been released under section 466, and the sureties for his appearance produce him to the officer whom the Magistrate or Court appoints in this behalf, the certificate of such officer that the accused is capable of making his defence shall be receivable in evidence.

Section 464, *supra*, makes it necessary to examine the medical witness but under this section, the certificate of such officer is sufficient for reviving the proceedings.

When a trial is postponed under S. 465, *supra*, on the ground of unsoundness of mind of the accused and he being consequently incapable of making his defence the trial should not be resumed from the point at which it was previously stopped but should be commenced *de novo* when the Court finds him capable of making his defence, Weir II, 532; 5 W.R. (Cr.) 3. The jurisdiction of the Magistrate ceases the moment the lunatic is handed over for safe custody and it does not revive until the accused is sent back to the Magistrate under S. 473, *infra*, 2 C. 356.

468 (1) If, when the accused appears or is again brought before the Magistrate or the Court, as the case may be, the Magistrate or Court considers him capable of making his defence, the inquiry or trial shall proceed. Procedure on accused appearing before Magistrate or Court.

(2) If the Magistrate or Court considers the accused to be still incapable of making his defence, the Magistrate or Court shall again act according to the provisions of section 464 or section 465, as the case may be, and if the accused is found to be of unsound mind and incapable of making his defence, shall deal with such accused in accordance with the provisions of section 466.

The Amendment in sub-section (2) is in consequence of the change in sub-section (2) of S. 466, *supra*. A trial postponed on the ground of the accused's insanity ought not to be resumed from the point at which it was previously stopped but should be commenced *de novo* when the Court finds that the accused is capable of making his defence Weir II, 532.

469. When the accused appears to be of sound mind at the time of inquiry or trial, and the Magistrate is satisfied from the evidence given before him that there is reason to believe that the accused committed an act which, if he had been of sound mind, would have been an offence, and that he was, at the time when the act was When accused appears to have been insane.

committed, by reason of unsoundness of mind, incapable of knowing the nature of the act or that it was wrong or contrary to law, the Magistrate shall proceed with the case, and, if the accused ought to be committed to the Court of Session or High Court, send him for trial before the Court of Session or High Court, as the case may be.

A Magistrate acts properly within his powers under this section when he commits an accused person for trial to the Sessions Court for murder and when he finds that the accused is insane at the preliminary inquiry, although he appeared to be insane when he committed the act, 9 W.R. (Cr.) 23. There is no provision of law making it incumbent upon a Magistrate holding a preliminary inquiry to order the making of a medical inquiry upon a defence of insanity. It is only in cases where the accused appears to be incapable of taking his trial by reason of mental infirmity that the issue of insanity must be tried as preliminary issue; where the Magistrate is satisfied of the sanity of the accused he has no alternative but to proceed under this section, 9 Lah. 371. A Magistrate cannot discharge the accused when the accused committed the offence when he was suffering from temporary insanity, Weir II, 582.

470. Whenever any person is acquitted upon the ground that at the time at which he is alleged to have committed an offence, he was, by reason of unsoundness of mind, incapable of knowing the nature of the act alleged as constituting the offence, or that it was wrong or contrary to law, the finding shall state specifically whether he committed the act or not.

Judgment of acquittal on ground of lunacy.

The acquittal must be by a duly constituted Court and after a regular trial; otherwise the acquittal is illegal and cannot stand, 2 N.W.P.H.C.R. 110. The leading principle relating to insanity is still to be found in the answers given by the learned Judges in *Macnaughten's* case. The law is that every man is presumed to be sane and to possess a sufficient degree of reason to make him responsible for his acts until the contrary is proved to the satisfaction of the Jury. In other words, the onus of proof where unsoundness of mind is pleaded, is upon the accused and not on the prosecution. The accused's sanity is presumed and it is for him if he can that at the time of committing the offence he was insane. He is to prove clearly that at the time of committing the offence he was labouring under such a defect of reason and disease of mind that he did not know the nature and quality of his act or that he was doing what was wrong. When an accused person relies on S. 84, I.P.C., to escape the legal consequences of his act, the onus is on him to prove that he was at the time when he committed the act, he was incapable of knowing its nature that it was wrong by reason of unsoundness of mind. That onus may be discharged by producing evidence as to his conduct at the time or immediately after the act and also by evidence of his mental conditions, his family history, etc., 9 Lah. 371.

See 7 W.R. (Cr.) 42 where the High Court acquitted an accused who was convicted by the Sessions Court on the ground of insanity and directed him to be kept in safe custody pending orders of the Local Government. See also 32 M.L.J. 72=30 M.L.T. 74=1922 M.W.N. 10=23 Cr. L.J. 71=65 Ind. Cas. 423.

471. (1) Whenever the finding states that the accused person committed the act alleged, the Magistrate or Court before whom or which the trial has been held, shall, if such act would, but for the incapacity found, have constituted an offence, order such person to be detained in safe custody in such place and manner as the Magistrate or

Person acquitted on such ground to be detained in safe custody.

Court thinks fit, and shall report the action taken to the Local Government :

Provided that no order for the detention of the accused in lunatic asylum shall be made otherwise than in accordance with such rules as the Local Government may have made under the Indian Lunacy Act, 1912.

- (2) The Local Government may empower the officer in charge of the jail in which a person is confined under the provisions of section 466, or this section to discharge all or any of the functions of the Inspector General of Prisons under section 473 or section 474.

Power of Local Government to relieve Inspector General of certain function

This section as amended by Act X of 1914 no longer requires the case to be reported to the Local Government. The Court can itself issue a direction for the detention of the person in a lunatic asylum or, if there is no accommodation in it, in jail or some other place of safe custody in British India, 21 Cr. L. J. 46=54 Ind. Cas. 754. 'Detained in safe custody' does not mean having regard to the language used in S. 475, *infra*, detained in the custody of friends and relations and that is quite clear, 55 C. 208.

The intention of the Legislature in amending this section was that in a case where it has been found that an offence has been committed by a lunatic, that the Court should confine itself to make an order that he should be kept in safe custody in such place and manner as the Court thinks fit. After that, it is for the Local Government under its powers to decide what should be done with the lunatic prisoner, 25 Bom. L. R. 286=26 Cr. L. J. 348=84 Ind. Cas. 652; 58 C. 208. This section does not compel the Court to send the accused to a lunatic asylum. All that is necessary to see is that such safe-guards are taken as would keep him from mischief. When the lower Court failed to pass an order when acquitting the accused, the High Court in revision can pass the necessary orders, 42 M. L. J. 72=30 M. L. T. 74=1922 M. W. N. 10=23 Cr. L. J. 71=65 Ind. Cas. 423. He may therefore be ordered to be kept under the control of his parents, 23 Cr. L. J. 71=65 Ind. Cas. 423. When a criminal lunatic is acquitted, the Court can order under this section that he be detained in custody in the jail where he then is until further orders of the Government to whom the case is to be reported, 43 B. 134. The High Court will not set aside an acquittal by a Jury on the ground of unsoundness of mind of the accused in the absence of the very clearest proof that the Jury were mistaken, 19 W. R. (Cr.) 43.

472. *Repealed by Act IV of 1912, S. 101 and Sch. II (The Indian Lunacy Act).*

473. If such person is detained under the provisions of section 466, and in the case of a person detained in a jail, the Inspector General of Prisons, or, in the case of a person detained in a lunatic asylum, the visitors of such asylum or any two of them shall certify, that, in his or their opinion, such person is capable of making his defence, he shall be taken before the Magistrate or Court, as the case may be, at such time as the Magistrate or Court appoints, and the Magistrate or Court shall deal with such person under the provisions

Procedure where lunatic prisoner is reported capable of making his defence

of section 468 ; and the certificate of such Inspector General or visitors as aforesaid shall be receivable as evidence.

474. (1) If such person is *detained* under the provisions of section 466 or section 471, and such Inspector-General or visitors shall certify that, in his or their judgment, he may be *released* without danger of his doing injury to himself or to any other person, the Local Government may thereupon order him to be *released*, or to be detained in custody, or to be transferred to a public lunatic asylum if he has not been already sent to such an asylum ; and, in case it orders him to be transferred to an asylum, may appoint a Commission, consisting of a judicial and two medical officers.

(2) Such Commission shall make formal inquiry into the state of mind of such person, taking such evidence as is necessary, and shall report to the Local Government, which may order his *release* or detention as it thinks fit.

475. (1) Whenever any relative or friend of any person *detained* under the provisions of section 466 or section 471 desires that he shall be delivered to his care and custody, the Local Government may, upon the application of such relative or friend and on his giving security to the satisfaction of such Local Government that the person delivered shall—

(a) be properly taken care of and prevented from doing injury to himself or to any other person, and

(b) be produced for the inspection of such officer, and at such times and places, as the Local Government may direct, and

(c) In the case of a person *detained* under section 466, be produced when required before such Magistrate or Court,

order such person to be delivered to such relative or friend.

(2) If the person so delivered is accused of any offence the trial of which has been postponed by reason of his being of unsound mind and incapable of making his defence, and the inspecting officer referred to in sub-section (1), clause (b), certifies at any time to the Magistrate or Court that such person is capable of making his defence, such Magistrate or Court shall call upon the relative or friend to whom such accused was delivered to produce him before the Magistrate or Court ; and, upon such production, the Magistrate or Court shall proceed in accordance with the provisions of section 468, and the certificate of the inspecting officer shall be receivable as evidence.

This section has been redrafted and sub-section (1) (c) and sub-section (2) are new.

* Detained in custody * within S. 471 does not mean detained in the custody of friends or relations and a Judge has no power to direct a lunatic accused acquitted by him by reason of insanity to be kept in the safe custody of his relatives on their furnishing proper security. It is the Local Government alone who can make such an order under this section when relatives or friends of the accused apply to them on that behalf, 58 C. 203.

CHAPTER XXXV.

PROCEEDINGS IN CASE OF CERTAIN OFFENCES AFFECTING THE ADMINISTRATION OF JUSTICE.

476. (1) When any Civil, Revenue or Criminal Court is, *whether on application made to it in this behalf or otherwise,* of opinion that it is expedient in the interests of justice that an inquiry should be made into any offence referred to in section 195, sub-section (1), clause (b) or clause (c), *which appears to have been committed in or in relation to a proceeding in that Court,* such Court may, after such preliminary inquiry, if any, as it thinks necessary, record a finding to that effect and make a complaint thereof in writing signed by the presiding officer of the Court, and shall forward the same to a Magistrate of the first class having jurisdiction, and may take sufficient security for the appearance of the accused before such Magistrate or if the alleged offence is non-bailable may, if it thinks necessary so to do, send the accused in custody to such Magistrate, and may bind over any person to appear and give evidence before such Magistrate.

*Provided that, where the Court making the complaint is a High Court, the complaint may be signed by such officer of the Court as the Court may appoint.**

For the purposes of this sub-section, a [Chief]† Presidency Magistrate shall be deemed to be a Magistrate of the first class.

(2) Such Magistrate shall thereupon proceed according to law and as if upon complaint made under section 200.

(3) *Where it is brought to the notice of such Magistrate, or of any other Magistrate to whom the case may have been transferred, that an appeal is pending against the decision arrived at in the judicial proceeding out of which the matter has arisen, he may, if he thinks fit, at any stage adjourn the hearing of the case until such appeal is decided.*

Amendment — This section is practically new. The Court may act on its own motion when it is of opinion that it is expedient in the interests of justice to do so. The alleged offence must fall within the offences mentioned in S. 195(1) (b) or (c) and a finding is to be

* This proviso was added by Act II of 1926, S. 6.

† Omitted by Act II of 1926, S. 6.

recorded to that effect and then a complaint in writing signed by the presiding officer of the Court is to be forwarded not to the nearest Magistrate of the first class as before but to the first class Magistrate having jurisdiction in the matter. By Act II of 1926, S. 6, it is now enacted that a Presidency Magistrate is to be deemed a first-class Magistrate and not a Chief Presidency Magistrate as it stood before, for purposes of this section. By this new amendment a Chief Presidency Magistrate who was not competent to take action under this section as the law stood before the amendment is now empowered to take action and thus a real omission has been supplied. Even before the amendment it was held in 53 C. 350 (F.B.) that when the Chief Presidency Magistrate made a complaint to himself and transferred it to another Presidency Magistrate for disposal and the latter committed the case to the High Court Sessions the procedure was substantially correct and the technical error did not go to the root of the case. Power is also given by enacting sub-section (3) to adjourn the trial of the case pending the disposal of an appeal from the original decision out of which proceedings under this section were initiated. Ss. 476A and 476B have been newly added providing for appeals and giving power to superior Court to make a complaint. The new proviso added to sub-section (1) by Act II of 1925 removes the inconvenience felt by the High Court in having the complaint of Court signed by the presiding Judge; now such complaints can be signed by such officer as the Court may appoint.

Scope and object of the section.—The combined effect of this section and S. 195 (1) *supra*, as amended by Act XVIII of 1923 is to substitute the *Complaint of Court* for the *sanction* in respect of prosecutions for offences indicated in the latter section. The recent decided cases are in favour of the view that it makes no difference whether the offender is a party to the proceeding or not. In relation to documents alleged to be forged which is produced or given in evidence in any proceeding before any Court the law requires that unless the Court lodges the complaint in the proper criminal Court, the latter is incompetent to take cognizance of it. The absence of the complaint by Court in writing as required by this section is an illegality which vitiates the proceedings, 28 Cr. L.J. 388=100 Ind. Cas. 1044. The law requires that when certain classes of offences are committed no Court shall take cognizance of such offences unless the Court before whom or in relation to the proceedings before it, such offences have been committed moves for the purpose and removes the legal bar to the prosecution. The Court should apply its mind to the matter and decide what offences are committed and who had committed them and then lay a complaint of Court before the proper criminal Court, 28 Cr. L.J. 843=104 Ind. Cas. 456. Before a Court makes an order under this section it ought to have before it direct evidence fixing the offence upon the person sought to be proceeded against. It is not sufficient that the evidence in the earlier case may induce some kind of suspicion about his guilt. Nature of proof required to establish a case of forgery in a civil Court is very different from that required in a criminal Court to secure a conviction, 30 Cr. L.J. 407=115 Ind. Cas. 174 where 16 C. 730 and 15 Cr. L.J. 33=22 Ind. Cas. 177 are followed. The object of the Legislature in enacting this and S. 476A and S. 476B *supra* was to sweep away the cloud of rulings which threatened to smother the original enactment and to lay down a simplified procedure on the lines of the existing procedure as to complaints, 30 Cr. L.J. 545=115 Ind. Cas. 832. Under this section as amended it is not essential that the proceedings in respect of which action is taken should be of a judicial character, 26 Cr. L.J. 170 at 173=83 Ind. Cas. 730. This section has no application to offences not mentioned in S. 195, *supra*, 39 C.L.J. 33. A Court cannot direct an inquiry into an offence under S. 161, I.P.C. as that section is not mentioned in S. 195, *supra*, 17 Cr. L.J. 388=35 Ind. Cas. 820. Moreover the jurisdiction to make a complaint of Court under this section is limited only to offences mentioned in S. 195 (1) (b) and (c) and not to offences mentioned in S. 195 (1) (a), 2 Luck. 395. The recent amendment to this section and S. 195 *supra*, have resulted in connecting the two sections more closely together and they must be read together, 2 Ran. 374, following 15 M. 224; 18 M.L.T. 433; 14 Bom. L.R. 968; 18 B. 581 and 22 C. 1004. The expression "Court" occurring in S. 195 *supra*, is of wider scope than the expression "Civil, Criminal or Revenue Court" occurring in this section, 4 Pat. 24; 43 A. 60. This section lays down the procedure to be adopted in cases falling under S. 195 (1) (b) and

(c), *viz.*, offences relating to public justice and offences relating to documents produced or given in evidence in proceedings before Civil, Revenue or Criminal Courts and not to S. 195 (1) (a) dealing with contempts of lawful authority of public servants. The Court may act *suo motu* or may do so on the application made to it in this behalf. The offence must appear to have been committed in or in relation to any proceeding (not merely judicial proceeding as before) in any Court and the Court must be satisfied that it is expedient in the interests of justice that an inquiry should be made into the case. The Court after recording a finding may make a complaint in writing signed by the presiding officer and forward the same to a First-class Magistrate having jurisdiction. In the presidency town the Chief Presidency Magistrate was deemed to be a First class Magistrate, but curiously enough no provision was made when an offence is alleged to be committed before the Chief Presidency Magistrate. Now by the new amendment, *viz.*, S. 6 of Act II of 1926 this omission has been rectified by omitting the word 'Chief.' The Court may take sufficient security for the appearance of the accused before such Magistrate and in non-bailable offences send the accused in custody and may bind over persons to give evidence before the Magistrate. To avoid inconvenience, the presiding officer need not appear before a Magistrate to give a sworn statement and on receipt of a complaint the Magistrate shall proceed according to law as if on complaint made under S. 200, *supra*. When a Court has taken cognizance of the offence of perjury on a sanction granted, before the amended Code came into force but has not completed the trial before the amended Code which abolished sanctions the trial can go on without a fresh complaint of Court under this section, 49 M.L.J. 276=22 L.W. 654=1925 M.W.N. 666. Once a Court is properly seized of a case any subsequent amendment of law except one which takes away its jurisdiction to try the offence cannot affect the Court's authority to proceed with the trial. The consequence of an amendment of procedure is not that all matters properly begun under the old procedure collapse and have to be begun again under the new procedure, but that they should be continued under the new procedure from time to time when the new procedure came into force. If this was the intention of the Legislature it would have said so. *Ibid* p. 278. The law does not compel a detailed inquiry. The grant of a right of appeal under S. 476B has not conferred any new right upon the accused and the extent of the preliminary inquiry is still left to the discretion of the Court, 3 Pat 494. It is not obligatory on a Court to wait till the termination of the proceedings in Court in respect of which the offence is alleged to have been committed to start proceedings under this section, 27 Cr. L.J. 1249=98 Ind. Cas. 87, but the proper time to take action, say, against a witness for perjury will be at the time of pronouncing the judgment in the main case. Any action taken in the course of the trial is bound to strike terror in the heart of the other witnesses especially defence witnesses and they would be most unwilling to give evidence, and this would be prejudicial to the accused, 29 Cr. L.J. 40=106 Ind. Cas. 456. Proceedings under this section when they relate to the merits of the statement made by witnesses in Court; if started before the close of the trial, are calculated to seriously affect the case of the party who calls them, as such action is bound to frighten the remaining witnesses who must assume it as an indication of the treatment they themselves are likely to receive if they make similar statement in Court, 30 Cr. L.J. 129=113 Ind. Cas. 321, *following*, 29 C.W.N. 316=26 Cr. L.J. 1249=98 Ind. Cas. 993. Action should not be taken before all the prosecution witnesses are cross-examined and without giving the accused an opportunity to show the falsity of the prosecution evidence and such action is obviously premature, 1912 M.W.N. 400=11 M.L.T. 191=13 Cr. L.J. 141=13 Ind. Cas. 532. Where an offence is committed before a Judge and he is transferred, his successor can validly take action under this section. It is clear whether the Judge or presiding officer is the same or a different person, the Court remains the same, and it is the Court that is to make the complaint, 29 Cr. L.J. 123=112 Ind. Cas. 336.

Civil, Revenue or Criminal Court.—The term "Court" used in this and S. 195 has a wider meaning than Court of justice as defined in the I.P.C., and it includes a tribunal entitled to deal with a particular matter and authorised to receive evidence thereof, 45 C. 585. The Court entitled to take action under this section, *viz.*, to make a complaint of Court, is the Court, which disposed of the case and not the Court where the complaint

was originally filed, 53 C. 433, where 6 C.W.N. 33 and 3 C.W.N. 33 is followed. Generally there is not much difficulty as to what is a Civil or Criminal Court. But the difficulty arises in finding out whether a Revenue officer acting under this section is a Court. In 24 M. 121 it was held, that a Tahsildar when holding an inquiry as to whether transfer of the names in a land register should be made or not, is a revenue Court, because he was authorised under Madras Act III of 1862 to receive evidence and decide the question of transfer and was therefore a tribunal empowered to deal with a particular matter and authorised to receive evidence on that matter in order to enable him to arrive at a determination, 23 M.L.J. 123=(1915) M.W.N. 177=2 L.W. 189=16 Cr. L.J. 231=23 Ind. Cas. 97, See 17 C. 872; 45 C. 338 and 585. A Magistrate holding an inquiry under S. 23 of the Legal Practitioner's Act is a Court, 9 A.L.J. 158=13 Cr. L.J. 190=13 Ind. Cas. 1039. Where the Collector was acting as a Revenue Court and was exercising judicial powers in setting aside the order of a Deputy Collector, he was subject to the superintendence of the High Court and his order was reversible under S. 115, C.P.C., and also under S. 107 of the Government of India Act and the High Court set aside the order directing the institution of criminal proceedings, 26 Cr. L.J. 1565=90 Ind. Cas. 445. A High Court while exercising its revision under the Code can take action under this section and lay a complaint of Court, powers of 3 Ran. 303 (F.B.). Where a Sessions Judge in the course of a Sessions trial makes an inquiry into the conduct of the Jury as to which exception was taken and records evidence, the Judge is entitled to make a complaint of Court under this section in respect of false evidence given in the inquiry before the Judge, which is certainly a judicial inquiry, 54 C. 279. See sub-section (2) of S. 193 as to what are included in the term "Court." "Court" in this section includes the successor of the Judge before whom the alleged offence was alleged to have been committed, 4 Lah. 53; 37 C. 642; 34 A. 393; 3 Ran. 49; 15 C.W.N. 691; 32 B. 184; 29 M. 331; 22 A.L.J. 772; 12 A.L.J. 1003=16 Cr. L.J. 97=27 Ind. Cas. 141; 15 C.W.N. 691=14 C.L.J. 123=12 Cr. L.J. 209=10 Ind. Cas. 66; 27 Cr. L.J. 527=93 Ind. Cas. 991; 30 Cr. L.J. 882=117 Ind. Cas. 906. The Court contemplated herein is the Court before which the offence is alleged to have been committed. The fact that a particular District is taken out of the jurisdiction of a particular Sessions division and constituted a new Sessions division, will not give the new Sessions Court power to make a complaint of Court relating to an offence alleged to have been committed before the Judge of the original Sessions division, and the new Sessions Judge cannot be regarded as the successor of the original Sessions Judge, 29 Bom. L.R. 1296=28 Cr. L.J. 49=99 Ind. Cas. 81. When a suit is tried by a Judge of the High Court, the term "Court" occurring in the section must be taken to mean the High Court. Any Judge of the High Court has therefore power to hear and dispose of an application under this section whether the matter out of which the application arises was heard by him or some other Judge. No doubt as a matter of convenience that would seldom be done, but where the Judge has ceased to hold office there is nothing in the language of the section to prevent any Judge from disposing of the matter. The result of the amendment of the Code has robbed decisions upon the terms of the former Code, of much of their significance, 49 B. 710 where 33 C. 193; 34 C. 551; 37 C. 642 are referred to, 49 A. 60. The word "Court" includes a Court in which a deposit is made under S. 83 of the Transfer of Property Act and such a Court is entitled under this section to make a complaint in writing with respect of a document filed with such an application, 4 Pat. 25. A District Registrar, is not a Civil, Criminal or Revenue Court under this section. 2 Pat. 459. It cannot be suggested that Election Commissioners were either Civil or Criminal Court. Their function was obviously not that of either of such Courts. Election Commissioners were of opinion that they were a Civil Court and relied on the definition of 'Court' in S. 3 of the Indian Evidence Act, but S. 6 of Act XXXIX of 1920 (Election Offences Inquiries Act) makes the provisions of the Indian Evidence Act applicable subject to the provisions of the former Act. Even if the Election Commissioners are legally entitled to take evidence that would make them a Court and not a civil Court. The Election Commissioners have not the powers of a civil Court and their power is restricted to matters in S. 5 of Act XXXIX of 1920 which makes no mention of this section but refers to Ss. 480 and 482 of the Code. Election Commissioners are not a civil Court and therefore had no power to take action under this section, but the High Court entertained an appeal from the order and

setting aside the order made under this section, maintained it as a 'complaint' under S. 190 *supra*, 47 A. 934 where 47 A. 813; 45 C. 585; 32 C. 1; 36 M. 72; 43 C. 926; 24 C. L. J. 235 are referred to.

Whether on application made to it in this behalf or otherwise.—These words have been newly added enabling a party to move the Court to take action under this section by making a complaint in writing against a person. The complaint required by this section must be a formal complaint as defined in S. 4 (1) (h) *supra*, and when it does not comply with the provisions of that section, the proceedings are liable to be quashed, 26 Cr. L. J. 1459 = 89 Ind. Cas. 1027. This section provides that the complaint may be made by a Court, either "on application or otherwise." Therefore it is immaterial whether an applicant was a party to the original proceedings in Court. There is no reason to refuse to take action, because the person applying is not a party but only brings facts to the notice of the Court, if it is expedient in the interests of justice that an enquiry should be made into the offence. So a complaint in respect of a forged document may be made by the court under this section even though moved to do so by a person not a party to the proceeding in which the document was used, 8 Pat. 736 at 739. The fact whether a private party moves the Court or the Court takes action *suo motu* is important for purposes of appeal. In 30 Cr. L. J. 163 = 113 Ind. Cas. 537, it was held that no appeal lay when the Court acts *suo motu* under this section. Action can be taken under this section by the Court and a person can be called upon to show cause even though previous proceedings under this section had been dismissed for non-prosecution by a party, 8 Pat. 376.

Expedient in the interests of justice.—These words are new and the sole consideration is whether the ends of justice require the initiation of proceedings against a certain person. Prosecution for offences against public justice should be allowed primarily in the interests of public justice, 37 C. 13 at 20; [1919] Pat. 286; 20 Cr. L. J. 337 = 50 Ind. Cas. 817. The Court is bound to satisfy itself that the interests of justice require a prosecution, 10 M. L. T. 117; 1 C. W. N. 400; see also 26 M. 116; 4 L. W. 616; 39 M. 677. There is no use of passing an order under this section unless there is a reasonable probability of a conviction, 24 Cr. L. J. 823 = 74 Ind. Cas. 855; 28 Cr. L. J. 1007 = 105 Ind. Cas. 831. It is absolutely essential to the validity of an order under this section that the Court which passes the order should apply its mind to the matter upon its merits and when this essential condition is wanting, the order cannot be sustained. Where in a case, a Sessions Judge passed the following order: "the accused want to be let off but as Mr. Justice Walsh has ordered me to prosecute them, I cannot help them. I therefore order their prosecution," it was set aside by the High Court as unsustainable, 26 Cr. L. J. 18 = 83 Ind. Cas. 498. A complaint of Court is not to be filed merely because there is a contradiction in the evidence of the witness but only when it is in the interests of justice, 30 Cr. L. J. 221 = 113 Ind. Cas. 842. It is not customary to prosecute persons under this section in mere matters of oath against oath; which may be a question of public policy rather than a question of law. It would be manifestly absurd at the end of most criminal trials to send all the *alibi* witnesses up for trial under this section, 39 M. L. T. 414 = 26 L. W. 479 = 28 Cr. L. J. 1007 (1) = 105 Ind. Cas. 831 (1). If a false statement made is clearly immaterial and nothing hinges on it, then the case is not a fit one for making a complaint of Court to prosecute the witness, 28 Cr. L. J. 310 = 100 Ind. Cas. 534. Prosecution should not be started when it is bound to fail, 28 Cr. L. J. 293 = 100 Ind. Cas. 373; provided that the Court is satisfied that a complaint of Court should be filed in the interests of justice, the mere fact that the parties in the appellate Court had agreed to compromise the matter or decided to refer it to arbitration cannot take away the jurisdiction of the Court if the offence alleged to have been committed falls under S. 195 (1) (b) or (c) *supra*, 43 A. 792.

Inquiry into an offence referred to in S. 195 (1) (b) or (c).—Before the amendment, the words were "into an offence referred to in S. 195" and there was a good deal of conflict between the various High Courts as to the interpretation of these words, viz., whether they were words of description or limitation. The amendment is in accordance with the Full Bench decision in 42 M. 540, which following the decisions in 40 M. 100 and 45 M. 224, held that the qualifying circumstances mentioned in S. 195, *supra*, are included in the

reference to S. 195. See 2 Ran. 374; 6 Lah. 34; 3 Ran. 48, 23 C. W. N. 830. In this connection the decisions in 40 A. 116 and 24; 1 Pat. L. J. 293; [1918] Pat. 352; 20 Cr. L. J. 267=49 Ind. Cas. 650; 20 Cr. L. J. 630=52 Ind. Cas. 390, 18 B. 531; 14 Bom. L.R. 968; 32 M. 49 at 87 are no longer law. The jurisdiction to make a complaint of Court is limited only to such cases as are provided for in sub-section (1) (b) or (1) (c) of S. 195, *supra*. This section does not authorise a complaint of Court being filed with regard to offences described in sub-section (1) (a) of S. 195, *supra*, committed in or in relation to any proceeding in Court, 2 Luck. 393. There is a distinction between the procedure to be adopted under S. 195 (1) (a) and under S. 195 (1) (b) and (c). In cases falling under the former the officer is in the position of a public servant. He exercises no quasi judicial function of any kind. In cases falling under the latter he is the presiding officer of a Court exercising judicial or quasi judicial functions and it is only in such cases action can be taken under this section and a complaint of Court filed, 2 Luck. 646. It seems clear that this section must be read with S. 195, *supra*, and the Legislature did not intend that Courts should exercise powers with regard to offences mentioned in S. 195 (1) (c) unless committed by parties to the proceedings in such Court. No doubt this view is attended with inconvenient consequences. It is obviously desirable that persons who abetted the offence not parties to the proceedings in Court should also be tried. It is undesirable that Courts should have power to initiate proceedings against parties before it and not against abettors. The question of the prosecution of the abettors should not be left to the public spirit or to the opponent in the suit or some other member of the public. This section is confined to parties alone but a Magistrate who receives information as to abettors may act under S. 190 (1) (c) if so empowered and then transfer the case to some other Magistrate subordinate to him, 26 A. L. J. 46; 28 Cr. L. J. 978=105 Ind. Cas. 802, 23 Cr. L. J. 31=64 Ind. Cas. 511. The question whether it was permissible to proceed against a person for offences which did not require a complaint of Court while other offences alleged to have been committed by him required a complaint of Court was left undecided in 56 C. 1041. In cases falling under S. 195 (1) (a) action by Court under this section is *ultra vires* and without jurisdiction, 2 Luck. 393. The Court has jurisdiction to act only with regard to offences mentioned in S. 195. It has therefore no jurisdiction to take action for an offence under S. 409, I.P.C., 1 Luck. 527. S. 195, *supra*, is a restrictive section and there is nothing in that or this section to prevent a Court from making a complaint under the ordinary law in respect of an offence under S. 471, I.P.C., which it finds to have been committed before it, 26 Cr. L. J. 1506=50 Ind. Cas. 290. The Court has jurisdiction to act under this section where a forgery is committed in respect of proceedings in Court whether the person proceeded against was a party or not, 28 Cr. L. J. 305=100 Ind. Cas. 259. There is nothing in law to prevent the trial of an abettor of an offence by a party to a proceeding in Court without a complaint of Court under this section, 30 Cr. L. J. 485=115 Ind. Cas. 529; *following*, 32 A. 74; 15 C.W.N. 565=12 Cr. L. J. 101=9 Ind. Cas. 577 and 29 Cr. L. J. 632=110 Ind. Cas. 108. No action should be taken when the circumstances against the person sought to be proceeded against do not amount to more than mere suspicion 29 Cr. L. J. 534=109 Ind. Cas. 358; 30 Cr. L. J. 407=115 Ind. Cas. 174

Committed in or in relation to a proceeding in that Court—Before the amendment the words were “committed before it or brought under its notice in the course of a judicial proceeding.” The various restrictions which existed before, have now been removed. The alleged offence need not be committed before it and it need not be in the course of a judicial proceeding. The words ‘in relation to’ are sufficiently wide to cover a case where the offence was actually committed before the proceedings are begun in the complaining Court. Where a person prefers a false charge to the police, he commits an offence in relation to the proceedings in the Sessions Court to which the accused is subsequently committed for trial and therefore the Sessions Court is competent to take action under this section. If two offences are even remotely connected by the relationship of cause and effect, then the first may be said to be committed in relation to the second. The institution of the false charge to the police may be considered as the cause of the proceedings before the Sessions Court and the false case instituted before the police was in relation to the proceedings in the Sessions Court, 28 Cr. L. J. 324=100 Ind. Cas. 708 where 5 Pat. 33 is *followed*. When a person who

is alleged to have preferred a false charge to the police, has also taken the same facts by way of a complaint to a Magistrate, a complaint of Court under this section is necessary before he can be prosecuted under S. 211, I.P.C., for preferring the false charge. It would be a most extraordinary result if while the Magistrate was still engaged in trying a complaint and possibly inclined to believe the same, the complainant could himself be put into the dock in another proceeding on the allegation that he had preferred a false charge with regard to the same occurrence to the police, 53 M.L.J. 435=1927 M.W.N. 694=39 M.L.T. 103=26 L.W. 405=28 Cr. L.J. 849=104 Ind. Cas. 625, following 43 C. 1152 and 7 M. 292. A proceeding under this section need not necessarily be one between two parties actually cited to appear before the Court, but includes proceedings, say, under the Guardian and Wards Act for the appointment of a guardian to a minor, 28 Cr.L.J. 388=100 Ind. Cas. 1044. There was a conflict of opinion as to the appropriate time for taking action under this section. When action was taken after the termination of the judicial proceedings before the Court, it was held that the Magistrate or Court acted without jurisdiction as action under this section should be taken at or immediately after the termination of the proceedings, before the matter has left the ken of the Court, 31 M. 140; 32 M. 49; 42 M. 422; 34 C. 851; 40 C. 444, Weir II, 597; 6 M. L. T. 92, but the Bombay High Court took a different view in 32 B. 184, and even in Madras the Judges were not unanimous, *Meller, J.*, dissented from the majority view in 31 M. 140, and later on, a Bench of the Madras High Court questioned the correctness of the view expressed and referred the matter to another Full Bench. See 42 M. 422 and 22 L.W. 863=27 Cr. L.J. 230=92 Ind. Cas. 456. All this difficulty has been got over by the amendment. See fuller discussion at p. 850. Even where an offence is committed in or in relation to a proceeding in Court but the offence falls under S. 195 (1) (a) *supra*, there is no jurisdiction to act under this section by making a complaint of Court, 2 Luck 395. The words "committed in or in relation to any proceeding before that Court" occur in S. 195 (1) (b). Proceedings after an *ex-parte* decree is set aside must be regarded as continuation of the trial which ended in the *ex-parte* decree and it is therefore competent to the Court at the time of the final disposal of the suit to proceed against a witness under this section who gave evidence before the passing of the *ex-parte* decree, for offences under Ss. 193 and 196, I.P.C., 48 L.W. 133=25 Cr.L.J. 731=81 Ind. Cas. 219. Under O. XX, r. 20, C.P.C., it is the duty of the Court which decided a case to give a copy of the judgment on application made to it. The proceedings arising out of the application to obtain a certified copy is therefore proceedings before the Court. The Court can delegate its powers and the official to which such functions are delegated really exercises them on behalf of the Court and acts as its ministerial officer. He is the custodian of the records of the Court on its behalf and therefore the application made to that official must also be deemed to have been made to the Court and any offence alleged to have been committed in regard to such an application is an offence committed in connection with proceedings in Court and a complaint of Court is necessary before initiating a prosecution, 29 Cr. L.J. 1028=112 Ind. Cas. 356. An order under this section can be passed on the basis of the evidence recorded under S. 202 2) *supra*, 45 A. 58; 24 Cr. L.J. 862=74 Ind. Cas. 1034. Under the amended section it is not necessary that proceedings in Court be judicial and the fact that no action could be taken before the amendment of the section and proceedings taken before was so dropped without any inquiry will not preclude action being taken afterwards, 26 Cr. L.J. 170=83 Ind. Cas. 730.

After such preliminary inquiry, if any, as it thinks necessary.—Preliminary inquiry is only optional with the Court, 18 Bom. L.R. 284. It may not be necessary to hold a preliminary inquiry. The language of the section is 'such preliminary inquiry, if any, as it thinks necessary'. If the Court can come to a finding on any materials which are before it, e.g., statements to the police under S. 162, *supra*, made to them in the course of their investigation of an alleged offence, other than the particular offence which is under consideration in the proceedings under this section, they can be used by the Court in arriving at a finding, 5 Ran. 26. Although the holding of a preliminary inquiry is discretionary yet when such an inquiry is held whether formal or informal, the Court should carry the investigation to completion so that the person affected may have a full opportunity of showing cause against his prosecution, 21 Cr. L.J. 718=58 Ind. Cas. 62. See also 21 Cr. L.J.

29-54 Ind. Cas. 173; 21 Cr. L.J. 278=33 Ind. Cas. 292; 22 Cr. L.J. 143=59 Ind. Cas. 635; 23 Cr. L.J. 488=77 Ind. Cas. 883; 23 Cr. L.J. 783=104 Ind. Cas. 111. Neither a notice to show cause nor a preliminary inquiry is indispensable and the person proceeded against cannot complain of the want of such inquiry, 13 C.W.N. 691; 20 C. 474; 5 C.W.N. 295; 26 M.L.J. 436; 34 A. 267. Although notice to the persons proceeded against is not essential under this section, it is highly desirable that it should be so given and the High Court looks with disfavour upon an order passed without notice, 23 Cr. L.J. 438=77 Ind. Cas. 889; 6 A. 98; 20 Cr. L.J. 777. Notice to the accused is not as a matter of law necessary, yet where the prosecution has been ordered on the evidence of a witness when the petitioner has no opportunity to cross-examine and whose evidence has thus not been tested, it is materially irregular to exercise powers under this section and direct a criminal prosecution without giving the person proceeded against a chance to know and meet the case against him, 44 M.L.J. 74, followed in 23 Cr. L.J. 227 (2)=93 Ind. Cas. 1027 (2); 11 M.L.T. 191=1912 M.W.N. 400=13 Cr. L.J. 144=13 Ind. Cas. 832. The preliminary inquiry is to be held by the Court itself, 23 Cr. L.J. 985=103 Ind. Cas. 810. A complaint is in no sense invalid merely because the person accused had no opportunity of showing cause against the complaint being made. It is a question of discretion whether the Court should hold a preliminary inquiry when held before making a complaint in writing, 30 Cr. L.J. 545=115 Ind. Cas. 882. In initiating proceedings under this section, the Court is not restricted to the evidence recorded at the original trial. It has inherent power to take such steps as may be necessary to discharge its duty imposed on it by law. The wording of the section "such preliminary inquiry, as it thinks fit" makes the position clear, 23 Cr. L.J. 15=73 Ind. Cas. 703. When the incident in respect of which a complaint is made took place outside the Court the Judge ought to have held a preliminary inquiry to enable him to determine whether there was any case fit to be sent to the Magistrate, 21 C.W.N. 125. Where the identity of the offender is uncertain a preliminary inquiry ought to be held, 23 C. 532; 20 C. 474 and 349. There is no provision in the section as to the manner in which evidence is to be recorded in such preliminary inquiry. A summary of the statement should be made, 42 C. 240. The nature of the preliminary inquiry is a matter for the discretion of the Court. The law does not compel a detailed inquiry. The grant of a right of appeal under S. 476B, *infra*, has not conferred any new right and the extent of the preliminary inquiry is still left to the discretion of the Court, 4 Pat. 434. What a Court has to decide is (1) whether an offence specified in S. 195 (1), (b) & (c) *supra*, appears to have been committed; (2) whether it is expedient in the interests of justice that it should be further inquired into. To arrive at a decision, the Court may, hold such preliminary inquiry as it thinks necessary. The nature, method and extent of the inquiry are entirely at its discretion. The inquiry is to satisfy the Court merely that an offence appears to have been committed. It cannot be held, that the law intended that a Court which has complete discretion, to refuse to hold an inquiry at all, must, if it holds one, issue notice to the party, and give him the equivalent of a full-dress trial. The inquiry that many of the rulings prescribe, seems to go far beyond the essential requirements of the section. The preliminary inquiry under this section should be of a nature merely to satisfy the Court that an offence appears to have been committed. Nothing more is necessary and a long discussion of a decision on the merits is as undesirable as it is unnecessary, 50 M. 660 where 34 A. 267 is followed and 6 Pat. L.J. 145 and 41 M.L.J. 74 are not followed; see also 15 A. 392; 26 A. 249; 4 Pat. 484; 10 M. 232; 8 A.L.J. 237; 10 A.L.J. 247; 21 Cr. L.J. 158=54 Ind. Cas. 686; 23 Cr. L.J. 438=77 Ind. Cas. 888; 23 Cr. L.J. 15=73 Ind. Cas. 703 as to necessity for a preliminary inquiry.

Record a finding to that effect.—Namely that in his opinion a prosecution is necessary in the interests of justice. This section requires that the Court shall record a finding that in the circumstances an inquiry into the offence should be made and a complaint on those terms signed by the presiding officer should be filed. A note in the margin of the application to the effect 'write to the District Magistrate about the matter and ask him to proceed under S. 476' is not a complaint within this section; 45 C.L.J. 40=28 Cr. L.J. 840=104 Ind. Cas. 436. This section merely says that the

Court should record a finding. It does not state that such a finding should be supported by reasons or that it should contain issue for decision but the Court will be well advised to give some reasons for its order. The order passed without recording reason for its finding cannot be set aside merely on that ground, 27 Cr. L.J. 1239=98 Ind. Cas. 87. To prosecute a person for perjury because he has given evidence which is contradictory, merely on the basis of that contradiction is a very doubtful procedure. The Judge taking action under this section should record a finding to the effect that it is expedient in the interests of justice that an inquiry should be made. When such a finding is not recorded it cannot be presumed that the Judge properly considered the matter and came to a right conclusion. From the mere existence of a contradiction in the evidence it cannot be held that an inquiry should be made in the interests of justice, 55 C. 1312 at 1314. Where the order passed showed that in the opinion of the Judge, the person proceeded against had given false evidence before him, that order by itself and in view of the proceedings started under this section carries the imputation that the Judge must have felt that the ends of justice required an inquiry into the alleged offence before a Magistrate should take place although he has not recorded an express finding, 55 C. 279. Omission to record a finding vitiates the whole proceedings. The defect cannot be cured by an argumentative complaint sent by the Judge to the Magistrate, 28 L.W. 774=1928 M.W.N. 229=30 Cr. L.J. 370=114 Ind. Cas. 834. See also 30 Cr. L.J. 221=113 Ind. Cas. 842. The finding recorded by the Court that an offence or offences have been committed by the person to be proceeded against, and it is not sufficient to record a finding of two alternative offences which are mutually inconsistent, 28 Cr. L.J. 888=104 Ind. Cas. 904. The Court has not only to consider whether there is a *prima facie* case but also whether it is expedient in the interests of justice to file a complaint of Court, 30 Cr. L.J. 666 at 667=116 Ind. Cas. 711.

Make a complaint thereof in writing signed by the presiding officer.— For a definition of complaint see S. 4 (1) (h) *supra*. Before the amendment of 1923, it was held by the various High Courts, that action under this section should be taken at or immediately after the conclusion of the proceedings, before the matter had left the *ken* of the Court. Otherwise the proceedings taken were held to be without jurisdiction, 32 M. 49 (F.B.); 31 M. 150 (F.B.); 34 C. 551 (F.B.); 40 C. 444; 37 C. 632 (F.B.). The changes made by the amendment in this section and by the enactment of two new Ss. 476A and 476B are significant. Under the present section it is not only the Court in which the offence was committed, but also the Court which hears an appeal from that Court which is entitled to proceed under this section and a party also is entitled to move the Court to take action under this section. The new S. 476B, provides an appeal both against a complaint made under this section as well as against an order refusing to lay a complaint. No hard and fast rule can be laid down as to within what time a complaint should be made under this section. If a Court disposes of a case, on the last working day of a term, and initiate proceedings under this section on the first day of the re-opening after the long vacation it cannot be said that the Court acts with undue delay, 22 L.W. 863=27 Cr. L.J. 280=92 Ind. Cas. 456. The power under this section may also be exercised now by any Judge of the Court concerned and not only by the Judge who tried the case, 3 Ran. 48; 1 Ran. 372. By the amendment made by S. 6 of Act II of 1925, it is enacted that where the Court making the complaint is a High Court, the complaint may be signed by such officer as the Court may appoint. A letter to the District Magistrate in which all the facts were stated and concluded by soliciting orders in the case was held not to amount to a complaint within this section, 40 A. 641; 12 A.L.J. 881. The fact that the presiding officer of the Court instead of making a formal complaint of Court merely directed a copy of his proceedings to be sent to the District Magistrate for necessary action will not vitiate the proceedings as the defect is merely formal, 3 Ran. 48. The Court is to hold such inquiry that its order when sent up to the Magistrate will amount to a complaint under S. 200, *supra*. For that purpose the complaining Court must decide upon and name the witnesses to be examined by the Magistrate or the complaint is liable to be dismissed on the ground that there are no witnesses. The complaining Court should not leave to the Magistrate to inquire for himself and find out who the witnesses may be. In cases falling under S. 193, I.P.C., giving false evidence, it should be stated what is the false evidence given by the

person sought to be proceeded against and it is not for the Magistrate to fish about in order to find out what statements the lower Court may have considered to be false. The complaint itself must make that clear, 43 M. 393 at 400.

Forward it to a Magistrate of the First Class having Jurisdiction.—The words before the amendment were "send the case for inquiry or trial to the nearest Magistrate of the first class" and difficulty was felt in construing the word "nearest." It was held that the case must be sent to the nearest First-Class Magistrate irrespective of local jurisdiction, 43 B. 300; Weir II, 390. To meet this difficulty the amendment has been made now. The complaint is to be forwarded to the Magistrate of the first class having jurisdiction, *i.e.*, territorial jurisdiction over the place where the offence was committed. S. 177, *supra*, enacts that every offence shall ordinarily be inquired into or tried by a Court within the local limits of whose jurisdiction it was committed. Provision is also made for securing the attendance of the accused and the witnesses and the accused are to be sent up to the Magistrate only in non-bailable offences. To meet the objection that a Presidency Magistrate was not included in the term "First-class Magistrate" it was specially enacted that a Chief Presidency Magistrate shall be deemed to be a First-class Magistrate, but no provision was made for the Chief Presidency Magistrate to take action under this section and S. 6 of Act II of 1926 supplied this omission by omitting the word 'Chief.' The rulings in 9 Bom. L.R. 1160; 3 C.L.J. 357 are no longer law. The amendment obviates the difficulty felt by the Madras High Court when acting under the section in having to send the case to Saidapet and not to a Presidency Magistrate in the city. The complaint can now be made to any Presidency Magistrate.

Proviso to Sub-section (1).—This has been newly added by Act II of 1926, S. 6. on account of the serious inconvenience felt by Judges of the High Court. The remarks that *Shadi Lal, C.J.*, in 6 Lah. 34 at 40 are to this effect. 'Under the new law the Court has no alternative but to prefer a complaint in writingand this procedure in its application to the High Court is open to serious objections. It is hardly consistent with the dignity of a Judge of a High Court that he should have to make and sign a complaint that is to be inquired into by one of his subordinates and that he should be treated and recorded as a complainant throughout the proceedings nor is it fair to the accused that he should be arraigned in a case instituted on a complaint made by a Judge of the highest tribunal and be tried by a judicial officer subordinate to the complainant.....thus giving rise to a reasonable apprehension that his conviction is a foregone conclusion.'

Sub-section (2).—This sub-section lays down the procedure to be followed on receipt of the complaint made in writing by the presiding officer under his signature. The proviso (as) to S. 200, *supra*, in unmistakable terms says that when such a complaint is made nothing in that section shall be deemed to require the examination of the complainant. The proviso is expressly made to obviate the difficulty and inconvenience of presiding officers of Courts and Public Servants acting as such in the discharge of official duties from appearing before Magistrates to give sworn statements like ordinary complainants. See 6 Lah. 34 at 40. The Magistrate on receiving a complaint is under this sub-section to proceed exactly as on receiving a complaint under S. 200, *supra*, that is normally, he will issue summons to the accused and in exceptional cases he will act under S. 202, *supra*, record reasons in writing for postponing the issue of process and make an inquiry or direct a Magisterial or police inquiry or investigation, 30 Cr. L.J. 545=115 Ind. Cas. 882. It is doubtful whether a Magistrate will be entitled to dismiss a complaint of Court under S. 202, *supra*, like a complaint made by a private party. See 21 Cr. L.J. 310=55 Ind. Cas. 470. Where it was held that there was no room for a preliminary inquiry the opinion of the Court is a judicial opinion founded on evidence. It is not necessary that the Court making a complaint under this section should state under what section of the statute the offence falls and a failure to specify the section does not render the complaint illegal, 26 Cr. L.J. 1115=88 Ind. Cas. 283.

Shall thereupon proceed according to Law.—The Magistrate is bound to proceed with the investigation of the complaint made to him by a Civil Court under this section; the words "shall thereupon proceed according to law" are imperative and confer jurisdiction on the Magistrate, 25 B. 785. The Magistrate is bound to proceed under Chapters

former Court is subordinate within the meaning of section 195, subsection (3), and the superior Court may thereupon after notice to the parties concerned direct the withdrawal of the complaint or, as the case may be, itself make the complaint which the subordinate Court might have made under section 476, and if it makes such complaint the provisions of that section shall apply accordingly.

person sought to be proceeded against and it is not for the Magistrate to fish about in order to find out what statements the lower Court may have considered to be false. The complaint itself must make that clear, 33 M. 323 at 400.

Forward it to a Magistrate of the First Class having Jurisdiction.—The words before the amendment were "send the case for inquiry or trial to the nearest Magistrate of the first class" and difficulty was felt in construing the word "nearest." It was held that the case must be sent to the nearest First-Class Magistrate irrespective of local jurisdiction, 33 B. 300; Weir II, 370. To meet this difficulty the amendment has been made now. The complaint is to be forwarded to the Magistrate of the first class having jurisdiction, i.e., territorial jurisdiction over the place where the offence was committed, S. 177, *supra*, enacts that every offence shall ordinarily be inquired into or tried by a Court within the local limits of whose jurisdiction it was committed. Provision is also made for securing the attendance of the accused and the witnesses and the accused are to be sent up to the Magistrate only in non-bailable offences. To meet the objection that a Presidency Magistrate was not included in the term "First-class Magistrate" it was specially enacted that a Chief Presidency Magistrate shall be deemed to be a First-class Magistrate, but no provision was made for the Chief Presidency Magistrate to take action under this section and S. 6 of Act II of 1926 supplied this omission by omitting the word 'Chief.' The rulings in 9 Bom. L.R. 1160; 3 C.L.J. 357 are no longer law. The amendment obviates the difficulty felt by the Madras High Court when acting under the section in having to send the case to Balaspet and not to a Presidency Magistrate in the city. The complaint can now be made to any Presidency Magistrate.

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Shall thereupon proceed according to Law.—The Magistrate is bound to proceed with the investigation of the complaint made to him by a Civil Court under this section; the words "shall thereupon proceed according to law" are imperative and confer dictation on the Magistrate, 26 B. 785. The Magistrate is bound to proceed under

XVIII, XX and XXI with the investigation but he is not bound to proceed to record evidence and convict the accused in every case. Where the matter imputed to the accused does not in the opinion of the Magistrate constitute an offence it will be right and proper to discharge the accused. He cannot return the case to the Court which sent it to him nor can the Court once it has made a complaint of Court commit the accused to the Court of Session, 12 W.R. (Cr.) 41. He cannot order an investigation under S. 202, *supra*, 21 Cr. L.J. 310=53 Ind. Cas. 470, but is competent to discharge the accused, 5 B.H.C.R. (Cr. Ca.) 41, but when a Magistrate after taking cognizance of an offence under S. 471 I.P.C., discharged the accused on the ground that civil suit subsequently filed by the accused on the basis of the document was dismissed and the complaint of the civil Court was necessary before he could proceed further it was held that the order of discharge was illegal and the prosecution could proceed without any complaint of the civil Court, 55 C. 1031 where 43 C. 1002 is distinguished and 43 M. 928 referred. He cannot order compensation when dismissing the complaint, 14 Bom. L.R. 1166; he has no jurisdiction to question the validity of the initiation of proceedings, 26 B. 785; 13 B. 109; 26 A. 514.

Sub-section (3).—Power is expressly given now at any stage to adjourn the hearing of the case until the appeal preferred against the decision arrived at in the judicial proceeding out of which the matter of the complaint has arisen is decided. Before the amendment the power to adjourn the case and to stay proceedings before the Magistrate rested on judicial decisions like, 20 C.W.N. 1116; 16 B. 729; 34 C. 843; 30 M. 226; 13 C.W.N. 398; 14 Bom. L.R. 969; 23 C. 532; 5 C.L.J. 233; 16 A. 80; 43 A. 180; 1905 A.W.N. 254.

May it be thought fit.—This gives a discretion to the Magistrate to stay proceedings until the disposal of the appeal if he thinks that it is expedient in the interests of justice. It would be a dangerous doctrine to lay down any hard and fast rule to the effect that a criminal trial or inquiry should of necessity be stayed simply because a civil suit (or appeal) is pending, 13 C.W.N. 398; 34 C. 843; 43 A. 180. In each case the Court is to exercise a judicial discretion in granting a stay of proceedings. See 48 C.L.J. 40=23 Cr. L.J. 840=104 Ind. Cas. 458.

from by all the other High Courts and doubted the Patna High Court, see 8 Pat. 428. There is no right of appeal when the Court acts *suo motu* and not on the application of some party. The language of the section also supports this view and also under the old Code when the Court acted *suo motu* there was no appeal provided against, such orders under this section whether action was taken *suo motu* by the Court or at the instance of a private party, the idea being that there can be no appeal from the lodging of a complaint, 30 Cr. L.J. 163=113 Ind. Cas. 537. The words "whether on application made to it or otherwise" in S. 476 also suggests that an appeal may not lie when the Court acts *suo motu*. When an appeal lies against an order under this section it is not open to the person proceeded against to question the validity of the order before the Magistrate or Judge who takes cognizance of the case in the complaint of Court at the trial exercising his right of appeal specially conferred now, 49 C.L.J. 193 at 195=30 Cr. L.J. 656=116 Ind. Cas. 632.

Further inquiry.—Where action is taken under this section by lodging a complaint of Court in writing before a Magistrate, and the Magistrate discharges the accused, it is open to a private party to move the Sessions Judge to revise the order of discharge and direct a further inquiry into the case. In every case somebody must bring to the notice of the superior Court, the order of discharge, as it cannot be supposed that it is aware of all the orders of discharge passed by Magistrates within its jurisdiction and there is nothing in the Code to limit the persons who can bring the matter to the notice of the superior Courts. The words used in S. 436, *supra*, are "on examining any record under S. 435, or otherwise," 49 A. 230. The discharge or acquittal of an accused person for want of a complaint of Court under this section by the officer competent to prefer such a complaint will not debar a subsequent trial of the accused for the same offence with the complaint of Court in writing by such officer, 52 B. 257, where 40 B. 97; 37 A. 107 are followed and 36 M. 308 not followed.

476A. *The power conferred on Civil, Revenue and Criminal Courts by section 476, sub-section (1), may be exercised, in respect of any offence referred to therein and alleged to have been committed in or in relation to any proceeding in any such Court, by the Court to which such former Court is subordinate within the meaning of section 195, sub-section (3), in any case in which such former Court has neither made a complaint under section 476 in respect of such offence nor rejected an application for the making of such complaint; and, where the superior Court makes such complaint, the provisions of section 476 shall apply accordingly.*

The newly amended S. 476, this section and 476B have taken the place of the old Ss. 19 and 476. When a Subordinate Judge allowed the proceedings under S. 195 to be dropped without passing any order of rejection it is quite open to the District Magistrate to instruct the Public Prosecutor to move the District Court to take action under S. 476A, 4 Pat. 23 at 31. This section is new and makes provision where a Civil, Revenue or Criminal Court has omitted to complain. In such a case a superior Court is empowered to act under S. 476, *supra*, and make a complaint of Court. S. 476, *supra*, deals with the procedure to be adopted in cases referred to in S. 195 (1) (b) or (c) *supra*, by a Court with regard to offences which appear to have been committed in or in relation to a proceeding in that Court and this section confers certain powers upon a superior Court where the subordinate Court has omitted to take action. The scheme of the section is that if the subordinate Court has neither made a complaint nor rejected an application for the making of a complaint then the superior Court may take action and make a complaint in respect of such offence. This section does not apply to a case where the subordinate Court rejected an application made to it for making a complaint and in such a case the next section alone will apply, 52 C. 1009. Under this section the superior Court has jurisdiction to interfere and file a complaint only in two contingencies (a) the lower Court has not made a complaint under S. 476, *supra*, (b) that it has not rejected an application to make such a complaint. The section is never intended to apply to the case of a Court not invoking a power which it never had power to invoke. Where before the amendment the subordinate Court had granted sanction under S. 195 for the prosecution, but such sanction had lapsed by the passing of the amended code, the remedy of the party is to move the subordinate court to prefer complaint of Court under S. 476 as amended and not to move the superior Court under this section to make a complaint, 23 A L J. 815=26 Cr. L J. 1126=88 Ind. Cas 353. This section applies only to cases where the subordinate Court has neither made a complaint *suo motu* nor rejected an application by a party for making such a complaint and a complaint of Court made by an appellate Court on appeal under S. 476B is not a complaint contemplated by S. 476, *supra*, even though the provisions of that section are made applicable to it by the former section 51 M. 777. The word 'rejected' in this section means rejected after consideration of the merits. This section empowers the superior Court to take action when the lower Court has not taken action at all or when the lower Court has not rejected an application made to it to take action. This seems to show that the superior Court cannot take action when either the lower Court has not taken action or after considering the matter before it has rejected an application to take action under S. 476, *supra*. When an application presented for proper action has been withdrawn without a consideration on the merits, it cannot be said that the application for purposes of this section is rejected, 52 B. 768.

476B. *Any person on whose application any Civil, Revenue or Criminal Court has refused to make a complaint under section 476 or section 476A, or against whom such a complaint has been made, may appeal to the Court to which such*

Appeals.

former Court is subordinate within the meaning of section 195, sub-section (3), and the superior Court may thereupon after notice to the parties concerned direct the withdrawal of the complaint or, as the case may be, itself make the complaint which the subordinate Court might have made under section 476, and if it makes such complaint the provisions of that section shall apply accordingly.

Scope of the section.—This section is new and has been enacted in the place of the original sub-section (6) of S. 195, *supra*, which gave the appellate Court the power of reversing an order granting sanction or an order by a Court instituting a complaint. S. 195, (5) itself provides for a remedy in cases where a complaint in writing is filed by a public servant under S. 195 (1) (a), viz., the superior public servant is authorised to direct a withdrawal of such complaint, 28 Cr. L.J. 547=102 Ind. Cas. 433. It provides an appeal where a Civil Revenue or Criminal Court refuses to make a complaint of Court on the application of any person or makes a complaint against a person under S. 476, *supra*. The section gives a right of appeal not only to the person against whom the complaint of Court has been made but also to the person whose application to the Court for making a complaint of Court has been rejected, but this section does not give a right of appeal to a person against whom the Court *suo motu* files a complaint and not on the application of some party. The word 'such complaint' occurring in this section means a complaint made on an application and not any complaint by Court under S. 476 or S. 476A, *supra*. Having regard to the genesis of the section this interpretation seems to be correct. In the old Code there was no provision for an appeal against an order under this section to the person against whom a complaint was filed, the principle being that there can be no appeal if any person chooses to lodge a complaint whether he be a private individual or a Court, i.e., there can be no appeal against the act of lodging a complaint, 30 Cr. L.J. 163=113 Ind. Cas. 537. The words of S. 476 *supra* to the effect "whether on application made to it or otherwise" seem clearly to support this view. If the Subordinate Court has neither made a complaint nor rejected an application then this section cannot apply and under S. 476A, *supra*, the superior Court is empowered to take action and make a complaint of Court. Where the Subordinate Court has rejected the application for making such complaint of Court then the procedure contemplated by the Code is by way of an appeal to the superior Court under this section, 52 C. 1009. Where the trial Court which had the advantage of seeing the witness in the box and was cognizant of the full facts in connection with the case in which the witness was examined did not think it right to make a complaint of Court against the witness for giving false evidence, the appellate Court should have been chary in taking a different view unless a case was clearly made out for the prosecution of the witness, 21 Cr. L.J. 500 at 502=56 Ind. Cas. 660. S. 195 (3) specified the Court to which such appeals are to be preferred. The superior Court may thereupon give notice to the parties concerned and either direct the withdrawal of the complaint made by the inferior Court or make the complaint which the inferior Court might have made but had refused to make. By this section the Legislature intended that the appellate Court in cases of appeals under this section should reconsider the entire matter on the merits and while allowing reasonable weight to the opinion of the Court below, should nevertheless reconsider the question of the propriety of the order appealed against upon a complete review of the entire facts. If the appellate Court is not satisfied that a *prima facie* case has been made out, the order appealed against must be set aside. The words occurring in S. 476, *supra*, "offence which appears to have been committed" seems to have been used to mean that the facts before the Court unless rebutted show that an offence has been committed, 23 A.L.J. 515=28 Cr. L.J. 1126=88 Ind. Cas. 338. This section gives a right of appeal to a person against whom a complaint is made. It implies that an appeal is to be preferred to the superior Court. See 55 C. 932, following the appellate Court's order and not contemplate that any

great interval should elapse between the passing of a formal order directing a complaint to be made and the actual making of the same and therefore an appeal is allowed not from the finding of the Court that a complaint should be made but from the making of the complaint. The view is further supported by the wording of S. 476 which provides that the Courts after making such preliminary inquiry, if any, as it thinks necessary, may record a finding that it is expedient in the interests of justice that an inquiry should be made into an offence referred to in S. 195 (1) (i) and (c) and make a complaint thereof in writing. The person against whom such a finding is recorded is affected by it only when a complaint is actually made. So time for appeals begins to run from the date on which the complaint is made and not from the date of the order directing a complaint to be drawn up, 7 Lah. 77; 58 C. 322, following 7 Lah. 77 and 52 B. 164; see also 32 C. 1009 and 53 C. 327. No second appeal lies to the High Court, 51 M. 777; 6 Lah. 36; 5 Ran. 523; 55 C. 835 and 763; 43 B. 401.

An appeal is provided herein and without exercising that right of appeal, it is not open to a person against whom a complaint of Court is made to question the validity of the complaint before the trial Court. The Code requires certain proceedings shall not be instituted unless there is a complaint and whether there is a valid complaint is a question which can only be agitated in the manner provided in this section, 49 C.L.J. 193 at 195. An appeal under the Code is given by this section and this being an application of a criminal nature it would not be proper for the appellate Court to extend the time given for the appeal even if the delay arises in consequence of any genuine mistake which could have been averted by a proper inquiry. Under the Code no application for revision lies in cases in which an appeal lies and therefore it is impossible for the appellant to invoke the High Court's revisional jurisdiction before exhausting his remedy by way of appeal. When the complaint of Court is filed by a civil Court the power of the High Court under S. 115, C.P.C., cannot be invoked without first exhausting the remedy by way of appeal. This particular jurisdiction of taking action under S. 476, *supra*, is given to the civil Court by the Criminal Procedure Code only and it is in the exercise of that criminal jurisdiction the civil Court is acting for a particular purpose. "Any error therefore committed by a Civil Court in exercising special jurisdiction so conferred must be corrected if at all by the machinery provided by the statute conferring jurisdiction, i.e., by the Criminal Procedure Code, 27 Cr. L.J. 780—93 Ind. Cas. 316 but this view is not accepted in 26 M. 129; 26 A. 243 (F.B.); 37 C. 714. See notes under the heading 'revision' at p. 858. The words of the section indicate clearly that the Court to which appeals lie, if a civil Court makes an order, is the authority or tribunal to which such Court is subordinate. Where an order is made by a District Munsif hearing a Civil suit, the appeal lay to the District Judge. Although the appeal is one allowed by this Code it must be heard by the District Judge exercising Civil appellate jurisdiction and the procedure governing an appeal of this description is one which has to be sought for in the four corners of the Civil Procedure Code the provisions of which are applicable. Therefore a District Judge is empowered to dismiss an appeal for default of appearance of the appellant and his pleader and there is no illegality in such dismissal, 53 C. 327. This section gives a right of appeal to a private person; the words are 'any person on whose application a Civil, Criminal or Revenue Court has refused to make a complaint, may appeal, etc.' The language does not indicate that any legal representative of a deceased applicant may appeal or support it on his death, 47 A. 359; see 45 M. 83. Art. 154, II Sch. to the Limitation Act, governs such appeals and time taken for obtaining copy of the order can be deducted, 47 A. 462. Article 155 applies to appeals to the High Court, 24 A.L.J. 383—93 Ind. Cas. 351.

Any person on whose application the Court has refused to make a complaint or against whom such a complaint has been made.—The word 'application' occurring herein is very significant and clearly indicates the circumstances under which an appeal is allowed under this section. Application must be distinguished from what the Court does *suo motu*. The language of the section suggests that there is no right of appeal in all cases where complaints of Court are made. The recent decision of the Lahore High Court reported in 30 Cr. L.J. 163—113 Ind. Cas. 537, supports this view. There a District

Magistrate who enquired into a complaint of rape made by a woman found the complaint to be false and at his own instance filed complaints of Court against the complainant and her witnesses under S. 211, I.P.C., on appeals to the Sessions Judge, dismissed the appeals holding that no appeal lay to him as the complaint was made *suo motu* by the Court and the High Court when moved in revision accepted the view of the Sessions Judge observing thus "The learned Counsel, for petitioners contends that the words '*such Complaint*' refer to the previous words a complaint under S. 476 or S. 476A' while the Counsel for the Crown contends that '*such a complaint* means a complaint made on an application. Having regard to the genesis of the section, the latter interpretation is correct. S. 476 of the old Code, gave no right of appeal to a person against whom a Court filed a complaint at its own instance the principle being that there can be no appeal if any person chooses to lodge a complaint whether that person be a private individual or a Court, that is to say, there can be no appeal against the act of lodging of a complaint." The words of S. 476 "whether on *application* made to it or *otherwise*" also clearly seem to support this view.

May appeal to the Court to which such Court is subordinate within S. 195 (3).—Sub-section (3) of S. 195 indicates the Court to which the Court making the complaint should be deemed to be subordinate. A Court should be deemed subordinate to the Court to which *appeals ordinarily lie* from its appealable decrees or sentences. See notes under S. 195 at pp. 356-358. The policy of law as laid down in this section is that whenever there is a decision by a Court upon an application that a complaint shall be made whether that decision be one way or another, there is one appeal from it and no more than one appeal. It matters nothing whatever what the result of the appeal may be. If any particular person is for the first time ordered to be prosecuted by the superior Court, his remedy after that is to take his defence before a Jury or a Magistrate according to the nature of the offence. Two Courts and only two are to deal with this preliminary question, as to whether a person shall be prosecuted or not. If the second Court is against the person to be prosecuted, he must look to the Jury for his safety, 55 C. 765, followed in 30 Cr. L. J. 658=116 Ind. Cas. 63g; see also 55 C. 836. The policy of the Legislature seems to allow only one appeal against orders that may be passed under S. 476 *supra* and not to allow an appeal and a second appeal against such orders, 51 M. 777. This section does not provide for a second appeal from an order passed by a superior Court 5 Ran. 523 following 48 B. 401 and 6 Lah. 56 and dissenting from, 6 Pat. 262 which took the view that a second appeal lay. See also 4 Luck. 155; see also 49 C. L. J. 342 and 47 C. L. J. 277 which took the same view as in 55 C. 765. See also 30 Cr. L. J. 382=115 Ind. Cas. 812. Although no second appeal lay, the High Court in the exercise of its revisional jurisdiction may set aside the order making the complaint of Court, 55 C. 836; See also 52 C. 1009. See also 30 Cr. L. J. 382=115 Ind. Cas. 812. This section gives a right of appeal only when a Court has made or refused to make a complaint under S. 476 or 476A *supra* and neither if these sections relate to a complaint made by Court on appeal from an order made by a subordinate Court refusing to make a complaint. From such an order no appeal lies, 6 Lah. 56. Ordinarily appeals lie from a single Judge of the High Court to a Division Bench but the language of this section and S. 195 (3) contemplates two Courts so far as the High Court is concerned. Both a Judge sitting singly and a Division Bench exercise the Jurisdiction of the same Court, though one exercises original and the other appellate jurisdiction of the same Court. It would be entirely contrary to the spirit of the Act to hold by reason of this, that S. 195 (3) and this section are inapplicable. The definition of subordination is an arbitrary or conventional one intended to meet all cases. In 45 M. 528 (F.B.), it was held before the amendment of the Code in 1923 that appeals ordinarily lie from a single Judge to the Division Bench of the Court against sanction orders and in 43 B. 270 it was held that an appeal lay to the Division Bench from an order by a single Judge of the original side granting or refusing sanction to prosecute before the amendment of the Code. Following these decisions it was held in 56 C. 923 that an appeal lay to the Division Bench of the High Court from an order of a single Judge on the original side making a complaint of Court under S. 476, *supra*. Where the Chief Judge of the Presidency Court of Small Causes makes a complaint of Court under S. 476, *supra*, it has been held that an appeal lay from such order to the appellate

side of the High Court and not to the Full Bench of the Court of Small Causes or to the original side of the High Court, 43 M. 395 where 34 B. 316 is followed, see notes under S. 195 at p. 358. It is submitted that due weight has not been attached to the words "ordinary original civil jurisdiction" occurring in S. 195 (3) when holding that the appeal lay to the appellate side and not to the original side of the High Court. Where a District Munsif invested with Small Cause powers makes a complaint of Court, an appeal lies from such order to the District Court and not to a subordinate Judge, 27 Cr. L.J. 83=91 Ind. Cas. 387. Where a complaint of Court is filed by a District Munsif an appeal lies under this section to the District Court and Civil Procedure Code governs such an appeal 53 C. 827, see 8 Pat. 428. Where certain Election Commissioners purported to act under S. 476, *supra*, professing to be a Civil Court and assumed jurisdiction, an appeal will lie even though the Commissioner acted within jurisdiction and the High Court entertained the appeal, and set aside the order of the Election Commissioners, 47 A. 935 where 13 A. 575; 12 A.L.J. 1113; 45 A. 669; 16 Cr. L.J. 77; 24 C.L.J. 235 and 45 C. 926 are referred to Articles 150, 154, 157 and 158 of Sch. II to the Indian Limitation Act, IX of 1908 are obviously meant to cover all orders under the Code from which an appeal lies. The period of limitation for an appeal under this section under Art. 154 when the order under S. 476, *supra*, is completed or supplemented, *i.e.*, from the date when the complaint is actually made. Till the filing of the complaint the order for purposes of this section is incomplete, 52 B. 164 at 167, following 7 Lah 77; 56 C. 932, following 53 C 827; 44 C. 804; 52 C. 1009; 7 Lah 77 and 52 B 164; 29 Cr. L.J. 72=106 Ind Cas 585. An appeal under this section to the High Court from an order of the District Court is governed by Art. 155 and Art. 156 Sch. II to the Limitation Act, being an appeal under this Code and must be preferred within 60 days of the order appealed against, 46 C.L.J. 40=28 Cr. L.J. 640=104 Ind. Cas 456. The article of the Limitation Act applicable to appeals to Courts other than the High Court under this section is Art 154 of Sch II of the Act, *vis.*, thirty days from the date of the order appealed against, 29 C.W.N. 1035=42 C.L.J. 120, and the party can avail himself of S 12 of the Limitation Act which permits of the time taken for obtaining a copy of the order appealed against, 47 A. 452. Where the superior Court entertained an appeal after the expiry of the thirty days holding that there was no rule of limitation applicable to a case of this kind, an offence against the administration of justice and instituted a complaint of Court after setting aside the order of the first Court the High Court in the exercise of its revisional jurisdiction set aside the appellate order, 52 C. 1009. An appeal under this Code must be disposed of by the appellate Court like any other appeal under the Code mere concurrence with the order of the lower Court is not sufficient for disposing of the appeal, 33 C.W.N. 945. The appellate Court cannot remand the case to the lower Court for the submission of fresh complaint nor can the appellate Court take additional evidence and dispose of the appeal acting on such evidence. The provisions of S. 428, *supra*, do not apply to appeals under this section, 51 M 603; 55 C 1277 nor can the appeal be summarily dealt with by the appellate Court, 51 C 335 but it was held in 39 C.L.J. 375, referring to 55 C. 1277 and 31 C.W.N. 281 that an appellate Court has jurisdiction under this section to remand a case to the lower Court directing it to specify the sections of the I.P.C., and such an order not objected to by the party, he cannot be heard to question the procedure at any subsequent stage. Where a District Magistrate filed a complaint of Court against certain persons for perjury and on appeal under this section, the appellate Court while holding that the particular statement assigned was not proper but substituted another statement as the subject-matter of the complaint, it was held that the procedure was valid as the action of the appellate Court amounted to the setting aside the order of the lower Court and the filing of a fresh complaint for a different offence of the same nature, 29 Cr. L.J. 795=111 Ind. Cas. 122. When a private party moves the Court to take action under S. 476, *supra*, and the Court rejects the application and after filing an appeal under this section he dies, the right to carry on the appeal does not survive to his legal representative or to anybody else, 47 A. 359. In an appeal against an order refusing to make a complaint of Court the party entitled to receive notice of appeal will be the person sought to be proceeded against. But if the appeal is by the person against whom a complaint of Court has been filed the opposite party as in all other cases is the Crown and not the person who moved the Court to make a complaint of Court, 29 Cr. L.J. 72=106 Ind. Cas. 585, following 8 Lah 563.

If it makes a Complaint the Provisions of S. 476, shall apply.—If the superior Court makes a complaint the provisions of S. 476, *supra*, shall apply to such complaint. This is quite clear and necessary. The accused can be sent in custody to Magistrate and the superior Court can bind over any person to give evidence before the Magistrate and the Magistrate must proceed according to law. But all these are quite different from saying that this section must apply over again and give a right of appeal on more to the High Court against the order of the lower Court, 85 C. 765.

Revision.—No further appeal lies to the High Court against the appellate order under this section and as a general rule it is undesirable that the High Court should interfere in revision with an appellate order refusing to withdraw a complaint of Court while it is in the discretion of the lower Court, 7 Lab. 108. The High Court will not interfere except perhaps under very extraordinary circumstances as the question whether a complaint of Court should be made or not is almost invariably a matter of discretion and if the lower Court thinks that there should be no complaint of Court it would be undesirable that the High Court should interfere, 38 B. 301. See also 37 A. 362, where the High Court entertained revision and set aside the order of the appellate Court directing the filing of a complaint when the Court of first instance refused to make a complaint. Where a superior Court set aside the order of the first Court refusing to file a complaint, reasons must be given by the superior Court as to why it thinks that the discretion was not properly exercised and where no reasons were given the High Court will be justified in interfering in revision, 52 C. 471. Where an order purported to be under S. 476, *supra*, but was not a complaint of Court as required by that section the High Court interfered in revision, 82 C. 656. In 27 Cr. L.J. 1240=98 Ind. Cas. 56, the Rangoon High Court *distinguishing*, 5 Pat. 262, set aside in revision an order under S. 476, *supra*, on the ground that no *prima facie* case had been made out and there was no likelihood of securing a conviction in a criminal Court. In 82 C. 1005 the High Court interfered in revision when the superior Court entertained an appeal which was filed more than thirty days from the date of the original order, holding that there was no rule of limitation to a case of this kind. When a civil Court takes action under S. 476, *supra* the High Court cannot revise the order under Ss. 435 and 439, *infra*, 26 Cr. L.J. 523=85 Ind. Cas. 362. S. 435, *supra*, only empowers the High Court to call for records of inferior Criminal Courts and no other, 24 A.L.J. 217=27 Cr. L.J. 276=92 Ind. Cas. 434 17 M.L.T. 268=16 Cr. L.J. 232=27 Ind. Cas. 904; 28 Cr. L.J. 16=89 Ind. Cas. 48. When a civil Court files a complaint of Court no appeal or revision lies to the High Court and Ss. 435 and 439 *supra*, cannot apply. The alteration made in S. 476 *supra*, has not affected the Full Bench decision in 26 A. 249 on this point, see also 24 A.L.J. 217. It is also clear having regard to the language of S. 115, C.P.C. no revision on the Civil side can be entertained although the order sought to be revised may have been based on faulty appreciation of facts or based on faulty view of the law and the Court cannot be held to have exercised a jurisdiction not vested in it or failed to have exercised a jurisdiction vested in it by law or to have acted illegally or with material irregularity. Some alteration in the law is desirable to obviate the difficulty. S. 476, *supra*, is a part of the Code and the Legislature in drafting it doubtless considered that Ss. 435 to 439, *supra*, would operate to afford means whereby the High Court could set aside such orders. Unfortunately by reason of the Full Bench decision in 26 A. 249 S. 115 C.P.C. and not Ss. 435 and 439, *supra*, applies when Civil Courts act under S. 476, *supra*, and the language of S. 115, C.P.C. is too narrow to meet a case. Where a Judge decides to file a complaint of Court on very insufficient or wrong grounds, S. 115, C.P.C. does not empower the High Court to interfere and quash an abortive criminal prosecution, 49 A. 536. The practice in Madras, and Calcutta is to entertain the application on the Civil side as the High Court cannot act under Ss. 435 and 439 as the civil Court cannot be said to be an inferior Criminal Court. Under S. 6, *supra*, only the High Court, the Sessions Court and the Courts presided over by Magistrates are Criminal Courts, 31 M.L.J. 440 at 432, *following* 25 M. 139; 26 A. 249 (F.B.); 37 C. 714. The long practice previous to 1902 of entertaining such revisions on the criminal side under Ss. 435 and 439, *supra*, was unsettled in 1907 (26 M. 139) and that unsettlement seems to have given rise to another settled practice during a long number of years which cannot be questioned now, 30 M.L.J. 440 at 448. A new Rule in the *Criminal Rules of Practice* in conformity with the decision in 26 M. 139

is in contemplation by the Madras High Court. See also 17 M.L.T. 288=18 Cr. L.J. 232; 30 M. 311; 18 M.L.T. 591 at 593 and 594; 51 M. 503 and 777; 40 C. 477=44 C. 816 at 823; 21 C.W.N. 654 at 656; 53 C. 1277 and 836; 23 A. 554; 30 Cr. L.J. 382=115 Ind. Cas. 812; 3 Luck. 155; 81 A. 338. The Lahore High Court in 30 Cr. L.J. 666=116 Ind. Cas. 711, takes a different view, following 1903 P.R. (Cr. J.) 5 (P.B.)=7 Cr.L.J. 281, and holds that a revision under S. 439, *supra*, lies even in a case where a civil Court takes action under S. 476, *supra*. Where a Collector was acting as a Revenue Court under the Tenancy Act and was exercising judicial powers in setting aside the order of a Deputy Collector, it was held that he was subject to the revisional jurisdiction of the High Court and his order was revisable by the High Court under S. 115, C.P.O. and S. 107 of the Government of India Act and the High Court set aside the order directing the institution of criminal proceedings, 25 Cr. L.J. 1565=90 Ind. Cas. 445; See also 28 Cr. L.J. 296=100 Ind. Cas. 376.

Transfer.—The appeal contemplated by this section would be an appeal from the order of the Court filing a complaint of Court under S. 476, *supra*, when a District Judge is authorised to transfer an appeal from an order of the Munsif, it is competent for him to transfer an appeal presented under this section to the Court of a Subordinate Judge and the Subordinate Judge is competent to deal with such an appeal, 27 A.L.J. 53, following 49 A. 536. But see 30 Cr. L.J. 382=115 Ind. Cas. 812 which held that there cannot be a transfer by the District Judge.

Review.—In view of the fact that an appeal is allowed by this section a review would appear undesirable when the Court at first refused to make a complaint of Court and generally there is no provision in the Code for a review, 49 A. 752. A person may be called upon to show cause why he should not be prosecuted by the Court a second time even though previous proceedings under S. 476, *supra*, on the applications of a party had been dismissed for nonprosecution, 8 Pat. 736, following 6 Pat. L.T. 225.

Costs.—Proceedings under S. 195 and S. 476, *supra*, must be treated as of a criminal and not of a civil nature and the criminal law of procedure is to be applied to them. The Code does not authorise an order for payment of costs in those proceedings and it is not possible to justify an order for costs with reference to any inherent power of the Court, 17 Cr. L.J. 184 (1)=33 Ind. Cas. 824, following 30 M. 311. See notes under 'costs' under S. 195, *supra*, at p. 359-360. The Court when exercising powers under its revisional jurisdiction say under S. 115, C.P.O., cannot award costs. There is no provision in Chapter XXXV of the Code for awarding costs especially against one who is not a party to the civil litigation out of which proceedings under S. 476, *supra*, were initiated, 51 A. 338.

477. Repealed by Act XVIII of 1923, S. 129.

478. (1) When any such offence is committed before any Civil or Revenue Court, or brought under the notice of

Power of Civil and Revenue Courts to complete inquiry and commit to High Court or Court of Session.

any Civil or Revenue Court in the course of a judicial proceeding, and the case is triable exclusively by the High Court or Court of Session, or such Civil or

Revenue Court thinks that it ought to be tried by the High Court or Court of Session, such Civil or Revenue Court may, instead of sending the case under section 476 to a Magistrate for inquiry, itself complete the inquiry, and commit or hold to bail the accused person to take his trial before the High Court or Court of Session, as the case may be.

(2) For the purpose of an inquiry under this section the Civil or Revenue Court may exercise all the powers of a Magistrate; and its proceedings in such inquiry shall be conducted as nearly as may be in

accordance with the provisions of Chapter XVIII and of Chapter XXXIII in cases where that Chapter applies and shall be deemed to have been held by a Magistrate.

Scope of the section.—This section deals with a special case where a Civil or Revenue Court is empowered to commit the accused to the Court of Session instead of sending the case for inquiry to a Magistrate under S. 476, *supra*, 28 A. 534 at 560 (F.B.). Such Court may complete the inquiry and frame a charge and commit, or hold to bail the accused person to take his trial before the Court of Sessions, but the Court is bound to send the charge with the order of commitment and the record of the case to a Magistrate authorised to commit for trial and such Magistrate shall bring the case before the Court of Session together with the witnesses for prosecution and defence, S. 479, *infra*. The present Ss. 476, 478 B, and this section have taken the place of the old Ss. 195 and 416 and when a subordinate Judge allowed the proceedings taken by him under S. 195, *supra*, to be dropped without passing any order of rejection, it is quite open to the District Magistrate to instruct the Public Prosecutor to move the District Court to take action under S. 476A, *supra*, 4 Pat. 24 at 31. When the Civil or Revenue Court takes action under this section the responsibility of the prosecution rests entirely upon the Court, 13 B. 384 at 388; 29 M. 331.

Any such offence.—This expression relates to offences referred to in S. 195, *supra*. There was really a conflict whether the conditions laid down by S. 195, *supra*, are also to be incorporated when construing the expression "any such offence." In 22 C. 1004 it was held that the word "offence" is not qualified by the circumstances under which it was committed as described in clause (c) of sub-section (1) of S. 195 by a party to any proceeding in any Court. See also 40 A. 115; 15 B. 381. The Madras High Court in 15 M. 221 took a different view holding that the offence must have been committed by a party to the proceeding. The view was followed in 40 M. 100 and confirmed by 42 M. 340 (F.B.).

Brought under its notice in the course of judicial proceeding.—This section refers not only to offences committed before any Court, Civil or Revenue but also refers to offences brought under its notice in the course of a judicial proceeding. So far as Criminal Courts are concerned there is separate specific provision in S. 487, *infra*.

Instead of sending the case under S. 476.—The use of the word 'instead' is significant. The procedure herein contained is only alternative and the Court has no power on failure of one to adopt the other. The procedure in this section is alternative to that of S. 476. The Court cannot proceed under both the sections. When a Court specified in this section has the option under this section either to make a complaint of Court under S. 478, *supra*, or of committing the case direct to the Court of Session. When a Civil Court started proceedings under S. 476, *supra*, it is not debarred from committing the case to the Court of Session under this section simply because by passing an order of commitment under this section, it deprives the person proceeded against of the right of appeal secured to him under section 478 B, *supra*, if a complaint of Court is made under S. 478, *supra*, 43 A. 895. When a Civil Court had once sent a case under S. 476 *supra* for inquiry and the Magistrate after an enquiry discharged the accused the Civil Court has no power to revive the case against the accused before itself and issue notice to him to show cause why he should not be proceeded against Ratanlal 969, nor can it convert proceedings under S. 476, *supra*, to one under this section subsequently, 50 A. 32.

Itself complete the inquiry.—A commitment cannot be made without holding the preliminary inquiry required by this section, 4 M. 227; Welr II, 583; 23 W.R. (Cr.) 52; 1 W.R. (Cr.) 5. The preliminary inquiry must be conducted in accordance with the provisions of Chapter XVIII, *supra*.

And commit.—It is discretionary to commit, 7 B.H.C.R. (Cr. Ca.) 29. If the offence has not been committed before (or is not one exclusively triable by a Court of Session then further inquiry is desirable and no commitment is to be made but the case sent to a competent Magistrate for inquiry, 4 B. 287. A Court not being bound to commit, the responsibility for the prosecution rests entirely on it, 13 B. 331.

Sub-section (2).—"With one exception perhaps I know of no statutory provision which confers upon any Civil Court as a Civil Court criminal powers of any kind. Enactments which create or appear to create new jurisdiction have to be construed strictly. In the one and only case in which I know of criminal jurisdiction being conferred upon Civil or Revenue Courts, viz., Ss. 478 and 479 of the Code of Criminal Procedure, the powers and procedure are laid down in very precise and well defined terms"—per *Knor, J.*, in 28 A. 554 at 560. The proceedings of a Civil or Revenue Court acting under this section shall be deemed to have been held by a Magistrate. A commitment made by a Civil or Revenue Court under this section can be quashed by the High Court under S. 215, *supra*, only on a point of law. But it was left open whether an appeal lay under S. 15 of the Letters Patent from an order of commitment made by a Judge sitting on the Original Side of the High Court exercising ordinary original jurisdiction but see 49 A. 893 and 43 M. 361 which hold that no appeal lay as S. 215, *supra*, controls and modifies S. 15 of the Letters Patent. Where a Civil Court neither examined the witnesses in the presence of the person against whom action is taken nor explained the charge to him the commitment was quashed as bad in law, 49 A. 32. There is no decided case holding that the Civil or Revenue Court acting under this section is an inferior Criminal Court within S. 435, *supra*, empowering a Sessions Judge to call for records in such a case or stay proceedings. All that the section says, is, that for the purpose of inquiry, under this section, the Civil or Revenue Court may exercise all the powers of a Magistrate and the inquiry shall be conducted as nearly as may be in accordance with the provisions in Chapter XVIII or Chapter XXXIII if it applies and shall be deemed to have been held by a Magistrate, perhaps the last portion of sub-section (2) "shall be deemed to have been held by a Magistrate" it is submitted, makes the Court inferior to the Sessions Court.

Appeal—There is no right of appeal against an order passed under this section. There can be no right of appeal unless it is conferred by the statute and the only provision in this Chapter is S. 476B, *supra*, which gives a right of appeal against an order passed under S. 476, *supra*. There is no corresponding provision relating to the case of an order under this section. It is not for the Court to speculate why no right of appeal has been given against an order passed under this section. The fact remains that there is no right of appeal against an order under this section, 49 A. 898. No appeal lies against an order of commitment under this section made by a Judge of the High Court exercising ordinary original civil jurisdiction as S. 215, *supra*, controls and modifies the general provisions of S. 15 of the Letters Patent of the High Court, 43 M. 361.

479. When any such commitment is made by a Civil or Revenue Court, the Court shall send the charge with the order of commitment and the record of the case to the Presidency Magistrate, District Magistrate or other Magistrate authorised to commit for trial, and such Magistrate shall bring the case before the High Court or Court of Session, as the case may be, together with the witnesses for the prosecution and defence.

This section speaks of the procedure to be adopted by the Civil or the Revenue Court after making an order of commitment, viz., to send the charge with an order of commitment and the record of the case to the Presidency Magistrate, District Magistrate or any other Magistrate authorised to commit, and such Magistrate shall bring the case before the High Court or Court of Session with the witnesses for prosecution and defence. When a Judge of the High Court on the Original Side or a Judge of the Presidency Small Cause Court or City Civil Court makes a commitment, the procedure is to send the charge with the order of commitment and the record to the Chief Presidency Magistrate who shall bring the case before the High Court Sessions.

480. (1) When any such offence as is described in section 175, section 178, section 179, section 180 or section 228 of the Indian Penal Code is committed in the view or presence of any Civil, Criminal or Revenue Court, the Court may cause the offender to be detained in custody and at any time before the rising of the Court on the same day, may, if it thinks fit, take cognizance of the offence, and sentence the offender to fine not exceeding two hundred rupees, and, in default of payment, to simple imprisonment for a term which may extend to one month, unless such fine be sooner paid.

(2) Nothing in section 294, or in Chapter XXXIII, shall be deemed to apply to proceedings under this section.

Scope of the section.—This section refers to five offences mentioned therein, namely, S. 175 (omission to produce a document); S. 178 (refusing oath); S. 179 (refusing to answer questions); S. 180 (refusal to sign statement); S. 228 (intentional insult or interruption of a judicial proceeding). Contempt of Court involves two ideas: (1) contempt of its power, (2) contempt of its authority. Power connotes ability to enforce obedience to its orders and authority connotes, its jurisdiction to declare the law and the rights of the parties. Generally speaking contempt of Court may be committed by any conduct tending to bring the authority and administration of the law into disrespect or disregard or interfere with or prejudice parties or witnesses during the litigation. The term generally applies to any disrespect or indignity offered to Judges while acting as such. In a case of intentional insult or interruption of a judicial proceeding, the record must show the nature, and stage of the judicial proceeding, in which the Court was insulted or interrupted and the nature of the insult or interruption. Talking outside in the Court verandah and refusing to come before the Court when ordered by the Court does not necessarily come within this section, 30 Cr. L.J. 118=113 Ind. Cas. 278.

Contempt of Court.—The essence of contempt of Court is an action or inaction amounting to an interference with or obstruction to or having a tendency to interfere with or to obstruct the due administration of justice, *Acq. Cr. Pl., Ev. and Pr.* p. 1157. "There are three different kinds of contempt, one kind of contempt is scandalising the Court itself. There may likewise be a contempt of this Court in abusing parties who are concerned in cases here. There may be also contempt of this Court in prejudicing mankind against persons before the cause is heard. There cannot be anything of greater consequence than to keep the streams of justice clear and pure, that parties may proceed with safety both to themselves and their character"—per Lord Hardwicke in 26 E.R. 683. Some contempts may arise on the face of the Court as by rude and contumacious behaviour by obstinacy, perverseness or provocation, by breach of the peace or by every disturbance whatever, others in the absence of the party as by disobeying or treating with disrespect the king's writ or process to the purposes of private malice extortion, or injustice; by speaking or writing contemptuously of the Court or Judges acting in their judicial capacity; by printing false accounts or true ones without proper permission of causes then depending in judgment and by anything in short, that demonstrates a gross want of that regard and respect which, when once Courts of justice are deprived of their authority, so necessary for the good order of the kingdom, is entirely lost among the people." *Blackstone vol. IV* 235. The jurisdiction in contempt is part of the legal system in this Country and therefore this part of this system should be executed as any other law, 4 Ran. 237. Any act done or writing published calculated to bring a Court or the Presiding Judge into contempt or to lower his authority is a contempt of Court. To impute improper motives to a court or Judge in its decision is a gross contempt of Court, 23 Cr. L.J. 727 at 742=103 Ind. Cas. 775. The jurisdiction to punish for contempt of Court is inherent

in the High Court as a Court of Record and without it, its constitution as a Court of Record would altogether be useless. But the Court always exercises its power of punishing for contempt with great forbearance and acts with scrupulous care. It is ordinarily very chary in punishing people for contempt and where the occasion arises it deals with such question in the interests of the public, bearing in mind that the greater the power it possesses the more caution it is necessary to use in exercising it. In other words the Court does not interfere where the offence is of a slight or trifling nature and it only interferes where there is a real attempt to obstruct the course of justice. From very early times it has been held to be a contempt of Court to assault, ill-treat or threaten a process server engaged in his duty. The object in punishing for such contempt is not to vindicate the dignity of the Court but to prevent undue interference with the administration of justice. The law has armed the Courts with the power and imposed on it the duty of preventing *bribe* man and by summary proceedings any attempt to interfere with the administration of justice. It is on that ground and not on any exaggerated notion of the dignity of individuals that insults to witnesses, Jury men and process-servers are not allowed. The principle is that those who have duties to discharge pursuant to orders of Court are protected by the law and shielded on their way to the discharge of such duties while discharging them and on their return therefrom in order that such persons may safely have resort to Courts of justice and carry out their orders, 25 Cr. L.J. 1205=88 Ind. Cas. 725; See also 6 Lah. 528. The rule given in this section is made expressly to refer to all Courts whether Civil Criminal or Revenue. Evidently it is a rule introduced for a larger sphere than the law of criminal procedure and has been introduced in the Code only because it deals with summary punishment for certain acts which generally amount to offences under the Criminal law. It is a necessity universally acknowledged that Courts of law should have power to deal with cases of contempt then and there as otherwise the proper administration of justice may seriously be impeded, 10 Cr. L.J. 237=12 Mys. G.C.R. 170. Any act done, or writing published, calculated to bring a Court or a Judge of the Court into contempt, or to lower his authority, or any act done or writing published to obstruct or interfere with the due course of justice, or the lawful process of Court, is a contempt of Court, 33 B. 240 at 243; 10 B.H.C.R. 73. The object of punishing for contempts is the protection of the public from the evil which will result if their faith in the authority and justice of tribunals is interfered with, 47 B. 76. S. 175, I.P.O., intentionally omitting to produce a document before a public servant, etc.; S. 178, I.P.O., refusing oath when duly required to take oath by public servant; S. 179, I.P.O., refusing to answer questions being legally bound to state the truth, 26 Cr. L.J. 354=84 Ind. Cas. 706. S. 180, I.P.O., refusing to sign statement made to a public servant when legally required to do so; S. 228, I.P.O., intentional insult or interruption to a public servant sitting in any stage of a Judicial proceeding. Where a witness being asked his grand-fathers's name, replies that he does not remember it cannot be held that he refuses to answer to the question put to him and will not therefore render himself liable to be dealt with under this section, 27 Cr. L.J. 252=92 Ind. Cas. 428. Where an accused person walked with creaking shoes near the Court room, a Court is not justified in inferring that the accused intended to insult or interrupt its work, 5 M.L.T. 286=9 Cr. L.J. 309=1 Ind. Cas. 560. Where a pleader uses derogatory language and he assures the Court that they were not meant to apply to the Court, the Court ought to accept the assurance and action under this section is unwarranted, 11 A.L.J. 855=14 Cr. L.J. 687=21 Ind. Cas. 1007. But in 9 M.L.T. 443, it was held, without deciding whether the act of a person walking in the view of a Magistrate with shoes on, while the Magistrate was sitting as a Magistrate amounted to an offence under S. 228, I.P.O., that no suit for damages will lie against the Magistrate as it was found that the Magistrate acted *bonafide* though he could have maintained the dignity of the Court without taking notice of the conduct in question. It is a contempt of Court to make comment in a pending case if the effect of such comment is to prejudice the fair trial of an accused person, 14 Bom. L.R. 231=13 Cr. L.J. 461=15 Ind. Cas. 93; see 15 C.W.N. 771; 41 C. 173. There ought to be a spirit of give and take between the Bench and the Bar and every little persistence on the part of a practitioner should not be turned into an occasion for a criminal trial unless the practitioner's conduct is so clearly vexatious as to lead to the inference of intentional insult or interruption

of the Court, 6 Bom. L.R. 541=1 Cr. L.J. 812. A contempt of Court being a criminal offence, no person e.g., a practitioner of the Court can be punished for contempt unless the specific offence charged against him is distinctly stated and an opportunity given to him of answering the same before passing a sentence. L.R. 2 P.C. 106. The general principle which must be applied in all cases of contempt however gross, and even if a witness has in evidence given immediately before the proceedings for contempt, admitted the contempt, and even if the attempt which he has admitted is a gross contempt, nevertheless he cannot be punished for that contempt unless the specific offence charged against him has been distinctly stated and unless he has had an opportunity of answering the charge the principle embodied in S. 535, *infra*, ought not to be applied here because although a formal charge may in certain circumstances be dispensed with in regular criminal cases where evidence is taken and the depositions of witnesses show for what offence the accused is being tried, a formal charge is essentially necessary in summary proceedings for contempt, where possibly no evidence to establish the offence may be recorded and where in the absence of a formal charge the person alleged to be in contempt may not know exactly what particular conduct of his is alleged to have amounted to contempt, 3 Ran. 257; see also 30 Cr. L.J. 118=113 Ind. Cas. 278.

In the view or presence of.—This is what is known in English law as contempt '*in the face of the Court*.' In cases of such contempt the offender can be arrested and sentenced at the discretion of the Court immediately without further proof. This section cannot apply to the case of a witness who when summoned to produce a document stated that it was not in his possession, which was disbelieved by the Magistrate. He should proceed, if at all, under S. 476, *supra*, 13 M. 24.

At any time before rising of Court on the same day.—The procedure herein laid down should be strictly followed, and the provisions of the section were intended to be applied *then and there*, or at any rate before the rising of the Court in whose view or presence the contempt was committed; Courts, when resorting to a use of this section, will do well to follow the procedure therein laid down herein, 11 A. 661 at 364.

Sentence to fine not exceeding Rupees Two Hundred.—The power to punish is limited by the provisions of this section to rupees two hundred or in default to simple imprisonment for one month. The Magistrate has no power to award imprisonment, as a substantive punishment. If he considers a fine to be too light a sentence for the offence committed, he ought to proceed under S. 482, *infra*, by referring the case to some other Magistrate who would have had power to inflict the severe punishment awardable under S. 228, I.P.O. Notwithstanding the provisions as to punishment in S. 228, I.P.O., a Court proceeding under this section cannot pass a sentence in excess of that prescribed herein, Weir II, 603; 6 M.H.C.R. (Appx.) 16.

Appeal.—An appeal lies from every order of conviction made under this section, see S. 456, *infra*. A Sessions Judge cannot decline to interfere on appeal merely because in his opinion the matter is a mere trifle. He is bound to hear the appeal and decide whether the conviction is legal, Ratanlal 978.

Sub-section (2).—The provisions of this section apply to European British subjects also.

Power of High Courts and Chief Courts to punish for contempts of Inferior Courts.—Act XII of 1926—an Act to define and limit the powers of High Courts and Chief Courts in punishing for contempts, empowers them to punish contempts committed before Courts subordinate to them. Doubts having been expressed as to the power of superior Courts to punish contempts committed before inferior Courts; to remove that doubt the said Act has been passed. All contempts except when such contempt is an offence punishable under the Indian Penal Code are liable to be dealt with by the superior Courts. The punishment under the Act is six months' simple imprisonment or fine which may extend to Rs. 2,000 or both and on an apology being made to the satisfaction of the Court, the accused may be discharged or the sentence may be remitted, see also 3 Ran. 257.

481. (1) In every such case the Court shall record the facts constituting the offence, with the statement (if any) made by the offender, as well as the finding and sentence.

(3) If the offence is under section 228 of the Indian Penal Code, the record shall show the nature and stage of the judicial proceeding in which the Court interrupted or insulted was sitting, and the nature of the interruption or insult.

Shall record the facts.—The intention of the Legislature in requiring that certain particulars shall be recorded by the Court was to provide a safeguard against an abuse of power and to enable the appellate Court to see whether the conviction was justifiable, 2 L.A. 303 at 310. The section does not say that a charge is to be framed but only that the facts constituting the offence are to be recorded. The directions contained in this section as to the recording of facts constituting the offence, with the offender's statement, finding and sentence are clearly mandatory and omission will vitiate proceedings, 10 C.W.N. 1032 = 4 C.L.J. 415 = 9 Cr. L.J. 210; 19 M.L.J. 324 (P.C.) = 13 C.W.N. 693 = 11 Cr. L.J. 277 = 4 Ind. Cas. 539; L.R. 2 P.C. 10; Courts when resorting to the use of this section would do well to follow the procedure laid down herein, 11 A 351; when the Magistrate did not specifically record his reasons and the facts constituting the contempt the order was set aside, 4 M.H.C.R. 229. See also 4 M.H.C.R. 143 where it was held that it was no contempt to laugh and hesitate in speaking. But in 13 Cr. L.J. 621 = 25 Ind. Cas. 623, the Madras High Court while holding that the defect was curable under S. 537, *infra*, was of opinion it will not be condoned when the records did not disclose the stage of the judicial proceeding in which the offence was committed and it was doubtful whether the facts amounted to an offence.

Statement, if any.—No person can be punished for contempt of Court which is a criminal offence unless the specific offences charged against him be distinctly stated and opportunity given him of answering the same. The expression "if any" in this section indicates that the Court cannot compel the accused to make a statement, but it does not mean that it should not give him an opportunity to make a statement. This is not an express provision of law enacting a special procedure contrary to the principle of criminal jurisprudence that a man must be heard before he is condemned, 24 Cr. L.J. 722 = 74 Ind. Cas. 642.

Finding and sentence.—The finding and sentence to be recorded under this section will fall within a "judgment" as held in 10 C.W.N. 1062 = 4 C.L.J. 415 = 4 Cr. L.J. 210.

Sub-section (2)—A coarse expression used by a party but not addressed to the Court can scarcely be treated as an insult to or interruption of the Court even if uttered within the hearing of the Presiding Judge, 13 Cr. L.J. 567 = 15 Ind. Cas. 293. Prevarication while giving evidence will not constitute contempt under this section or under S. 228, I.P.C., 4 B.H.C.R. (Cr. Ca.) 6; see also 13 Cr. L.J. 621 = 25 Ind. Cas. 629, nor refusal or neglect to give direct answers to question, 4 B.H.C.R. (Cr. Ca.) 7. Some latitude should be shown to a member of the Bar insisting upon his questions being taken down or his objections being noted by the Court when the Court thinks the question inadmissible or the objection untenable, 6 Bom. L.R. 541 = 1 Cr. L.J. 612. Where the records do not comply with the provisions of this sub-section by not showing the nature and stage of the judicial proceeding in which the Court interrupted or insulted was sitting and the nature of the interruption or insult, the proceedings were quashed, 23 Cr. L.J. 837 = 111 Ind. Cas. 444.

482. (1) If the Court in any case considers that a person has committed or is committing any of the offences referred to in sub-section (1) and is not prepared to be punished otherwise than in default of payment of fine, or that a fine exceeding two hundred rupees should be imposed, the Court may, if it thinks fit, order that the person should be committed to prison.

Procedure where Court considers that case should not be dealt with under section 480.

be imposed upon him, or such Court is for any other reason of opinion that the case should not be disposed of under section 480, such Court, after recording the facts constituting the offence and the statement of the accused as hereinbefore provided, may forward the case to a Magistrate having jurisdiction to try the same, and may require security to be given for the appearance of such accused person before such Magistrate, or, if sufficient security is not given, shall forward such person in custody to such Magistrate.

(2) The Magistrate, to whom any case is forwarded under this section, shall proceed to hear the complaint against the accused person in manner hereinbefore provided.

Scope of the section—This section contemplates that the trial is to be by a judicial officer other than the person before whom the contempt was committed and it applies to cases when a more severe punishment than that is allowed by S. 480, *supra*. There is nothing to warrant the inference that an officer before whom, while acting in a particular capacity a contempt has been committed punishable under S. 228, I.P.C., can in another capacity take up and try the offence, an offence committed against himself. If he could do so, it would be a violation of that fundamental rule in the administration of justice that no man can be a Judge in a case wherein he is interested 12 W. R. (Cr.) 18 at 21. The necessity for commitment to another Magistrate arises only whether the Court thinks, imprisonment without the option of fine or a fine of two hundred rupees, is demanded by the circumstances of the case, 6 M.H.C.R. (Appx.) 16.

Sub-section (1).—Under this section the Court is to record a statement of facts constituting the contempt and the statement of the accused and then forward the case to a Magistrate, 11 W. R. (Cr.) 49; when a Civil Court omitted to call upon the person who was charged with contempt to make his defence it was held that the irregularity was fatal to the order and the High Court would set it aside, 7 B.H.C.R. 402, 5 Bom. L.R. 343, but where the offender was a practitioner who left the Court abruptly before a statement could be recorded from him the omission was held immaterial and the dismissal of the case of contempt against the practitioner on the sole ground that the offender was not allowed an opportunity of explaining his conduct was set aside by the High Court, Weir II, 604; the procedure under S. 480, *supra*, is summary and the punishment can be one of fine only and action should be taken on the same day the contempt was committed. This section need not be read along with S. 480, *supra*, and it is not imperative on a Magistrate to draw up the proceedings on the same day, 35 C. 161. A Magistrate instead of forwarding the case under this section may commit; see S. 487 (2) *infra*. In cases of contempt the Court is bound to accept, if sufficient bail is offered, 12 W. R. (Cr.) 18; 11 W. R. (Cr.) 49.

Sub-section (2).—The Magistrate to whom the case is forwarded shall proceed to hear the complainant in the manner hereinbefore provided, *viz.*, in S. 200, *supra*, and following sections. The wording of S. 476 (2), *supra*, is narrower. Here the words used "hear the complaint and proceed as if upon complaint made under S. 200." The same officer in another capacity cannot try the offender for no man can be a Judge in a case in which he is interested, 12 W. R. (Cr.) 18.

When Registrar or Sub-Registrar to be deemed a Civil Court within sections 480 and 482.

483. When the Local Government so directs, any Registrar or any Sub-Registrar appointed under the Indian Registration Act, 1877, [now 1908] shall be deemed to be a Civil Court within the meaning of sections 480 and 482.

The section is in accordance with the decision in 13 B. L. R. Appx. 43=22 W. R. (Cr.) 113, where it was held that a Sub-Registrar under the Registration Act, being a public servant and the proceedings before him being judicial proceedings within S. 223, I. P. C., had jurisdiction to take contempt proceedings. A Sub-Registrar is held to be not a Court within S. 195, *infra*, 12 B. 36; 11 M. 3, 12 M. 201; 4 M. L. J. 182, and sub section (2) of S. 1-5 *supra* expressly enacts so. This section is an exception and makes a Sub-Registrar a Court for dealing with contumacious contempts and is an exception to the general system and an exceptional provision, 12 B. 36 at 42-43.

484. When any Court has under section 480 or section 482 adjudged an offender to punishment or forwarded him to a Magistrate for trial for refusing or omitting to do anything which he was lawfully required to do, or for any intentional insult or interruption, the Court may, in its discretion, discharge the offender or remit the punishment on his submission to the order or requisition of such Court, or on apology being made to its satisfaction.

Discharge of offender on submission or apology.

When a pleader was punished for contempt by a District Munsiff for certain words uttered in Court which the Munsiff thought was derogatory to his position and the Munsiff declined to accept the assurance of the pleader that the words had no reference to the Court and the District Judge on appeal declined to interfere the High Court in revision directed the Munsiff to consider whether it was not a case in which he should accept the assurance of the pleader and act under this section. Upon the Munsiff's declining to do so as the pleader had not withdrawn the words uttered, it was held that the assurance given that the words were not uttered with reference to the Court should be taken to be sufficient, 11 A. L. J. 535=14 Cr. L. J. 687=21 Ind. Cas. 1007. Litigants are bound to conduct themselves in an orderly manner in Court, but too much notice should not be taken of any sudden lapse, during a moment of excitement into language which is unfortunately too common among the lower class of rustics and is not meant to be taken seriously when a litigant is detained and adopts a submissive attitude when brought before the Court later on after excitement is worn off. A due admonition or a petty fine at the most is sufficient for preservation of order, 13 Cr. L. J. 567=15 Ind. Cas. 983.

485. If any witness or person called to produce a document or thing before a Criminal Court refuses to answer such questions as are put to him, or to produce any document or thing in his possession or power which the Court requires him to produce, and does not offer any reasonable excuse, for such refusal, such Court may for reasons to be recorded in writing, sentence him to simple imprisonment or by warrant under the hand of the presiding Magistrate or Judge commit him to the custody of an officer of the Court for, a term not exceeding seven days, unless in the meantime such person consents to be examined and to answer, or to produce the document or thing. In the event of his persisting in his refusal, he may be dealt with according to the provisions of section 480 or section 482, and, in the case of a Court established by Royal Charter, shall be deemed guilty of a contempt.

Imprisonment or committal of person refusing to answer or produce document.

"Any witness or other person" cannot include a complainant who cannot be punished under this, or S. 179, I.P.C. There is no case which brings in a complainant under these penal provisions, 13 B. 500 at 504.

It is to be borne in mind that Courts are necessarily presided over by Judges who, like other men are mortal and liable to err. It is no offence to subject their decisions to fair, honest and reasonable criticism. Indeed these criticisms may be couched in strong perhaps even in extravagant language but to ascribe their decisions not to error but to improper motives is to bring the Judges and the whole Court into contempt and undermine the confidence of the public in all judicial pronouncements and determinations. It is pointed out by Sir John Wilmot, *C.J.*, in *R. v. Almon*, 94 E. R. 94, that "attacks upon Judges excited in the minds of the people a general dissatisfaction with all judicial determinations and whenever men's allegiance to the laws was so fundamentally shaken, it is most vital and dangerous obstruction of justice calling for more rapid and immediate redress than any other obstruction not for the sake of the Judges as private individuals but because they are the channels by which the King's justice is conveyed to the people," 23 Cr. L.J. 727 at 741=103 Ind. Cas. 775, 45 C. 169 & Lah. 523. The special power under this section is different from the power possessed by Courts of Record to commit for contempt. The High Courts in the Indian Presidencies are superior Courts of Record. The offence of contempt of Court and the powers of the High Court to punish it are the same as in the superior Courts in England and the jurisdiction was exercised by the High Court in such a case, 45 C. 169 at 183-185; 41 C. 173 at 218, 10 C. 109 (P.C.); 11 C.W.N. 273, 21 M.L.J. 832=10 M.L.T. 209; 33 B. 243; 43 A. 711; 6 Lah. 523; 28 Cr. L.J. 727=103 Ind. Cas. 775. The object which a Court has in view for punishing for contempt is the protection of the public from the evil which will result if their faith in the authority and justice of the tribunals is impaired, 47 B. 76. A District Court is not a Court of Record and as such has no inherent powers to punish for contempt, 26 M. 494. The power to punish for contempts is not by virtue of the Penal Code for British India and this Code, but by virtue of the Common Law of England, 5 Moore, P. C. (N.S.) 291. The jurisdiction to punish for contempt of inferior Courts also exists in the Superior Court of Record, 21 M.L.J. 832=10 M.L.T. 209. But a different view was taken by the Calcutta High Court in 41 C. 173 (Sp. B.) and now Act XII of 1926 expressly empowers High Courts and Chief Courts to punish contempts committed before Courts subordinate to them. See notes at p. 564, under S. 480 *supra*.

486. (1) Any person sentenced by any Court under section 480 or section 485 may, notwithstanding anything hereinbefore contained, appeal to the Court to which decrees or orders made in such Court are ordinarily appealable.

Appeals from convictions in contempt cases.

(2) The provisions of Chapter XXXI shall, so far as they are applicable, apply to appeals under this section, and the Appellate Court may alter or reverse the finding, or reduce or reverse the sentence appealed against.

(3) An appeal from such conviction by a Court of Small Causes in a presidency-town shall lie to the High Court, and

an appeal from such conviction by any other Court of Small Causes shall lie to the Court of Session for the sessions division within which such Court is situate.

(4) An appeal from such conviction by any officer as Registrar or Sub-Registrar appointed as aforesaid may, when such officer is also Judge

of a Civil Court, be made to the Court to which it would, under the preceding portion of this section, be made if such conviction were a decree by such officer in his capacity as such Judge, and in other cases may be made to the District Judge, or, in the presidency-towns, to the High Court.

This section provides for appeals in cases of conviction for contempt.

Ordinarily appealable.—This expression means appealable in majority of cases, 11 B. 438 at 443. When a single Judge sitting on the Original Side of the High Court refused on application to commit for contempt of Court, it was held an appeal lay to the Appellate Side of the High Court under S. 15 of the Letters Patent, 1863, 23 C. 236. See in this connection the decision in 56 C. 923, following 43 M. 923 and 43 B. 270, noted under S. 476B, *supra*, at p. 857.

Sub-section (3).—In this sub-section, it is provided that an appeal from a conviction by a Court of Small Causes shall be to the Court of Session. But in sub-section (1) the appeal lies to the District Judge. It is more appropriate to state that the appeal, under this clause also lies to the District Judge rather than to the Court of Session as the conviction is by a Civil Court. An appeal from a Court of Small Causes to the Court of Session is also inconsistent with the expression "ordinarily" occurring in sub-section (1).

487. (1) Except as provided in sections 480 and 485, no Judge of a Criminal Court or Magistrate, other than a Judge of a High Court, shall try any person for any offence referred to in section 195, when such offence is committed before himself or in contempt of his authority, or is brought under his notice as such Judge or Magistrate in the course of a judicial proceeding.

Certain Judges and Magistrates not to try Offences referred to in S. 195 when committed before themselves.

(2) Nothing in section 476, or section 482 shall prevent a Magistrate empowered to commit to the Court of Session or High Court from himself committing any case to such Court.

Object of the section.—This section is limited to offences referred to in S. 195 *supra*. The prohibition in the section is a personal prohibition, the mischief to be prevented being that the same person should not decide a matter which he may have already prejudged. It does not refer to the office of the Magistrate or Judge before whom an offence of the class described in the section is committed, but only refers to the person of the Magistrate, 1 M. 303. This section is enacted to bar the jurisdiction of a Judge of a Criminal Court or Magistrate, when the facts alleged to constitute the offence were committed by a person in the course of a judicial proceeding, 21 Cr. L.J. 696=57 Ind. Cas. 936.

No Judge of a Criminal Court.—The use of the word "Criminal" is significant and shows that the prohibition does not extend to a Judge of a Civil Court. Therefore a District Judge who takes action under S. 195 or S. 476, *supra*, is not debarred from trying the offence in his capacity as a Sessions Judge, 6 B. 479; 7 C.W.N. 708; 16 C. 766 (F.B.); 18 B. 380 (F.B.). The prohibition applies when a Sessions Judge directs prosecution in relation to a judicial proceeding before himself, 13 A. 354; 1 B. 311; Weir II, 609. Even though the trial is not illegal it is undesirable that the same person should try the offender, 6 B. 479; 1887 A.W.N. 139. The use of the word "Judge" is significant. The disqualification is personal and the successor in office is not disqualified to hold the trial.

Magistrate.—The word "Magistrate" includes a Presidency Magistrate, 12 C.W.N. 246.

Shall try any person for an offence.—This section does not prohibit the hearing of an appeal, Weir II, 607; 7 C.W.N. 708. The word "try" as used in this section includes

the hearing of an appeal. The provisions of this section are mandatory. A Sessions Judge who files a complaint of Court has no jurisdiction to hear an appeal from the conviction for the offence in respect of which he had filed a complaint of Court, 25 Cr. L.J. 713=81 Ind. Cas. 201.

Referred to in S. 195.—This section specifically refers only to contempts referred to in S. 195 (1) (a) dealing with Ss. 172-188, I.P.C., contempts of the lawful authority of public servants, S. 195(1) (b) refers to offences against public justice, and S. 195(1) (c) to offences relating to documents given in evidence. A Tahsildar Magistrate whose summons to a person to appear before him was disobeyed, complained to himself as to an offence under S. 174, I.P.C., having been committed by the person summoned and he then issued a warrant the execution of which the accused person was alleged to have prevented. As this section precluded the Tahsildar from commencing to try the case of disobedience to his summons under S. 174, I.P.C., an offence falling under S. 195 (1) (a), *supra*, the warrant subsequently issued by him was without jurisdiction and by preventing the execution of the warrant, the accused cannot be held to have committed any offence, 27 Cr. L.J. 1341=98 Ind. Cas. 416.

Other than a Judge of the High Court—The High Court is a Court of Record and has the power of summarily punishing every contempt without sending the accused for trial to ordinary Criminal Courts, 21 M. 523 at 549 and 262; 8 W. R. (Cr.) 32; 1 B. 339.

Sub-section (2)—This sub-section gives no power to commit, to a Magistrate not ordinarily competent to commit. It only says that a Magistrate ordinarily competent to commit is not obliged to adopt the procedure of Ss. 476 and 482, *supra*. The inquiry will be in the way prescribed by Chapter XVIII of the Code.

CHAPTER XXXVI.

OF THE MAINTENANCE OF WIVES AND CHILDREN.

This Chapter seems to be out of place in a Code of Criminal Procedure and it is here inserted only because corresponding provisions were placed in the Codes of 1861 and 1872. Sir James Fitzjames Stephen thinks that this Chapter should be placed in Part IV relating to prevention of offences, as he says it is a mode of preventing vagrancy or at least preventing its consequences. Unfortunately, though vagrancy is an offence in England it is not in India and never has been an offence in India. *Whitely Stoke's Anglo Indian Codes Vol. II, p. 29*. The right to maintenance enforceable under the Code is a right which exists independently of the personal law of the parties. The provision is analogous to that made by the English Poor Law under which children who have no Common Law right to claim it from their father's hands may claim it before a Magistrate, 23 M. 473 at 473 (F.B.). Among Hindus marriage is not a mere contract but a sacrament. The marriage is complete and irrevocable on the performance of certain ceremonies. *Mayne on Hindu Law* says, "The maintenance of a wife by her husband is a matter of personal obligation arising from the very existence of the relation and independent of possession of property and this obligation attaches from the moment of marriage, where the wife is immature it is the custom that she should reside with her parents and they maintain her as a matter of affection but not of obligation. If from inability, unwillingness or any other cause, they choose to demand her maintenance from the husband he is bound to pay it and he alone is liable." Under Mahomedan Law evidence of continued co-habitation duly made out is sufficient to prove a marriage and the effect of a legal marriage is to place the wife under the dominion of the husband to confer on her right of maintenance, etc. The right to maintenance is expressly recognized under Mahomedan Law and even where the husband is absent without making any provision for the wife's maintenance she is entitled to have it out of his property. In case of divorce the wife is entitled to maintenance during the period of *iddat*, i.e., the period of her probation. Children whether legitimate or illegitimate are entitled to maintenance from the father until they reach an age when they can support themselves. The word used is 'unable to maintain himself.'

488. (1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding *one hundred rupees* in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

(2) Such allowance shall be payable from the date of the order, or if so ordered from the date of the application for maintenance.

(3) If any person so ordered *fails without sufficient cause* to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment, if sooner made :

Enforcement of order. ct Provided that, if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing :

Provided, further, that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due.

(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

(6) All evidence under this Chapter shall be taken in the presence of the husband or father, as the case may be, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed in the case of summons-cases :

the hearing of an appeal. The provisions of this section are mandatory. A Sessions Judge who files a complaint of Court has no jurisdiction to hear an appeal from the conviction for the offence in respect of which he had filed a complaint of Court, 25 Cr.L.J. 713=81 Ind. Cas. 201.

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488. (1) If any person having sufficient means neglects or refuses to maintain his wife or his legitimate or illegitimate child unable to maintain itself, the District Magistrate, a Presidency Magistrate, a Sub-divisional Magistrate or a Magistrate of the first class may, upon proof of such neglect or refusal, order such person to make a monthly allowance for the maintenance of his wife or such child, at such monthly rate, not exceeding *one hundred rupees* in the whole, as such Magistrate thinks fit, and to pay the same to such person as the Magistrate from time to time directs.

(2) Such allowance shall be payable from the date of the order, or if so ordered from the date of the application for maintenance.

(3) If any person so ordered *fails without sufficient cause* to comply with the order, any such Magistrate may, for every breach of the order, issue a warrant for levying the amount due in manner hereinbefore provided for levying fines, and may sentence such person, for the whole or any part of each month's allowance remaining unpaid after the execution of the warrant, to imprisonment for a term which may extend to one month or until payment, if sooner made :

Provided that, if such person offers to maintain his wife on condition of her living with him, and she refuses to live with him, such Magistrate may consider any grounds of refusal stated by her, and may make an order under this section notwithstanding such offer, if he is satisfied that there is just ground for so doing :

Provided, further, that no warrant shall be issued for the recovery of any amount due under this section unless application be made to the Court to levy such amount within a period of one year from the date on which it became due.

(4) No wife shall be entitled to receive an allowance from her husband under this section if she is living in adultery, or if, without any sufficient reason, she refuses to live with her husband, or if they are living separately by mutual consent.

(5) On proof that any wife in whose favour an order has been made under this section is living in adultery, or that without sufficient reason she refuses to live with her husband, or that they are living separately by mutual consent, the Magistrate shall cancel the order.

(6) All evidence under this Chapter shall be taken in the presence of the husband or father, as the case may be, or, when his personal attendance is dispensed with, in the presence of his pleader, and shall be recorded in the manner prescribed in the case of summons-cases :

Provided that, if the Magistrate is satisfied that he is wilfully avoiding service, or wilfully neglects to attend the Court, the Magistrate may proceed to hear and determine the case *ex-parte*. Any orders so made may be set aside for good cause shown on application made within three months from the date thereof.

(7) The Court in dealing with applications under this section shall have power to make such order as to costs as may be just.

(8) Proceedings under this section may be taken against any person in any district where he resides or is, or where he last resided with his wife, or, as the case may be, the mother of the illegitimate child.

awardable under
In sub-section (3)
without reasonable
sub section making
cause" have been substituted for recovery of the amount due within one year from
Sub section (7) has been omitted inasmuch
nation of the person proceeded against as a
numbered as (1) and (5) and contain only
witness. Sub-section
mere verbal alterations.

Scope and object of the section—This section invests Criminal Court with a sort

marrage, divorce, paternity and the like but their decisions are not binding upon the parties in other litigations in Civil Courts. They are merely incidental to the main object of the
the other hand if a competent
wife of B, then the Magistrate
the wife of B and order B to
maintain her. A Magistrate must in proceedings under this section attend to a decree of a
competent Civil Court declaring the rights of the parties before him and cannot be heard to
say that he was not bound to take the Civil Court's decrees into consideration, 3 Cr. L.J. 229.
See the new sub-section (2) to S. 459 *infra*, in this connection. An application for main-
tenance under this section is not a complaint of an offence. The neglect or refusal to
maintain one's wife or child does not involve any punishment to be awarded under this
section. The section is merely intended to enforce the legal obligation in a summary manner
of the husband or father. The person proceeded against is not an accused person and there has
been a deliberate change by the new amendment of the section showing a clear intention on
the part of the Legislature that a person proceeded against does not come within S. 340 (2)
supra, and he is entitled to offer himself as a witness in the case, 10 Lah. 406.

The object of this section is not to punish a parent for his past neglect but to prevent
vagrancy by compelling those who can do so to support those who are themselves unable to do
so and have a moral claim to be supported. It is the future support of the child that has to be
considered and ensured, 25 Cr. L.J. 1249-51 Ind. Cas 257; 9 B. 43; 16 B. 266; 19 Cr. L.J. 811
-41 Ind. Cas 331. The intention of the Legislature is thus to enforce the liability of the
husband of the woman and the male parent of an illegitimate child as the person primarily
responsible for their maintenance, Weir II, 619. The object of law in enacting this section is

down in Ss. 200 and 203 *supra* do not apply. The proceedings are more of a civil nature than criminal, 1903 P.L.R. (Cr. J.) 161 p. 661. There is no provision in the Code which bars a second application under this section when the first one was dismissed for default of appearance without recording any evidence. No adjudication was therefore arrived at and so there is nothing which prevents a second application being proceeded with, 21 C.W.N. 32; 30 C.L.J. 123=21 Cr. L.J. 3=54 Ind. Cas. 51, but where a Magistrate after recording the whole evidence and hearing arguments passed a final order dismissing the petition, he has no jurisdiction to entertain a second application on the same facts and the *High Court in revision set aside the order passed on the second application*, 17 Cr. L.J. 128=32 Ind. Cas. 842 where 5 A. 224 and 1 C.L.R. 89 are referred to. See also 18 Cr. L.J. 326=38 Ind. Cas. 438. On the general principle of *res judicata* a Magistrate will not be acting properly and in accordance with law in re-opening a matter of maintenance which had already been adjudicated on by another Magistrate, 5 A. 224 referred to in 8 Cr. L.J. 21=4 L.B.R. 337, but a Magistrate to whom an application is made *knows or has reason to believe* that a similar application on the same facts had previously been adjudicated upon, he ought not to act on the application without considering the previous judgment and it cannot be said that he was wrong in law when he does so and that his proceedings were therefore bad in law and void regardless of the merits, 8 Ran. 697, following, 9 Cr. L.J. 21=4 L.B.R. 337. An application under this section for maintenance of a child should be made not in the name of the mother but should be made in the name of the child by mother, as its guardian, 23 Cr. L.J. 1249=82 Ind. Cas. 237.

Sub-section (1): any person having sufficient means—The word 'means' does not signify only *visible means* such as real property or definite employment. If a man is healthy and able bodied he must be taken to have the means to support his wife, 50 M.L.J. 34 at 35=(1926) M.W.N. 146=27 Cr. L.J. 350=92 Ind. Cas. 562. A person against whom an order for maintenance is made under the section must have *sufficient means*, but the fact that the husband may be of slender means, Weir II, 617, or that the father or husband is a professional beggar, Weir II, 616, or that he is an undivided member of a Hindu family, 13 M. 17, or that he is a student at school, 5 N.W.P.H.C.R. 123, does not
 wife may have friends able and
 his obligation, Weir II, 613,
 he husband to show that he
 B. 562. The word used is 'any
 to be able to utilise his joint
 interest as well for his maintenance, as that of his wife when necessary to do so, 13 M. 17.

Neglects or refuses to maintain.—To give jurisdiction to a Magistrate an actual neglect or refusal to maintain must be established, Weir II, 630. Neglect or refusal may be by words or by conduct. It may be express or implied, 3 Bom. L.R. 359. Where a husband ill-treated his wife and turned her out of his house so as to make it impossible for her to live in the house, that would be neglect or refusal to maintain her, 5 Bom. L.R. 614; see also 27 A.L.J. 1208. What gives jurisdiction to a Magistrate to award and entitles the children to receive maintenance, is not merely a formal refusal of the father to maintain, but also his neglect to do so, 19 L.W. 530=(1924) M.W.N. 465=25 Cr.L.J. 84=76 Ind. Cas. 80. With regard to children it is sufficient if neglect or refusal to maintain them is proved and on such proof, the Magistrate can make an order for payment of monthly allowance for the child to such person as the Magistrate from time to time directs. An offer to maintain order; the Magistrate may be entitled to consider the circumstances in which the offer was made and whether it is right and proper that children if not in their father's custody be handed over to him. With regard to the maintenance of a wife there is a special proviso in this section, that if the husband offers to maintain her on condition of her living with him and she refuses to live with him the Magistrate may consider the grounds of refusal and make an order notwithstanding such refusal if he is satisfied there is just ground for doing so, 27 A.L.J. 1208 at 1210. The Legislature has not included children in that proviso for

very good reasons. The onus should not be thrown on them of stating grounds of refusal which would have to be considered before making an order. Expression of willingness to maintain will not deprive the Magistrate of his jurisdiction if he is satisfied that the father has neglected or refused, 49 B. 562 at 565-566. A husband against whom an order of adjudication is made cannot be held to have neglected to maintain, he being unable to pay and cannot be proceeded against for arrears due, 50 C. 867. See in this connection 31 Bom. L.R. 366 following 49 M. 851 and distinguishing 50 C. 867.

His wife or legitimate or illegitimate child.—A wife alone is entitled to claim maintenance under this section and proof of a valid marriage is necessary to enable a Magistrate to award maintenance, 16 B. 269; 19 A. 53. In maintenance proceedings under this section, the wife must show that she is wife of the person from whom she claims maintenance, 15 Cr. L.J. 434 (2)=24 Ind. Cas. 372 (2). A wife's means of earning a livelihood should not be taken into consideration before an order for maintenance is passed in her favour, 1887 A.W.N. 107; 10 Bur. L.R. 166; 10 Bur. L.R. 169; the fact that the wife has relations rich and able to maintain her will not relieve the husband from his duty to maintain her if he has sufficient means, Weir II, 615; 16 Cr. L.J. 80=26 Ind. Cas. 672. A concubine or kept woman cannot claim maintenance herself under this section although she is entitled to claim maintenance for her illegitimate child. A married woman is entitled under this section to claim a maintenance allowance for her illegitimate children from the putative father even during the life-time of her husband, Weir II, 619; 18 B. 468; 18 A. 107. A Mahomedan wife is entitled to maintenance even though irrevocably divorced by pronouncing 'talak', during the period of *iddat*, as by pronouncing an irrevocable divorce, the marital relationship between the parties is not completely destroyed until the expiry of the *iddat* and therefore an order already existing in favour of the wife can be enforced by the Magistrate during the period of *iddat*, 20 M.L.J. 12=10 Cr. L.J. 502=4 Ind. Cas. 130; see 21 Cr. L.J. 503=56 Ind. Cas. 663 where 5 A. 226 and 12 Cr. L.J. 82=9 Ind. Cas. 457 are followed. The word "child" means one who has not attained majority, 37 M. 555. When an application is made on behalf of a child for maintenance it is the duty of the Magistrate to inquire (1) as to whether the child is unable to maintain itself, (2) if the father has sufficient means, (3) whether the father has neglected to maintain it. Past neglect to support the child may be a cogent factor to be taken into account in finding, that at the date of the application the father is neglecting or refusing to support the child, 1917 P.R. (Cr.J.) 22. In proceedings under this section for maintenance of an illegitimate child, the real question at issue is, whether the respondent is the putative father of the child. Two persons most competent to give evidence about the parentage of the child are the woman and the alleged father, 18 A. 107. Mere assertion on oath by the mother that the respondent is the father, ought not to be acted upon without some independent corroboration of it, to satisfy the Court that her statement is true, 24 L.W. 409=27 Cr.L.J. 1095=97 Ind. Cas. 359. Where the mother stated on oath that the respondent was the father of the child and the respondent admitted his frequent visits to the woman's house and witnesses spoke that the petitioner was the respondent's mistress to whom he gave money and jewellery the Court will be justified in holding that the parentage of the child was proved, 12 Bur. L.R. 150=4 Cr. L.J. 39. It is the duty of the Court to find definitely the parentage of the child before awarding maintenance. It is not enough that the defendant may have been the father, Weir II, 621. Similarity of name and features of the child and the defendant cannot be taken into consideration, 16 C. 781; "child" simply means son or daughter and reference to age is purposely omitted. Maintenance can be claimed so long as son or daughter is unable to maintain itself, 11 Cr.L.J. 427=6 Ind. Cas. 960. An order awarding maintenance in respect of a child yet unborn, is illegal, Weir II, 618. If the wife fails to prove the marriage, maintenance can be recovered as for an illegitimate child if parentage is proved, 16 C. 781. A husband is bound to maintain his wife but he is not bound to do more than supply her with lodging, food and clothing; he is not bound to maintain her as his wife, 25 Cr. L.J. 1249; 16 B. 269. By maintenance it is not intended to go further than assure the wife or child with food, clothing and lodging and cannot include educational expenses, 25 Cr.L.J. 1249=82 Ind. Cas. 257; 11 Cr. L.J. 40=4 Ind. Cas. 753. The word 'child' is not defined in

the Code and in the absence of any definition or anything contrary in the Code, child is a person who has not reached full age. It is only then that the child becomes competent to enter into any contract or enforce its claims. A child which had not attained the age of majority is within the meaning of this section, 37 M. 565; 26 Cr. L.J. 525=83 Ind. Cas. 376. The Code makes no restriction to the award of maintenance to illegitimate children. An illegitimate child of a Hindu born of a non-Hindu woman can claim maintenance under this section but the claim can be enforced only during the life-time of the father and ceases with his death, 27 M. 13. A father is bound to maintain his child whatever the position of the mother may be. Whether she makes the application to annoy him or not is immaterial. It is also immaterial that when the child goes to the father he gives little money. It is not necessary for a mother to prove that he had asked the father to support the child and he has refused to do so. The mere fact that it was necessary to institute proceedings may be taken to prove neglect or refusal on the part of the father. Mere sending a servant to go and ask the child to come and live with the father does not amount to any *bona fide* offer to support the child and cannot absolve the father from his responsibility to maintain the child, 15 Cr. L.J. 273=23 Ind. Cas. 486, following 11 Cr. L.J. 488=7 Ind. Cas. 460. A husband alone is liable for the maintenance of the wife and not the father-in-law of the woman, 4 Cr. L. Rev. 6; Cr. L.J. 110; 15 Cr. L.J. 577=25 Ind. Cas. 329; 30 Cr. L.J. 135=113 Ind. Cas. 327; 1905 P.L.R., p. 86, following 5 B.H.C.R. (Cr. Ca.) 81.

Unable to maintain itself.—The expression 'unable to maintain itself' means unable to earn a livelihood for itself, that is to say, a complete livelihood such as an adult person might earn without depending on any other person. There is a continuing obligation upon a father who has sufficient means to maintain his child and he cannot contract himself out of that obligation. The fact that the child is not in a starving condition cannot be set up as an answer to an application for its maintenance. The essential point is that a man is bound to feed and clothe his minor offspring and he cannot be heard to say that the latter should help him to fulfill his obligation. The sum he should be ordered to pay is fixed according to his means, the status of the parties and the age of the child. No other consideration should come in. Were it otherwise, the Court in most cases will be obliged to enter upon calculations of some nicety as to the proportion of the expense which the child itself should bear. Every able-bodied boy or girl over ten years of age is a potent wage-earner. For instance, a town-bred boy of twelve or fourteen, even if attending school, might easily in his spare time earn an anna or two by hawking newspapers, but it does not follow that this should be taken into consideration in giving the sum which his father should be ordered to pay for his maintenance. A father who has sufficient means is bound to maintain his child who is under the age of majority and in fixing the sum payable no regard should be paid to the fact that the child is able to contribute to its own support by means of labour or work, 2, Ran. 682. There is some conflict of authority as to the interpretation of this expression. The interpretation of the words "unable to maintain itself" is not so simple as it appears to be. It may be said that the Legislature meant to provide for minor children and minority alone fulfilled the requirements of the section, 21 C.W.N. LXI. In 22 M. 246 and 22 M. 247 (f.n.) and 25 M.L.J. 355=1913 M.W.N. 997=14 M.L.T. 223=14 Cr. L.J. 597=21 Ind. Cas. 469, it was held that the expression meant physically unable, on account of tender years, to earn a livelihood, and therefore unable to maintain itself, but in 33 M. 937 it was held that the expression meant unable for want of sufficient means to maintain itself. The inability contemplated by this section applies as much to the case of a child which has got means of its own or which is entitled in law to be maintained, and is being maintained as in this case by some other person, as to a child which is able to earn a living by its own exertions. This is a summary procedure provided by S. 468 and it does not cover entirely the same ground as the civil liability of a father to maintain a child. It does not seem to have been within the contemplation of the Legislature that a child which is well-to-do should be entitled under S. 468 to an order for maintenance against its father—per *Abdur Rahim, J.*, 33 M. 937 at 938, following 19 M. 461 and dissenting

from 23 M.L.J. 355=1913 M.W.N. 997. This view was followed in 37 M.L.J. 361 and 46 M.L.J. 324=19 L. W. 275=1924 M.W.N. 305=25 Cr.L.J.370=77 Ind. Cas. 418. The view taken in the earlier Madras decisions that 'unable to maintain itself' refers to physical incapacity and not to property qualification of the child, seems, it is submitted, to be more reasonable and natural, regard being had to the object of the section to provide a speedy remedy for maintenance of children in a summary way and an elaborate inquiry into the property qualification of the child will in most cases frustrate the very object of the section and the intention of the Legislature. A child which is deaf and dumb is entitled to maintenance even after attaining majority, 5 N.W.P.H.C.R. 237. The mere fact that the girl to whom maintenance was awarded was subsequently married, will not necessarily make her able to maintain herself, if in spite of the marriage the husband is too poor to maintain, or for any other good reason the father's liability will still continue. 49 M. 503. All that has to be proved to give jurisdiction to the Magistrate is that the child is unable to maintain itself and the father neglected or refused to maintain it. Even a grown up child if unable to maintain itself, is entitled to maintenance from the father if he has the means, 49 M. 891 at 897. The law does not treat prostitution as a profession by which a girl may earn her livelihood and maintain herself. It is against public policy to do so 37 M. 565; 2 Ran. 682. A father cannot be compelled to educate a boy in a college and thus better his position. The liability is to maintain only, 24 Cr. L.J. 550=73 Ind. Cas. 334. A father has certain *prima facie* rights in regard to the custody of the children but it has been clearly laid down in 49 B. 562 that a Magistrate is entitled to consider the circumstances in which the father's offer to maintain his children is made and whether it is right and proper that children if not in his custody should be made over to him, 30 Bom. L. R. 938 at 961. When a father is ready to keep his minor children with him and maintain them, there is no reason to withhold them from him on the ground that the children are of tender years of six and two and in directing to pay maintenance, 27 Cr. L. J. 1319=93 Ind. Cas. 391 following 1894 P. R. (Cr. J.) 18; 18 Cr. L. J. 811=41 Ind. Cas. 331; 8 B.L.R. Ap. 19=16 W.R.(Cr.) 72; 15 Cr. L. J. 529=24 Ind. Cas. 841. A minor child living with a duly constituted guardian other than the father cannot be refused maintenance merely on the ground of the offer of the father to maintain the child if the latter comes and lives with him, 9 Lah 313 at 316, following 25 M.L.J. 355=14 M.L.T. 223=14 Cr. L.J. 557=21 Ind. Cas. 469 and 13 A.L.J. 636=16 Cr. L.J. 656=30 Ind. Cas. 480.*

The District Magistrate, etc.—The expression 'District Magistrate' refers to magistrates of the particular District in which the person proceeded against resides, 9 B. 40. Under this section maintenance cases must be tried only by the classes of Magistrates therein mentioned and any order for maintenance passed by a Magistrate not empowered in this behalf shall be void, S. 530, cl. (n), *infra*.

Upon proof of such neglect or refusal—Before a Magistrate makes an order under this section he must find that the husband has neglected and refused to maintain his wife or child, 16 B. 269; 6 N.W.P.H.C.R. 205; 3 Cr. L.J. 428. Neglect or refusal to maintain may be by words or conduct. It may be express or implied, 9 Bom. L.R. 359, 5 Bom. L.R. 614. Evidence must be recorded by the Magistrate himself and he is not competent to refer it to a Subordinate Magistrate for inquiry under S. 202, *supra*, Weir II 617; 11 M. 199. Sub-section (6) provides that evidence shall be recorded as in summons-cases and S. 355, *supra*, regulates the mode of recording evidence. Proceedings cannot be conducted as in a summary trial, 20 C. 351. "Proof" means legal proof on oath, 13 W.R. (Cr.) 19, and similarity of features of the child with its alleged putative father is not sufficient evidence, 16 C. 781.

May make a monthly allowance.—The use of the word "may" as distinguished from "shall" shows that the Magistrate has a discretion to decide in what cases the award of maintenance may properly be made. No doubt the discretion must be exercised judicially and reasonably and not capriciously, 31 M. 183. A Magistrate has no power to award anything but an allowance for maintenance. The husband cannot be ordered to provide a house for the wife to live in, 29 Cr. L. J. 909=111 Ind. Cas. 669. A man is bound to maintain his legitimate or illegitimate child but he is not bound to maintain the child of his wife by het

former husband, 7 Lah. 365. The Magistrate 'may' and not 'shall' make an order. He has a discretion to consider and be guided by the social ideas and feelings of the community to which the parties belong, 20 M. 470 (F.B.) at 476, followed in 31 M. 183. Where the Magistrate exercised a judicial discretion in refusing maintenance, the High Court will not interfere with the order in revision, 31 M. 183. The proceedings of the Probate Division in England do not control the jurisdiction of the Magistrates in India, and the existence of an order to pay alimony is no bar to the Magistrate making an order under this section on the application of the wife if the husband neglects or refuses to maintain either by payment of alimony or otherwise, 49 M. 891 at 896. Similarly a decree for maintenance of a Civil Court which cannot be executed owing to the insolvency of the husband is no bar to proceeding for maintenance under this section. A mere decree of a Civil Court awarding maintenance is not equivalent to maintaining the wife, 31 Bom L.R. 1366 following 49 M. 891 and distinguishing, 50 C. 867. In fixing the amount, no luxury should be allowed, but only necessities of life should be considered, according to the station in life of the applicant and the means of the respondent, 13 Cr. L.J. 55=13 Ind. Cas. 381. The payment must be a monthly payment and in cash. An order directing the giving of two clothes annually, Weir II, 627, or grain Weir II, 626, 627, is not legal. So also an order directing a mixed payment in kind and in cash, 26 Bom. L.R. 136=25 Cr. L.J. 965=81 Ind. Cas. 613. An order directing the husband to give his wife twelve maunds of grain each harvest season and to provide her with a separate house is illegal, 25 Cr. L.J. 1271=82 Ind. Cas. 27. So also a conditional order that the husband do pay a fixed sum if after taking back the wife home he fails to maintain her or turns her out of the home, 7 Lah. 313, following Weir II, 630 and 18 Cr. L.J. 528=39 Ind. Cas. 496, or a conditional order that the wife should reside in the village of her husband, 30 Cr. L.J. 51=113 Ind. Cas. 67. A Court enforcing an order for maintenance cannot apportion the maintenance allowance between the mother and child when the original order, did not allot any particular portion for the mother or the child. The remedy, if the mother wants an apportionment, is to make an application for allotting her a separate allowance, 8 L. B. R. 49.

Not exceeding one hundred rupees in the whole.—The amount awardable under this section cannot exceed rupees one hundred per mensem in the case of a single individual and an order awarding rupees one hundred and fifty in favour of a wife is without jurisdiction even though the husband acquiesced in the same for some time, 23 Bom. L.R. 1298=28 Cr. L.J. 51=99 Ind. Cas. 83. The words 'in the whole' mean that only a sum of money not exceeding one hundred rupees should be ordered to be paid and no other payment either in the shape of fees or medical expenses, etc., should be ordered to be paid, nor can the Magistrate order the husband to provide a house for the wife 23 Cr. L.J. 1271=82 Ind. Cas. 279. It is to prevent the Magistrate making an order that the husband should pay so much for the schooling of children or so much for clothing or so much for medical expenses, and so on, that the words 'in the whole' has been put into the section, 49 M. 891 at 896. If a man has the luxury of more wives than one, his liability to maintain them is not lessened thereby. Every wife and every legitimate child and every illegitimate child can be awarded up to rupees one hundred as maintenance, provided the husband or the father has the means to pay. Where a wife and her two children were awarded one hundred rupees each, in all amounting to rupees three hundred, it was held that the order was not *ultra vires* as the maximum of rupees one hundred fixed by the section is the maximum awardable to each of the applicants, 49 M. 891; 19 L.W. 530=1924 M.W.N. 465=25 Cr. L.J. 94=76 Ind. Cas. 30.

Pay to such person as the Magistrate, from time to time, directs.—An order directing payment of a maintenance allowance into a public treasury is not legal, Weir II, 627 and the payment must be to the person in whose favour the order is made or to such other person as the Magistrate directs.

Sub-section (2).—The allowance can be made at the most from the date of the application for maintenance and cannot be given retrospective effect, Weir II, 633. The Magistrate has no power to make an order under this sub-section for the payment of any sum for a period prior to the date on which the application for maintenance is filed, 7 Lah. 363. A Magistrate can order payment of maintenance in advance from the date of his order.

It is only reasonable to supply the woman or child with means of subsistence for the time to come and not for the time past. This is clear from the wording of the section 'shall be payable from the date of the order,' Ratanlal 189.

Sub-section (3).—The words "wilfully neglect" have been omitted and the words "fails without sufficient cause" have been substituted for the same. The Legislature has deliberately used the expression "sufficient cause" obviously intending the Magistrate should be in a position to use his judicial discretion having regard to all the circumstances, and such judicial discretion should not be fettered or limited by any definite rule. The circumstances of each particular case should be considered in determining judicially whether there is or there is not sufficient cause, 43 M. L. J. 494 = 21 L. W. 702 = 26 Cr. L. J. 253 = 87 Ind. Cas. 105. A husband against whom an order has been made when adjudicated an insolvent cannot be proceeded against for failure to pay arrears due to the wife for maintenance; he being unable to pay his debts, his failure cannot be held to be a failure without sufficient cause, 50 C. 867, but this decision in 50 C. 867, is distinguished, in 31 Bom. L. R. 1366 at 1368 on the ground that the case is no authority on the question of the jurisdiction of the Magistrate to pass an order under sub-section (1) *supra*, in case the husband has applied for insolvency and neglected to maintain his wife and there is also a change in the language in this sub-section from '*fails without sufficient cause*' to '*wilfully neglects*.' An order for maintenance can be enforced by the Magistrate who passed the order even though the person proceeded against resides within the jurisdiction of another Magistrate and a Magistrate acts illegally in returning the application, 52 M. 77. A Magistrate may himself issue a warrant for the collection of arrears of maintenance or refer the applicant to a Magistrate within whose jurisdiction the defendant is to be found, 4 M. 230. This sub-section authorises the Magistrate to issue a warrant for the levy of the amount in the manner provided in B. 386, *supra*, for the levy of fines, *i. e.*, by distress and sale of any moveables of the person asked to pay the allowance. A police officer to whom the warrant is addressed in executing the warrant can break open inner-door of the house of the person whose moveables are to be attached and seize the moveables locked up by him and by doing so the police-officer acts legally, Ratanlal 431, and the new proviso fixes a period of one year within which an application for arrears of maintenance should be made. The maximum imprisonment will be for one month and it shall cease on payment of the amount due. There is nothing in this clause which compels the Criminal Court to award separate maintenance to a wife whom the husband agrees to protect in a suitable manner because he refuses to cohabit with her, 42 M. L. J. 566 = 5 L. W. 535. Where the husband offers to maintain his wife, the Magistrate must comply with requirements of this proviso, 27 Cr. L. J. 228 = 16 Ind. Cas. 394, where 16 B. 269 is approved. The first proviso to this sub-section does not apply to orders directing maintenance to children and such an order cannot be superseded by a decree for restitution of conjugal rights against the wife the father not being appointed guardian of the children, 1 Cr. L. Rev. 368. The proviso to this and sub-section (4) refers only to wives and cannot be extended to children. Where an order is obtained by the wife for herself and her children, any decree which the husband obtains against the wife for restitution of conjugal rights will not absolve him from the order to pay maintenance on behalf of the children, 14 Cr. L. J. 95 = 18 Ind. Cas. 658 where 23 B. 484; 27 A. 483 are referred to. See also 46 A. 877. The offer of the husband to supply the wife with food, clothing and separate residence or to admit her into his own house is sufficient. He need not agree to keep the wife with him as his wife. No authority is given for the proposition that the words "*as his wife*" must be read into the section. Criminal Courts have no sufficient machinery to direct domestic arrangements, or control the domestic rules of *pater familias*, 16 B. 269 at 274-275. The second proviso enacts that no warrant for arrears of maintenance shall be issued unless the application is made within one year of the amount falling due. For enforcement of orders passed in British India of maintenance orders made in other parts of His Majesty's Dominions and Protectorates and *vice versa* (see Act XVIII of 1921), Maintenance Orders Enforcement Act). See also 52 B. 252.

May consider grounds of refusal stated by her.—In dealing with the question whether a wife is justified in living apart we must consider the civil law applicable

to the parties, e.g., Hindu Law, if the parties are Hindus. It is the duty of a woman to reside with her husband and it is her correlative right to be maintained by him under his roof, 16 B. 269 at 273; 30 Bom. L.R. 958 at 960=29 Cr. L.J. 1049=112 Ind. Cas. 473 following 9 B. 40. The mere fact that a Christian husband has become a convert to Judaism will not entitle the Christian wife living apart from her husband and claim separate maintenance so long as the Jewish husband allows his Christian wife to practice her own religion and does not press her to abandon her religion or to adopt his religion, she has no right to leave her husband, 27 Cr. L.J. 1177=97 Ind. Cas. 809. Concubinage is within certain limits recognised by Hindu and Mahomedan Law and is not in all circumstances to be reprobated by the public opinion of the communities. Keeping a concubine is not necessarily and in all circumstances to be regarded by the Magistrate as a sufficient cause for a woman to refuse to live with her husband though it is equally clear that the Magistrate may in certain cases regard it as a sufficient reason and award separate maintenance. The Magistrate must be guided by all the facts and circumstances of each case and with due regard to the social ideas and customs of the community to which the parties belong, 20 M. 470 at 476 (F.B.). Where the husband offers to maintain his wife, it is the duty of the Magistrate to ask the wife whether she is prepared to accept the offer and live with the husband and if she refuses, then to consider the grounds of her refusal and any order passed for maintenance without a consideration of these questions, of offer, refusal and the grounds of refusal are bad in law, 9 Cr. L.J. 501=2 Ind. Cas. 153, followed in 27 Cr. L.J. 1319=93 Ind. Cas. 331. Amongst the Hindu community concubinage is recognised and it is possible for a concubine to have a certain status. If, therefore a husband keeps a concubine in his house apart from his wife, it is doubtful whether such an act would entitle the wife to separate maintenance. But if he kept such a concubine in the same house as his wife lived, and against the wishes, or in such a manner as to offend the self-respect of his wife, that would entitle the wife to separate maintenance under this section, 20 M. 470 at 472. The question in each case will be whether the conduct of the husband is such as the wife consistently with self-respect and due regard to her position as wife, can live in the house of the husband. If this is possible and the husband is willing to receive her, the Magistrate may refuse separate maintenance, *Ibid* at 473.

If he is satisfied that there is a just ground for so doing,—It is to be noticed that in the earlier Act the words were "that he habitually treats his wife with cruelty" and these words have now been omitted in the present Code and the words "*that there is just ground for so doing*" have been substituted. The result of the amendment is that under the present Code the right of the wife who is living separately from the husband is not restricted to payment of maintenance to Cases in which she has been treated by her husband with habitual cruelty. The words "*just ground*" invest the Magistrate with larger discretion in the matter of granting maintenance under this section. Habitual cruelty may be a just ground but there may be other grounds apart from habitual cruelty which may be taken into account in awarding maintenance. 27 A. L.J. 1233 at 1210.

Sub-section (4).—This sub-section and sub-section (5) qualify the wide words of sub-section (1) to the extent that the wife is not bound to accept an offer for separate maintenance and residence by the husband. She can of course agree to it and if by mutual consent they are living separately up to the time of the application there would be a clear ground for refusal to make an order in her favour. It is only when she refuses the offer of the husband, she has to show sufficient cause for such refusal for getting an order in her favour and it is not necessary for the wife to show sufficient cause where the refusal is not of the offer to live with the husband but for separate residence, 52 B. 763. The provision of this sub-section does not authorise a Magistrate to entertain an application for separate maintenance by the wife who had, of her own accord, left her husband's house and protection. She must prove that there is just ground for her living away from her husband. In 23 C. 75, it was held that the duty imposed upon a Hindu wife to reside with her husband wherever he may choose to reside is a rule of Hindu Law and not merely a moral duty. *Mayne on Hindu Law* says, "As soon as the wife is mature her home is necessarily her husband's house. He is bound to maintain her in it while she is willing to reside with him and to perform her duties,

If she quits him of her own accord, either without cause or on account of such ordinary quarrels as are incidental to married life in general, she can set up no claim to separate maintenance. Nothing will justify her in leaving her home except such violence as renders it unsafe to her to continue there, or such continued ill-usage as would be termed cruelty in an English matrimonial Court." A wife who dictates her terms to her husband who is willing to maintain her in his home cannot demand separate maintenance from him, 30 Cr. L.J. 861=117 Ind. Cas. 903. The husband marrying a second wife is no ground for the wife living away from her husband, 7 M. 187; 23 Cr. L.J. 235=99 Ind. Cas. 1036; 27 Cr. L.J. 507=93 Ind. Cas. 971; 29 Cr. L.J. 895=111 Ind. Cas. 575, but marriage by a Mahomedan with the wife's step mother is a sufficient cause, as such marriage is prohibited by Mahomedan law, *Weir II*, 647. It was held in 20 M. 470 (F.B.) that adultery on the part of the husband may constitute a sufficient cause for the wife living away from the husband. Unless continuance of conduct is established it cannot be inferred from a single act of adultery that the woman is living in adultery. Although a woman has given birth to an illegitimate child, it is open to a Magistrate to find that apart from that circumstance she is not living in adultery within this sub-section, 29 C.W.N. 647=26 Cr. L.J. 1185=88 Ind. Cas. 608. The right of a wife to maintenance is not lost because she makes a false or scandalous allegation against her husband which must have been very annoying to him and subsequent proceedings may also show that there was no foundation for such scandalous allegations made by the wife. But that would not by itself justify the husband in denying his wife's right or insisting that the allegation should be unconditionally withdrawn in open Court before he would agree to maintain her. 52 B. 262. What the law contemplates by this sub-section is well recognized in *affiliation proceedings* between husband and wife under the English law, *vis.*, where husband and wife have lived apart by a definite contract mutually made between them, then *affiliation proceedings* are inapplicable. A contract voluntarily and freely made between them and entered into by reason of the ill-treatment of the husband towards his wife would be an act of their own volition. If the parties separated under such terms, so that neither should molest the other and that both should be free to live and go where and whither they respectively wished, such an agreement would be a voluntary act and contract by the parties themselves, unfettered by the decree or declaration of any tribunal, 4 Pat. L.J. 109 at 112-113. Where a husband and wife are living apart in obedience to the arbitration of a *panchayat* of their caste men by which the wife was given a stipend as maintenance, it cannot be said that they are living apart by mutual consent. When once it is proved that the parties are living separately by mutual consent the Magistrate has no jurisdiction to pass an order under this section. Under this sub-section a wife living in adultery is not entitled to receive maintenance from her husband but the fact of living in adultery will not automatically deprive her of the right until the order that has been made is cancelled by the Court. An order cancelling maintenance cannot have retrospective effect and deprive her of the right to receive arrears which had accrued due prior to such cancellation, 30 Cr. L.J. 719=117 Ind. Cas. 67. Before an order for maintenance in favour of a wife can be disturbed the husband has to show under this sub-section how she became disentitled to the allowance. A solitary act of adultery will not so disentitle her, 30 Cr. L.J. 403=115 Ind. Cas. 161.

Sub-section (5).—This sub-section seems to deal with proof of facts which may have occurred subsequent to the order for maintenance being passed. It is a general principle of law that an order whose term is not fixed, and whose currency is not made expressly dependent upon the continued existence of certain circumstances or sets of circumstances, remains in force until it is cancelled; and *prima facie* this rule applies to orders for maintenance under this section. This sub-section provides that in certain specified circumstances, where the wife is living in adultery, where without sufficient cause she refuses to live with her husband or where the parties are living separately by mutual consent, the Magistrate shall cancel the order under S. 489 *infra*; it is open to the Court to alter the order, but it is for the husband to obtain a cancellation or alteration of the order and until that is done the original order remains in force. The mere fact that the wife had returned and lived with the husband for some time would not have the effect of automatically cancelling the original order, 50 M. 663 at 665 where 19 A. 50; 37 C.L.J. 180=24 Cr. L.J. 945=75 Ind. Cas. 522;

8 C.W.N. 210 are not followed. An order for maintenance once passed remains in force until it is cancelled by the Court, even though the wife came back and lived with the husband subsequently for a long time by some arrangement between them. In such a case it is the duty of the husband under this sub-section to have the order cancelled if he wishes to question the binding character of the original order, 38 M.L.T. 13=25 Cr. L.J. 237=99 Ind. Cas. 1037. A mere temporary stay of the wife, who had obtained an order for separate maintenance, with her husband for a few months will not have the effect of cancelling the order for maintenance although such stay may have the effect of suspending it, 37 C.L.J. 280=25 Cr. L.J. 945=75 Ind. Cas. 529. Mere second marriage will not justify first wife's refusal to live with her husband, 27 Cr. L.J. 507=93 Ind. Cas. 971, especially where a plurality of wives is allowed by Hindu and Mahomedan law, 29 Cr. L.J. 815=111 Ind. Cas. 575; 28 Cr. L.J. 236=99 Ind. Cas. 1036; see also 7 M. 187. Where a husband marries a second wife and offers to provide a separate residence for his first wife and she refuses to accept that offer, she cannot be said to refuse to live with her husband within this sub-section, 25 Cr. L.J. 453=77 Ind. Cas. 805. Adultery as contemplated by this section is the popular sense of the term, *i.e.*, breach of the matrimonial tie by either party. The words "living in adultery" mean something more than a single act of adultery as these words refer rather to a course of conduct, 27 Cr. L.J. 1190=97 Ind. Cas. 930; 52 B. 160. A single act of adultery does not amount to living in adultery within this sub-section and will not justify refusal of maintenance. The construction put on the words living in adultery is the natural one. The significant present tense 'living' is used. The fact that in such a case the wife does not come to court with absolutely clean hands cannot affect her right. Under Hindu law also, a wife though leading an impure life cannot altogether be abandoned by the husband, 52 B. 160, following 29 Cr. L.J. 314=109 Ind. Cas. 24; 30 M. 332; 26 A. 326; 29 C.W.N. 647; 34 B. 278 at 293. The words "living in adultery" refer rather to a course of conduct or at least something more than a single lapse from virtue. The words point to a continuous course of conduct and not to isolated acts of immorality. Conduct which according to western notions could be condemned as a breach of marital obligation is not so condemned either by Hindus or Mahomedans, 20 M. 470 at 473 476. See also 27 Cr. L.J. 1190=97 Ind. Cas. 930. Therefore a single act of adultery does not necessarily amount to "living in adultery" so as to disentitle the wife from applying for maintenance, 30 M. 332 where 20 M. 470; 26 A. 326 are referred to. But a single act of misconduct may justify a husband to live away from his wife but it will not release him from his obligation to pay her maintenance, 27 Cr. L.J. 1190=97 Ind. Cas. 930. Where a single act of adultery by the wife was with a low caste-man entailing social ex-communication from caste, it was held that the Magistrate was justified in refusing maintenance to the wife, 34 M. 183; 27 Cr. L.J. 1190=97 Ind. Cas. 930. An order for maintenance passed in favour of a wife may be cancelled on proof of adultery, 8 B.H.C.N. (Cr. Ca.) 124; 5 A. 224; 24 C. 635. Where a wife lived with a paramour for 9 years, a strong presumption arises of her living in adultery and she must prove her chastity to entitle her to maintenance. Cr. R. C. 590 of 1929 (M. H. C.).

Sub-section (6)—It is not laid down in this sub-section that the procedure at the hearing of the application shall be the same as in the trial of summons-cases. All that is stated here is, that all evidence under this Chapter . . . shall be recorded in the manner prescribed in the case of summons-cases. This refers back to S. 355, *supra*, which prescribes that a memorandum of the substance of the evidence of each witness shall be made as the examination proceeds in contradiction to the provisions of S. 356, *supra*, which prescribes a different manner for the record of evidence in other cases, 1903 P.R. (Cr. J) 163 p. 554; 23 Cr. L.J. 478=101 Ind. Cas. 606. Evidence ought to be taken in the presence of the father or the husband or his pleader unless he is wilfully avoiding the service of summons. The petition cannot be referred to a Subordinate Magistrate to take evidence and report upon the facts stated in the petition and no order can be passed by a first class Magistrate for maintenance in the absence of the husband, 11 M. 199; 1 C.L.J. 102; Weir, II, 628. Evidence should be recorded as provided in S. 355, *supra*, and the procedure is as in summons-cases. The provisions of S. 342, *supra*, as to questioning the accused do not apply to proceedings under this section which are more of a civil nature and the person proceeded against is

entitled to give evidence on oath, 52 B. 768, following 25 Cr. L.J. 1091=81 Ind. Cas. 915; see also 9 Lah. 313. Any separate order for maintenance made may, for good cause shown on application made within three months from the date, be set aside. An order cannot be enforced after the death of the person against whom the order was passed. From the language of the sub-section it is quite clear that in the mind of the Legislature the instance of the deceased person, against whose estate arrears of maintenance may be claimed was never present, 17 C.W.N. 1130=2 Cr. L. Rev. 247 at 248. The proviso to this sub-section empowers a Magistrate to re-open a case in which an order for maintenance had been made by his predecessor and to revise that order if a petition for the same is presented within 3 months of the date of the original order and the original order is made *ex parte* without effecting personal service of notice, 24 Cr. L.J. 923=75 Ind. Cas. 304.

Dispense with personal attendance.—A Magistrate has a discretion in an application under this section to dispense with the personal attendance of the applicant when she is a *pardanashin* lady. Such applications are not complaints within S. 4 (1) (b) *supra*, and it is not laid down that the whole procedure is to be that of a summons-case and the section itself recites in the first para that the Magistrate may give relief upon "proof" of such neglect or refusal. Very obviously in regard to one class of cases coming under this section, *vis.*, the case of an infant child, it is not intended to insist on the personal attendance of the person in whose favour the order is to be made which is nowhere laid down in the section and exemption from personal attendance even of the person against whom the application is made is specifically provided in this sub-section. Of course an applicant absenting herself may run a greater risk of having her application dismissed but that is a different matter for her own consideration, 1903 P.R. (Cr. J.) 158 p. 663.

Sub-section (7).—Power is herein given to award costs as in proceedings under Chapter XII, S. 148, *supra*, but it was held in 48 M. 262 (F.B.) that the High Court in revision cannot award costs. The Magistrate passing the decision is alone entitled to award costs. Similarly the High Court in revision under this section will not be entitled to pass orders as to costs and the question was not argued and considered in 49 M. 891, where costs were awarded. The reasoning of the Full Bench may apply to these proceedings also. It is submitted that the language used in this sub-section 'the Court in dealing with applications under this section shall have power to make such order as to costs as may be just' is not restricted as in S. 148 (3) to the effect 'the Magistrate passing a decision under S. 145 may direct by whom costs shall be paid.' The High Court in revision, can be said without violence to the language used, to be the Court dealing with application under this section and it may have power to award costs. See 29 Cr. L.J. 1177 at 1179=97 Ind. Cas. 809; where costs in revision were refused.

Sub-section (8).—The first process calling upon the husband or father to maintain his wife or child should be sought in the District in which the obligation to maintain (and the breach of the obligation took place) is *prima facie* to be fulfilled, *i.e.*, in the District in which the husband or father resides. Such duty and correlative right cannot be altered by anything stated *ex-parte* by the wife when applying for a summons 24 C. 638, following 9 B. 40 at 43. The jurisdiction is to be exercised ordinarily in the District where the party against whom an order for maintenance is sought has his residence, 9 B. 40; 1894 A.W.N. 153; 24 C. 638; 1 C.W.N. 577; 1893 P.R. (Cr. J.) 5; 1895 P.R. (Cr. J.) 13; but where the wife was compelled by the husband's conduct to choose her own place of residence then the Court of that place where she resided, 13 A. 343; 5 N.W.P.H.C.R. 237. It is the duty of the wife to reside with the husband and it is her correlative right to be maintained by him under his roof. The term "Reside" means primarily to have a settled abode for a time. But a man may reside or have a settled abode at a place where his family or his servants eat, drink, or sleep. In 1 A. 51, it was held that a soldier who travels about from place to place with his regiment, has his dwelling place where his family lived and whither he had the intention of returning. A man may therefore be said to reside with his wife at any place where his wife has a settled abode and is not necessary that he himself should live there permanently or ordinarily, provided he has the intention of going there and living there when opportunity occurs. Though 'reside' connotes a stay for sometime no minimum time has been laid down as a

'qualification. In 38 C. 963 the parties were held to have resided together for purposes of the Divorce Act at a Calcutta hotel for about a fortnight, they having no permanent residence. In the case of a kept mistress it cannot reasonably be demanded that the nature of the residence of the man should be more permanent than in the case of a lawful husband. A man may be said to reside with the mother of illegitimate children if he visits her only occasionally at her settled place so long as he has the intention to continue his visits. A period of two months was considered to be a sufficient stay to constitute residence for the purpose of this section, it being not shown that the woman had any permanent residence, 13 Cr. L.J. 522=15 Ind. Cas. 799. Temporary residence within jurisdiction of Magistrate when the application is made is sufficient to give jurisdiction, 21 C.W.N. 873; 8 M. 205; 36 C. 564. In cases where the husband and wife have a fixed abode or permanent place of residence, a temporary residence in any other place will not confer jurisdiction on the Magistrate at that place under this sub-section but where the parties have no fixed abode and no permanent residence, casual residence at a particular place, say, for eight days for procuring an employment there, will give the Magistrate of that place jurisdiction to entertain an application under this section, 31 Bom. L.R. 931, referring to 33 A. 203 (F.B.); 35 C. 964; 45 B. 547; 25 Bom. L.R. 178 and following 21 C.W.N. 872 and distinguishing 27 Cr. L.J. 820=93 Ind. Cas. 594. Where a wife returning from a short visit to her sister found her husband living with another woman in the house and left the house immediately for another District where she claimed maintenance, it was held that refusal to maintain was a breach committed at the place where the application was made and the Magistrate had jurisdiction to pass an order under this section, 13 A. 343; 5 N.W.P.H.C.R. 237. A Magistrate may himself issue a warrant for the collection of arrears or refer the applicant to the Magistrate within whose jurisdiction the man is to be found, 4 M. 239. The fact that the parties were married within the jurisdiction of the Magistrate will not be sufficient to confer jurisdiction on the Magistrate to act under this section 27, Cr. L.J. 1009=58 Ind. Cas. 865. The words "last resided" occurring in this sub-section do not refer to a mere casual residence in a place for a temporary purpose with no intention of remaining there. Where the wife residing with her father in G District is visited sometimes by the husband residing in J District in the father's house in G District, the Magistrate in G District had jurisdiction to entertain the wife's application under this section as the husband and wife last resided in that district when they met in the wife's father's house, 29 Cr. L.J. 897=110 Ind. Cas. 239. Where a husband was employed as a carpenter in the Railway Workshop at Lahore and has been residing there continuously for several years, a temporary sojourn or a temporary stay at Lucknow with his wife will not confer jurisdiction on the Magistrate at Lucknow to entertain an application for maintenance, 1 Luck. 393; 32 A. 203; 36 C. 964; 45 B. 547 are referred to. A flying visit to attend to business in a lodge of freemasons cannot amount to residence. A person may have a permanent residence and also a temporary one. The point at which a visit or a stay becomes capable of being held a residence is one difficult to define. A stay for two months in a temporary place with occasional visits to the permanent place of residence is sufficient residence within this section. The expression 'resided' will include a temporary residence and is not confined to a permanent residence, 25 A.L.J. 435=28 Cr. L.J. 494=101 Ind. Cas. 670. An order passed under this section by a Magistrate who is otherwise competent to do so would not be vitiated by the mere fact that proceedings were held in a wrong district. S. 531 (a) will apply to such a case, 49 C.L.J. 205=30 Cr. L.J. 525=115 Ind. Cas. 602.

Appeal and Revision.—No appeal lies from an order of the Magistrate under this section, 7 W.R. (Cr.) 40; 5 B.H.C.R. (Cr. CA.) 81; 28 M.L.J. 583. The High Court in its revisional jurisdiction may set aside an illegal order; see 40 Cr. L.J. 609=30 Ind. Cas. 433; 18 B. 269.

Review.—Whether the provisions of S. 369, *supra*, which appears in Chapter XXVI apply in terms to orders passed under the section or apply only to cases of judgments in trials terminating in either conviction or acquittal, it is unnecessary to decide. Even if S. 369 *supra* did not apply in terms, the principle laid down in that section applies, as proceedings under this section are judicial and the final order or reasons given for a final order under this section is in effect a judgment and cannot be reviewed, 21 C.W.N. 344=18 Cr. L.J. 556=30

Ind. Cas. 700. Apart from any change in circumstances which could be the basis of a new order under S. 482, *infra*, the Magistrate cannot review the original order under this section as S. 369, *supra*, precludes such a course, 30 Bom. L.R. 617=29 Cr. L.J. 903=111 Ind. Cas. 668. The rejection of an application in one District for want of jurisdiction is no bar to the renewal of the application in the proper District, 5 N.W.P.H.C.R. 237; 9 B. 40. When an application under this section was dismissed for default and not on the merits a second application will lie as there is nothing in the section which bars a second application, 30 C. L.J. 128.

Further Inquiry.—When an application under this section is dismissed, no further inquiry under S. 486, *supra*, can be ordered, 25 A. 545; see 1 C.L.J. 102.

Civil Suit not barred.—The order of a Magistrate awarding maintenance did not take away the jurisdiction of the Civil Court to make a declaration under S. 42 of the Specific Relief Act. The decree of the Civil Court being final, it is binding upon the parties to it and the husband who is ordered to pay maintenance by the Magistrate is entitled to insist that the Magistrate's order is not enforced. It is not open to the Magistrate to ignore the final decree of the Civil Court on the ground that it rests on reasons which do not appear to him to be satisfactory, the jurisdiction vested in him being auxiliary to that of the Civil Court. This will not preclude the interference of the Magistrate, if there should arise any fresh causes for such interference, Welr. II, 615; 33 M.L.J. 459; 20 M.L.J. 12; 2 M.L.T. 344=7 Cr. L.J. 235; 46 M. 721; 18 L.W. 132; 43 A. 835; 27 B. 493. See the new sub-section (2) to S. 489 *infra*. But it is not competent to a Civil Court to make a decree setting aside an order for maintenance, passed by a Magistrate, Welr. II, 614; nor can the Civil Court grant an injunction restraining the Magistrate from enforcing his order, 14 C. 276.

489. (1) On proof of a change in the circumstances of any person receiving under section 488 a monthly allowance, or ordered under the same section to pay a monthly allowance to his wife or child, the Magistrate may make such alteration in the allowance as he thinks fit:

Alteration in allowance.

Provided that if he increases the allowance the monthly rate of one hundred rupees in the whole be not exceeded.

(2) Where it appears to the Magistrate that in consequence of any decision of a competent Civil Court, any order made under section 488 should be cancelled or varied, he shall cancel the order or, as the case may be, vary the same accordingly.

Amendment—In sub-section (1) the monthly allowance has been raised to rupees one hundred consequent on the change in S. 488, sub-section (1); sub-section (2) has been newly added to explain the change of circumstances recognising Civil Court's decree as a ground for cancelling or varying the order awarding maintenance which depended before, on judicial decisions under this section. See 45 M. 721; 43 B. 835; 14 C. 276; 27 A. 433.

On proof of change of circumstances.—The change in the circumstances referred to is a change in the pecuniary or other circumstances of the party paying or receiving the allowance, which would justify an increase or decrease of the amount originally fixed and not a change in the status of the parties which would entail the stoppage of the allowance, or the expiry of the period of *iddat* where the parties are Mahomedans and an irrevocable divorce is pronounced, (20 M.L.J. 12=10 Cr. L.J. 502=3 Ind. Cas. 440; 21 Cr. L.J. 503=56 Ind. Cas. 663.) 19 A. 50 (F.B.). This section does not refer to a change in the status of the parties but only contemplates a change in the financial circumstances of the person affected by the order, 30 Bom. L.R. 617=29 Cr. L.J. 903=111 Ind. Cas. 663. *following* 19 A. 50 (F.B.) but the question of a valid divorce being effected between the parties can be raised whenever the

husband is called upon to show cause why he has not complied with the order to pay the allowance, 30 Bom. L.R. 617=29 Cr. L.J. 909=111 Ind. Cas. 668. A Magistrate is entitled to alter the rate of monthly allowance, for example, when the child gets older, or the birth of another child or by the death of a child, 12 C. 535, 14 M. 398, or that the girl had been married, Weir II, 630. The fact that a child in whose favour an order for maintenance is made is able to maintain itself or the fact that the amount available for a farward becomes insufficient to maintain the children would be a sufficient change of circumstance, 37 M. L.J. 361; 19 L.W. 275. The fact that a Mahomedan wife got a decree for divorce after the order for maintenance and married a second husband will not be a change in the circumstance, absolving the first husband from his duty to maintain his children, 27 A. 11, but if there is a valid divorce that affects the change of status which renders the order for payment of maintenance inoperative after the date of such divorce and if the husband adduces satisfactory evidence of such a valid divorce then the Magistrate may act on such evidence, 30 Bom. L.R. 617=29 Cr. L.J. 909=111 Ind. Cas. 668. The fact that the wife might possibly be able to earn something by her own labour is not a change in the circumstance, 1887 A.W.N. 107. An agreement by parties subsequent to an order for maintenance modifying in terms will entitle the party interested to apply and get the original order altered, 23 A. 165. The mere fact that a minor daughter who had been awarded maintenance has been subsequently married does not disentitle the Magistrate to cancel the order. The question will really be whether the altered circumstances are such that the child has become able to maintain itself by reason of her marriage and cease to depend on the original maintenance. If in spite of the marriage the child still remains unable to maintain itself, either because the husband is too poor to maintain her or for any other good reason, the father's liability still subsists, 43 M. 303. If a husband can object to the enforcement of the order for maintenance relying on his having divorced his wife as in, 19 A. 50 (F.B.) there appears to be no reason why a father should not be entitled to object to payment to the child when the child for whose maintenance he was ordered to pay had become able to maintain himself. The foundation of the order was taken away when he became able to maintain himself and so far he was concerned the order had spent itself and become unenforceable, 18 Cr. L.J. 103=37 Ind. Cas. 311. Without proof of change of circumstances and without an application by a party a Magistrate of his own motion has no power to alter the order of maintenance to a lower scale, Weir II, 623. A Magistrate hearing an application for alteration of the rate of maintenance under this section cannot go into the question whether at the time of the original order and at the time of the first application the husband had sufficient means to pay, because by so doing he would be in effect reviewing the previous order of the Court contrary to the provisions of S. 509 *supra*. When an order for maintenance is once passed, apart from any change of circumstances which could form the basis of a new order under the section, the Magistrate has no power to review the previous order by inquiring into the sufficiency of the means of the husband, 30 Bom. L.R. 617 at 620=29 Cr. L.J. 909=111 Ind. Cas. 668.

The Magistrate may make such alteration.—These words preceded by the word *wife* and followed as they are by a limitation as to the amount of the monthly allowance, clearly indicate that the alteration in the allowance contemplated by the section only refers to a power to alter the amount and not to a total discontinuance thereof, 5 A. 228 at 228; 5 C. 558; 1885 A.W.N. 29, 8 B.H.C.R. (Cr. Cas.) 95; 7 B. 180; 14 C. 278. An order under S. 483, *supra*, cannot be cancelled on the ground that the marriage was null and void as no evidence as to the illegality of the marriage can be adduced in the lower Court and the proper remedy of the husband in such a case is to move the matrimonial Court to declare that the marriage was null and void, 28 Bom. L.R. 1293=23 Cr. L.J. 31=99 Ind. Cas. 83, but now sub-section (2) expressly permits a total discontinuance of the maintenance awarded. A Magistrate has no power to reduce the amount of maintenance under this section which has already accrued due. The reduction will be limited only to payments accruing due after the date of the order, Weir II, 630; 21 C. 281. When the parties make an agreement subsequent to the order modifying its terms, it will be competent to the party's interest to apply under this section and get the order altered, 23 A. 165. A Magistrate is competent when varying the rate of

maintenance under this section to give effect to his order from the date of the application for maintenance, 27 Cr. L.J. 940=96 Ind. Cas. 396. The word "alter" is not used in any restricted meaning. The reduction of the maintenance awarded to nothing, would also come within the meaning of the word "alteration."

Sub-section (2)—This is in accordance with the decisions in 45 M. 721; 18 L.W. 132; 5 C. 553; 14 C. 276; 7 B. 180; 43 B. 685; Weir II, 614, 615; 27 A. 433; 15 A. 143, 23 B. 434; 33 M.L.J. 449=1918 M.W.N. 65=6 L.W. 536=22 M.L.T. 29 and various other decisions. Under this sub-section it is competent for a Magistrate to cancel or vary an order for maintenance, if he thinks that it should be cancelled or varied in consequence of any decision of a competent Civil Court. When the Civil Court gave a decree to the husband for restitution and he *bona fide* wished to execute it and the wife refused to obey the decree and return to him, that would be a good ground for cancelling the maintenance order. But where the husband did not wish to have his wife back but his real object in getting the decree for restitution was merely to get the maintenance order cancelled, then in the exercise of the discretion under this sub-section it would be wrong on the part of the Magistrate to cancel the order, 49 M.L.J. 269=22 L.W. 479=(1925) M.W.N. 645=27 Cr.L.J. 30=91 Ind. Cas. 62; see 27 Cr. L.J. 876=96 Ind. Cas. 124; 44 B. 972. See also 3 Ran. 150 where it was held that such decree for restitution will not necessarily be conclusive but is only to be taken into consideration along with other circumstances by the Court. There is clear authority for the position that a Magistrate ought to treat an order for maintenance made by him as determined if the wife failing to comply with the Civil Court's decree subsequently obtained for restitution of conjugal rights, refuses to live with her husband. The order for maintenance in such a case is spent up and has no legal effect, 17 Cr. L.J. 412=35 Ind. Cas. 972 following 23 B. 434. See 46 A. 877, where it was held that the weight to be attached to a decree for restitution must depend upon the circumstances of each case and no hard and fast rule can be laid down that the Civil Court's decree is for ever and always binding on the Magistrate or that his discretion is never fettered and when a husband enforcing the decree for restitution took the wife to the house and there ill-treated and drove her away the Magistrate's order for maintenance was held to be justified.

Revision—A revision lies to the High Court against a wrong order under this section. It is only proper that it should be corrected by the High Court in its revisional jurisdiction, 27 Cr. L.J. 876=96 Ind. Cas. 124.

490. A copy of the order of maintenance shall be given without payment to the person in whose favour it is made, or to his guardian, if any, or to the person to whom the allowance is to be paid; and such order may be enforced by any Magistrate in any place where the person against whom it is made may be, on such Magistrate being satisfied as to the identity of the parties and the non-payment of the allowance due.

Enforcement of order of maintenance.

Scope of the section—The provisions of this section cannot be held to derogate from S. 488 (3) *supra* under which a Magistrate who passed the order can levy the amount due in the manner of levying fines, i.e., he can issue a warrant under S. 386, *supra*, for the attachment and sale of any moveable property of the person proceeded against and such warrant can be executed within or without the Magistrate's local limits under S. 387, *supra*, when endorsed by the District Magistrate within whose jurisdiction the moveable property is found. It must be held that this section merely provides an alternative remedy by enabling an application for execution direct to the Magistrate within whose jurisdiction the person against whom the order was passed may be and that Magistrate after satisfying himself as to the identity of the parties and non-payment of the allowance can enforce the order by proceeding under S. 386, *supra*. It is left to the applicant to choose whether she will apply to the Magistrate who passed the order or to the Magistrate within whose jurisdiction the person against whom execution is sought may be. The Magistrate who passed the original order

cannot decline to receive the petition on the ground that the person sought to be proceeded against resides in another Magistrate's jurisdiction, 13 Cr. L.J. 701=26 Ind. Cas. 449, see also 52, M. 77. "It is not the intention of the Legislature that the Magistrate to whom the application is made to enforce an order for maintenance should take into consideration anything further than the identity of the parties and the non-payment of the allowance. It is true that in the Court one step further has been taken, and we have held that it is open to the Magistrate to consider whether the person to whom the order of maintenance has been given is at the time she makes the application, still holding the position of a wife, but I know of no further step relaxing the clear words of S. 480. To me the reason appears obvious. If a person against whom an order for maintenance has been made considers that such an order should no longer be in force against him, it is for him to apply under S. 489 and get the order altered. It does not seem suitable or expedient that it should be open to a second Magistrate to call in question an order duly given upon proof"—per Knox, J. in 25 A. 165 at 166-167. The conditions mentioned herein as to the identity of parties and non-payment of the allowance, have special reference to cases where enforcement of order is sought at a place other than the one where the order was originally passed or by a Magistrate other than the one who passed the order, and cannot be taken as exhaustive. Another material question for consideration will be whether the order sought to be enforced is still in force, e.g., a decree for restitution of conjugal rights may supersede the order for maintenance. But an order for the maintenance of a child will not be superseded by such a decree against the wife, especially where there is no order appointing the father as guardian of the child, 1 Cr. L. Rev. 368. When proceedings under S. 488, *supra*, ended in a compromise whereby the husband undertook to pay a fixed allowance to the wife and on his failure to pay the same, the wife applied to the Magistrate for recovery of the arrears, and warrant of attachment for the same was issued, it was held, that once a compromise is entered into there is no refusal to maintain and S. 488, *supra*, had no longer any application, and any order passed by the Criminal Court regarding such compromise is without jurisdiction and the proper remedy lay in the Civil Courts to enforce the compromise, 27 Cr. L.J. 779=93 Ind. Cas. 315 following 2 Cr. L.J. 690.

May be enforced by any Magistrate.—A Second-class Magistrate of a place where the husband is at the time is competent to enforce the order for maintenance made against him and is a competent Magistrate on that behalf, Ratanlal 238. A Magistrate cannot refuse to enforce an order for maintenance on the ground that the amount is excessive, Weir II, 633, or on account of the defendant's inability to pay, Weir II, 636 but he may decline to enforce it if the claim has been released, 10 M. 13; 2 Cr. L.J. 690.

The words used are "any Magistrate" and therefore even a second class Magistrate is empowered to enforce an order for maintenance although he is incompetent to pass an order awarding maintenance under S. 488, *supra*, Ratanlal 239. The section does not deprive the Magistrate who originally passed the order, of the jurisdiction given him under S. 488. When the defendant is beyond his jurisdiction he may in his discretion exercise the jurisdiction or refer the applicant to the Magistrate having jurisdiction at the place where the defendant is to be found, 4 M. 230. This view has not been accepted in 13 Cr. L.J. 701=26 Ind. Cas. 449, where it was held that the Magistrate who passed the order cannot return the petition on the ground that the person proceeded against resided within the jurisdiction of another Magistrate who alone could enforce the order under S. 386 *supra*. A Court cannot refuse to exercise jurisdiction on the ground that some other Court has also concurrent jurisdiction. It is left to the applicant to choose whether to apply to the Magistrate who passed the order or to the Magistrate within whose jurisdiction the person sought to be proceeded against resided, and the order of the Magistrate who passed the original order for maintenance returning the application to be presented to the other Magistrate was set aside and he was directed to receive the petition and deal with it according to law. See also 52 M. 77, which took the same view and held that the order could be enforced by the Magistrate who passed the original order even though the person against whom execution is sought was not within the Magistrate's jurisdiction. When a Magistrate for enforcing the order issues a warrant, the party is not exempt from arrest under S. 135 of

the Civil Procedure Code as that section gives exemption from arrest under Civil process to a person engaged in a civil litigation, 30 Cr. L.J. 788—117 Ind. Cas. 238.

The new sub-section (2) to S. 489, *supra*, declares that when it appears to the Magistrate that in consequence of a decision of a competent Civil Court, an order under S. 488, *supra*, should be cancelled or varied, he shall cancel or vary the order.

CHAPTER XXXVII.

DIRECTIONS OF THE NATURE OF A HABEAS CORPUS.

Power to issue directions of the nature of a *Habeas Corpus*.

491. (1) Any High Court may, whenever it thinks fit, direct—

(a) that a person within the limits of its *appellate criminal jurisdiction* be brought up before the Court to be dealt with according to law;

(b) that a person illegally or improperly detained in public or private custody within such limits be set at liberty;

(c) that a prisoner detained in any jail situate within such limits be brought before the Court to be there examined as a witness in any matter pending or to be inquired into in such Court;

(d) that a prisoner detained as aforesaid be brought before a Court-martial or any Commissioners acting under the authority of a Commission from the Governor General in Council for trial or to be examined touching any matter pending before such Court-martial or Commissioners, respectively;

(e) that a prisoner within such limits be removed from one custody to another for the purpose of trial; and

(f) that the body of a defendant within such limits be brought in on the Sheriff's return of *cepi corpus* to a writ of attachment.

(2) The High Court may, from time to time, frame rules to regulate the procedure in cases under this section.

(3) Nothing in this section applies to persons detained under the Bengal State Prisoners Regulation, 1818, Madras Regulation II of 1890, or Bombay Regulation XXV of 1827, or the State Prisoners Act, 1850, or the State Prisoners Act, 1858.

Amendment.—"Any High Court" instead of "any of the High Courts of Judicature of Fort William, Madras, Bombay, etc.," are substituted. In sub-section (1) (a) for the words "ordinary original jurisdiction" the words "appellate criminal jurisdiction" are substituted.

History of the writ of 'Habeas Corpus.'—The writ of *habeas corpus* was originally issuable out of the Court of King's Bench and out of the Court of Chancery in England but that in very early days the Court of Common Pleas and Exchequer had claimed the right to issue the writ in protection of their own officers and suitors, and that this practice has been gradually extended to other cases. In the Seventeenth Century, the *Habeas Corpus* Act

1640 (16 chas. 1. C. 10) expressly recognised the right and duty of the Court of the Common Pleas to order the writ to issue and the *Habeas Corpus* Act, 1679 (31 Chas. 2, C. 2, S. 6) enacted that it shall be lawful to move and obtain *Habeas Corpus* as well out of the High Court of Chancery or Court of Exchequer as out of the Courts of King's Bench Division or Common Pleas or either of them. This latter Act further provided that the Lord Chancellor or anyone of His Majesty's Justices might grant *Habeas Corpus* in vacation and imposed heavy penalties upon any Judge who wrongfully refused to entertain the application, 28 L.W. 874 (P.C.) at 878=30 Cr. L.J. 113=113 Ind. Cas. 273. The writ is a high prerogative writ for the protection of the liberty of the subject and it would be a startling result, if a statute enacted primarily for the simplification of procedure should have materially cut down that protection and the Judicature Act of 1873 has had no such result *Ibid* at 897 (P.C.). In every part of the British Empire every person has a right to be protected from illegal imprisonment by the issue of the prerogative writ of *Habeas Corpus*. The King's Bench Division in England exercised the power of issuing such writs throughout the British Empire till the statute known as the *Habeas Corpus* Act, 25 and 26 Vic., C. 20, was passed. By that Act the powers of the King's Bench are limited to England and such places outside England which have no local Court competent to exercise the power. The right to such a writ is an absolute right either from a Court in this country, and if there be no competent Court to grant it, from the King's Bench Division sitting in London. It is fully established that the High Court has all necessary powers and is competent to grant the writ. The High Court has succeeded under the High Courts of Judicature in India Act, 24 and 25 Vic., C. 104 and the Letters Patent issued thereunder, to all the powers of the Supreme Court of Madras and the Supreme Court had by its Charter of 1800, Art. 8, given to it the powers over all the territories which are now or hereafter may be, subject to, or dependent upon the Government of Madras aforesaid and to have such jurisdiction and authority as Our Justices of Our Court of King's Bench have and may lawfully exercise within that part of Great Britain called England as far as circumstances will admit. These words give to the Supreme Court the right usually exercised by the King's Bench in England of issuing writ of *Habeas Corpus*, 35 M. 922 at 925-926, 6 B.L.R. 392; 35 M. 72. The Bengal Criminal Law Amendment Act (Supplementary) 1935, S. 6, says that the powers conferred by this section shall not be exercised in respect of any person arrested, committed to or detained in custody under the said Act and is valid law See 31 C.W.N. 593.

Scope of the section—*Habeas Corpus* is the most celebrated writ in English law, being the great remedy which the law has provided for the violation of personal liberty. The most important species of *Habeas Corpus* is *Habeas Corpus ad sub iudicandum* which is the remedy used for deliverance from illegal confinement. This remedy is resorted to for deliverance of persons illegally confined and the writ is directed to any person who detains another in custody and commands him to produce the body of the person so confined. It is well settled in England that the Court hearing an application for a writ of *Habeas Corpus* is not a Court of Appeal from the Magistrate on questions of fact; but has only to see that he had such evidence before him as gave him authority and jurisdiction to commit. The Court will not review the decision of the Magistrate, if there was any evidence before him to justify a commitment. The sufficiency of such evidence is a question entirely for the Magistrate, but when there is no evidence before the Magistrate, the High Court will interfere, 39 C. 164 at 201. The proceedings by way of *Habeas Corpus* are proceedings calling upon a person having custody of a prisoner to produce him and demonstrate under what authority he holds him in custody. If the authority be a legitimate one the Court cannot interfere and all that the High Court is empowered to do is to see that there is no patent defect visible in the authority by which the person having custody detains the person, 27 Cr. L.J. 37=91 Ind. Cas. 69. When a person arrested in British India under a warrant issued by a Native State and removed out of British India and taken in the custody of that Native State the person so arrested is no longer within the limits of the High Court's jurisdiction and its powers to issue directions in the nature of *Habeas Corpus* under this section could not be exercised nor can it direct the Political Agent of the Native State to produce the person before the High Court.

when the Political Agent has no custody or control over that person, 27 A.L.J. 520 distinguishing 50 B. 616 where it was held that the High Court has jurisdiction to issue a writ in the exercise of its Common law power for the production of certain children who are outside British India in a case when it is satisfied that they are in the custody or control of a person within its jurisdiction. When a person arrested under the orders of the Manager of an Encumbered Estate under S. 10 of Sind Encumbered Estates Act, the High Court has no jurisdiction under this section to issue the writ, 28 Cr.L.J. 124 (2) = 99 Ind. Cas. 930 (2), following 31 B. 604 at 609. The High Court retains all the powers, which the Court of the King's Bench in England can exercise and therefore has under its Common Law powers jurisdiction to issue a writ for the production of minor children outside British India, if it is satisfied that they are in the custody or control of a person within its jurisdiction and the Legislature by enacting this section has not in any way limited such Common law powers for the issue of writs of *Habeas Corpus*, 50 B. 616. The discretionary powers vested in the High Court under the provisions of this section are not to be exercised when the applicant has another effective remedy open to him, say under the Guardians and Wards Act under which the rights of the parties can be more satisfactorily settled than by the summary proceedings under this section, 27 Cr. L.J. 737 = 93 Ind. Cas. 65. The Executive have certain special powers under the *Goondas Act* and the High Court can interfere under this section only when those powers have been exercised and the person arrested is illegally or improperly detained in public custody, 30 C.W.N. 791 ; 53 C. 962, but see 51 C. 460. Judging from the context of this section, the Criminal Appellate Bench of the High Court, being the highest Court of Criminal appeal or Revision has got ample powers to deal with an application under this section. The terms of the section as it now stands give the Appellate Criminal Bench, jurisdiction to entertain and dispose of the application, 52 C. 319 at 325. This section merely substitutes or adds a different form of procedure less cumbersome than the granting of a writ of *Habeas Corpus*. This section does not apply to the case of an accused convicted and sentenced by a Judge of the High Court at the Criminal Sessions of the High Court, on the ground of irregularities having been discovered after the delivery of the verdict, 44 C. 723, but this decision is of a doubtful authority by the amendment in sub-section (1) (a). The writ of *Habeas Corpus* is distinguishable from the directions in the nature of a *Habeas Corpus* dealt with by this section, 39 C. 164. The underlying principle of every right of *Habeas Corpus* is to ensure the protection and well-being of the person brought before the Court under this writ. See 57 M.L.J. 642 = 1929 M.W.N. 689 = 30 L.W. 685. The real interest and well-being of a person brought up on a writ of *Habeas Corpus* ought to be not only the determining factor but the sole factor for consideration, 12 Bom. L.R. 891 at 896. It has been repeatedly held in England that the main consideration which ought to weigh with the Court of Chancery in issuing directions in the nature of *Habeas Corpus* is really the question of the welfare of the child. The jurisdiction arises from the power of the Crown delegated to the Court of Chancery and it is essentially a parental jurisdiction and is to be exercised for the benefit of the infant. It is also settled law that the welfare must be taken in its widest sense. The moral and religious welfare must be considered as well as its physical well-being and due regard must be had to the ties of affection. The rules as administered by the Court of Chancery in England are applicable to the Courts in India, and the Guardians and Wards Act recognises those rules and S. 17 of the said Act enacts that the Court shall be guided by what appears in the circumstances to be for the welfare of the minor and where the minor is old enough to form an intelligent preference the Court may consider that preference, 43 M. 299 at 301-302, see 23 C. 290. It is not reasonable or normal procedure to make applications to the High Court under this section or for bail while applications by the same persons for bail are still pending in the Sessions Courts. The proper course in such matters is to apply to the lower Courts and to obtain their orders before coming up to the High Court and there is no reason to depart from that course, 30 Cr. L.J. 301 = 114 Ind. Cas. 444.

Any High Court.—The High Court which by this section is invested with certain powers is defined in S. 4 (1) (j) *supra*, to mean the highest Court of Criminal Appeal or Revision for any local area. The High Court may act under its Letters Patent, by any Judge or any Division Bench thereof, subject to any rules that may be made or directions that may

(2) The District Magistrate, or subject to the control of the District Magistrate, the Sub-divisional Magistrate may in the absence of the Public Prosecutor, or where no Public Prosecutor has been appointed, appoint any other person, not being an officer of police below such rank as the Local Government may prescribe in this behalf, to be Public Prosecutor for the purpose of any case.

Public Prosecutor.—For definition of "Public Prosecutor" see S. 4 (1) (d), *supra*. The Crown represented by the Public Prosecutor is the party in criminal cases, 13 B. 389 and in a case conducted by the Public Prosecutor any Pleader appearing for a private party can instruct the Public Prosecutor and act under his instruction, S. 493. A Public Prosecutor has the right to appear without written authority, S. 493, and without permission of the Court, S. 495, and he has the power to withdraw charge, S. 491. His duty is to assist the Court in the furtherance of justice and not to act as Counsel for any particular person or party, 8 C. & P. 286. He should not by his statement aggravate the case against the prisoners or keep back a witness because his evidence may weaken the prosecution. His only object should be to aid the Court in discovering the truth, 9 C. & P. 23. It is elementary that great care must be taken by the counsel for the prosecution in the observations he makes to the Jury, 50 C.L.J. 106 at 125—33 C.W.N. 101 (F.B.). He should avoid any proceeding likely to intimidate or unduly influence witnesses on either side. There should be on his part no unseemly eagerness for or grasping at conviction. He ought to endeavour to perform his duties with that calmness and impartiality which should ever characterise a Public Prosecutor, 8 B.H.C.R. (Cr. Ca.) 126 (F.B.) at 154; 4 B.L.R. Appx. 1; 26 Cr. L.J. 163—83 Ind. Cas. 723. In the case of Crown Prosecution in England, where the Attorney General or Solicitor General is conducting the case for the prosecution there is never the vestige of animosity or prejudice. The practice and procedure prevailing in England should be adopted in India, 8 C.W.N. xvii. Purpose of a criminal trial is not to support at all costs a theory but to investigate the offence and determine the guilt or innocence of the accused, and the duty of a Public Prosecutor is to represent not the police, but the Crown and his duty should be discharged by him fairly and fearlessly, and with a full sense of the responsibility that attaches to his position. The guilt or innocence of the accused is to be determined by the tribunals appointed by law and not in accordance with the tastes of any one else. It is undoubtedly the duty of the Public Prosecutor especially in capital cases to place before the trial Court the testimony of all available eye witnesses 8 Pat. 239 at 303 and 623. Every witness who was present at a transaction ought to be called even if they give different accounts, so as to enable the Courts from the evidence, to form its own conclusion as to the real truth of the matter. This is no technical rule; it is founded on common sense and is dictated by humanity. It is not the duty of the Public Prosecutor to call only those witnesses who speak in his favour, 42 C. 422 at 427-428, followed in 30 Cr. L.J. 675 at 683—116 Ind. Cas. 770. The only legitimate object of a prosecution by the state is to secure not a conviction but that justice be done. The prosecutor is not free to choose how much evidence he will bring before the Court. It is *prima facie* his duty to call those witnesses who prove their connection with the transaction in question and also must be able to give important information. The only thing that can relieve the prosecutor from calling such witnesses is the reasonable belief that if called, they would not speak the truth, 8 C. 121; 10 C. 1070 49 C. 277; 42 C. 937; 45 M.L.J. 846—1923 M.W.N. 782—33 M.L.T. 213—25 Cr. L.J. 75—75 Ind. Cas. 937; 25 L.W. 437—23 Cr. L.J. 307—100 Ind. Cas. 531. It is beyond the region of doubt that Counsel for the prosecution ought not to struggle to obtain a conviction, but should regard himself rather as a minister of justice assisting in its administration, 50 C.L.J. 106 at 125—33 C.W.N. 1121 (F.B.) following [1915] 2 K.B. 621. It is the duty of the Public Prosecutor to conduct the case for the Crown fairly. His object should be not to obtain an unrighteous conviction, but to see that justice is vindicated, and in exercising his discretion as to the witnesses whom he should or should not call, he should bear that in mind. A Public Prosecutor should not refuse to call or put in the calendar one as a witness for the

Crown, merely because the evidence of such witness might in some respects be favourable for the defence, 16 A. 81 (F.B.) at 88. There should be no unseemly eagerness on the part of a public prosecutor to grasp at conviction. He is to perform his duties with calmness and impartiality and not to aggravate the case against the accused. He is to aid the Court in discovering the truth and it is his duty to do justice between the Crown and the prisoner, 26 Cr. L.J. 163=83 Ind. Cas. 723. It is a question how far it is open to a Public Prosecutor to propound an inconsistent opinion with the position successfully taken by the Crown in the Court below and on a previous occasion in the High Court. Where the construction of a section admitted of two opinions a Public Prosecutor in view of his personal opinion is not justified in throwing overboard the case for the Crown which could have been argued by him to be of assistance to the Court in deciding which of two possible constructions is more acceptable, 30 Cr. L.J. 1019 at 1021=119 Ind. Cas. 625. S. 270, *supra*, provides that in every trial before a Court of Session the prosecution shall be conducted by a Public Prosecutor.

493. The Public Prosecutor may appear and plead without any written authority before any Court in which any case of which he has charge is under inquiry, trial or appeal and, if any private person instructs a pleader to prosecute in any Court any person in any such case, the Public Prosecutor shall conduct the prosecution, and the pleader so instructed shall act therein, under his directions.

Public Prosecutor may plead in all Courts in cases under his charge Pleaders privately instructed to be under his direction.

Any private Pleader engaged by a party cannot conduct the prosecution; and he shall act in the case under the directions of the Public Prosecutor who alone is entitled to conduct the prosecution. The Public Prosecutor may avail himself of the services of a Pleader retained by a private party but under S. 417 *supra*, it is the Public Prosecutor that ought to prefer an appeal against an acquittal, 41 C. 425. The general conduct of the case vests in the Public Prosecutor, 11 B.H.C.R. 102. A representative of a Railway appointed under S. 145(2) of the Railway Act cannot insist to lead the prosecution in the presence of the Public Prosecutor who has charge of the prosecution and a Pleader instructed by a private person including the Agent of a Railway administration shall act under the direction of the Public Prosecutor, 1926 Pat. 74=27 Cr. L.J. 313 (2)=22 Ind. Cas. 697 (2). This section does not refer to an application by a private party that a charge in a particular case has not been framed under proper sections of the I.P.C. and that it should be framed under the appropriate sections 29 Cr. L.J. 1056=112 Ind. Cas. 430.

494. Any Public prosecutor may, with the consent of the Court, in cases tried by jury before the return of the verdict, and in other cases before the judgment is pronounced, withdraw from the prosecution of any person *either generally or in respect of any one or more of the offences for which he is tried* and upon such withdrawal,—

Effect of withdrawal from prosecution.

(a) if it is made before a charge has been framed, the accused shall be discharged *in respect of such offence or offences*;

(b) if it is made after a charge has been framed, or when under this Code no charge is required, he shall be acquitted *in respect of such offence or offences*.

Amendment.—The words "appointed by the Governor-General in Council or by the Local Government" have been omitted. After the words "withdraw from the prosecution of any person" the words "either generally or in respect of any one or more of the offences for which he is tried" have been added, and after the words "discharged and acquitted" the words "in respect of such offence or offences" have been added. All Public Prosecutors are now empowered to exercise the power of withdrawal from a prosecution.

Scope of the section.—This section gives a wide discretion to the Magistrate whether he will consent to the withdrawal by the prosecutor from the prosecution. The discretion is to be exercised not arbitrarily but on correct legal principles and the order to be passed by him is a judicial order and reasons are to be recorded to satisfy the High Court that consent to the withdrawal was rightly given, 56 C. 1023. Reading the words of this section it is reasonably clear that it contemplates the case of a withdrawal of a prosecution by the Public Prosecutor in cases tried by Jury before the return of the verdict by the Jury and in other cases before the judgment is pronounced by the trial Court and it does not contemplate the case of a withdrawal by the Public Prosecutor after the conviction of the accused by the trial Court and in the appellate stage of the case even though the petition of withdrawal was inspired by the Magistrate of the District, 46 C.L.J. 121=28 Cr.L.J. 833=105 Ind. Cas. 449.

Any public prosecutor.—Any private person in the absence of a statutory provision to the contrary can commence a criminal prosecution but the prosecution is always at the instance of the Crown. Hence it is that the criminal proceedings were called *Pleas of the Crown*. The Crown only can stay process or remit a punishment awarded by any Court," 12 R.R. 450=104 E.R. 501=15 East 1, quoted in, 21 Cr. L.J. 641 at 642=57 Ind. Cas. 657. A person acting under the directions of the Public Prosecutor duly appointed for the district can withdraw, 30 C.L.J. 255.

May with the consent of the Court withdraw.—This section lays down that the consent of the Court must first be obtained, 6 Pat. 208; 33 C.W.N. 468. But the failure to obtain such consent to confine the prosecution to some of the charges only, is a mere irregularity which will not vitiate the proceedings unless objection is taken at the beginning of the trial, 6 Pat. 208. The only Prosecutor who may, under the provisions of the Code, withdraw from a prosecution without obtaining the consent of the Court and without giving reason, is the Advocate General. No other Public Prosecutor is placed in that privileged position; and if the consent of the Court is to be regarded as a ministerial act or merely as an executive act we do not understand why it should have been necessary for the Legislature to insert such a provision in this section. It is clear that, in either withholding consent or in according consent, the Court is acting in a judicial capacity, and, for its order as for every order judicially made, it ought to give and record its reasons. If the consent has been improperly recorded, it is clear that the consequential discharge must also be looked upon as improper. When a Court acting under this section gives its consent to a withdrawal from a prosecution it acts in a judicial capacity, and must record its reasons in order that the High Court may be in a position to say whether the discretion has been properly exercised, 22 C.W.N. 65 at 71=26 C.L.J. 28=18 Cr. L.J. 886=41 Ind. Cas. 998; 33 C.W.N. 468; 25 C.W.N. 880 followed in 43 C. 1103; 24 Cr. L.J. 229=71 Ind. Cas. 693; 24 Cr. L.J. 361=72 Ind. Cas. 361; 1 Ran. 736. The test to be applied by the High Court is whether the Magistrate in coming to the conclusion has taken into consideration extraneous circumstances which ought not properly to have been taken into account in making a judicial order, 33 C.W.N. 468. It was held in 2 Pat. 709 at 710, that the Calcutta decisions overstated the law and this section does not expressly require the Court to give any reasons for consenting to the withdrawal, nor is there any provision which compels a Court to write a reserved judgment establishing the propriety of an order. There are many final orders known to the Court for which no recorded judgment is required. See 5 M.L.T. 216=11 Cr. L.J. 193=4 Ind. Cas. 1125, where it was held that the provisions of this section are to be regarded as a mere ministerial or executive act for which it is not

necessary, that Magistrate should set out any reason. In 1 Ran. 756, the Calcutta view was followed and it was held that in withholding or according consent the Court acts in a judicial and not in a ministerial capacity and ought to give and record reasons; if good and sufficient reasons are required in a case of *discharge*, they are all the more necessary in a case of *acquittal* in which case a remedy by way of revision is not ordinarily available; see also 2 Pat. 708 at 710 where the Calcutta rulings are not followed.

Before judgment is pronounced.—The words cannot be held applicable to the pronouncement of the judgment by the appellate Court and this is clear from the wording of the section. To construe the section as authorising to withdraw from the prosecution after the accused had been convicted is something which is not only on the face of it startling but also absurd having regard to the words of the section, 46 C.L.J. 121=23 Cr. L.J. 833=104 Ind. Cas. 449

Of any person.—When a Public Prosecutor is appointed to conduct a prosecution it means he is to conduct the whole case and therefore he has power to withdraw under this section from the prosecution of an accused person who was added subsequent to his appointment as Public Prosecutor, 18 Bom. L.R. 266.

Before charge the accused shall be discharged of such offence.—There is nothing in law to prevent a Magistrate from entertaining a complaint after the discharge of the accused in a previous police case under this section. The explanation to S. 403, *supra*, provides that an order of discharge is not an acquittal for the purposes of that section, 1924 Pat. 276=26 Cr. L.J. 129=83 Ind. Cas. 689; 2 Pat. L.J. 34; 40 C. 71. A formal order of discharge should be made, 33 C. 1333 and after discharge he is a competent witness, 47 C. 154. This section clearly provides that if the Public Prosecutor withdraws a case before a charge has been framed, then the accused shall be discharged. There is no difference in law in the case of a person discharged by a Magistrate on a consideration of the evidence tendered against him and of a person discharged at the instance of the Public Prosecutor under the section so far as ordering a further inquiry is concerned, 30 Cr. L.J. 233=114 Ind. Cas. 50. See also [1911] 2 M.W.N. 74=12 Cr. L.J. 440=11 Ind. Cas. 624, which took a different view as to the power to order further inquiry.

Withdrawal after charge the accused shall be acquitted.—An acquittal is a matter of right to the accused after the Public Prosecutor has withdrawn from the prosecution with the consent of the Court. The opinion of the Assessors need not be taken in such a case. An acquittal is a matter of right then, whatever the opinion of the Assessors may be. It may be disregarded, Ratanlal 397. As soon as the Public Prosecutor withdraws from the prosecution an accused person becomes a competent witness against the remaining accused even though the Court omits to record a final order of discharge, 47 C. 154; 21 Cr. L.J. 641; 18 C.W.N. 1213; 15 Cr. L.J. 693=26 Ind. Cas. 141; 33 C. 1333; 7 A.L.J. 86, and the evidence of discharged accused is admissible, 18 Bom. L.R. 266; 25 B. 422; 23 B. 213; 16 B. 661; 7 M. 102. This section and S. 337 *supra* should be read together; S. 337 *supra* does not govern this section and does not in any way abridge the wide language of this section. S. 337 *supra* does not suggest the idea that the only method of obtaining the evidence of a co-accused against another is by tendering a pardon under S. 337, 56 C. 1023. S. 403 *supra* applies to an order of acquittal made under this section, see 18 Cr. L.J. 329=38 Ind. Cas. 441; when a Public Prosecutor withdraws from a prosecution in a summons case before summons is served on the accused to appear and the accused is acquitted, it was held that the rule of English Law requiring the accused to have been tried and acquitted to plead *autrefois acquit* in bar of trial embodied in this section is inapplicable to statutory acquittals embodied in this section and S. 247 and S. 345 *supra* which are intended to bar further proceedings whether the accused can be said to have been tried or not, 40 M. 976. An order under this section was held good even though the avowed object of the prosecution was to secure the evidence of one accused against his co-accused, 23 B. 422; (1911) 2 M.W.N. 74=12 Cr. L.J. 440=11 Ind. Cas. 624. This section controls the other sections of the Code relating to sessions trials, 24 Cr. L.J. 3=71 Ind. Cas. 53. This section, S. 495 and S. 403 do not apply to security proceedings and

such proceedings cannot be withdrawn, 36 M. 315. The effect of an unauthorised withdrawal is that the result contemplated by this section does not follow, but the trial proceeds and an accused person cannot plead that he was discharged or acquitted in such a case. When an accused person accepts a tender of pardon he ceases to be an accused person and it is unnecessary for the prosecution to withdraw the charge against him, 10 M.L.J. 147. It was previously held that a Public Prosecutor is not competent to withdraw only one of the charges. If he withdraws at all, he must withdraw all the charges, 2 C.L.J. 18(N). Now he can withdraw all or any one of the charges. An acquittal by Sessions Judge on appeal from the conviction acting on a petition of withdrawal presented in the appellate Court even though such petition was inspired by the District Magistrate is no acquittal and there is no judicial determination of the appeal pending before the Sessions Judge, 46 C.L.J. 121=28 Cr. L.J. 833=104 Ind. Cas. 449.

Revision.—In 5 M.L.T. 216=11 Cr. L.J. 193=4 Ind. Cas. 1126 it was held that the acquittal under this section being a statutory right, the High Court will not interfere in revision but the question whether the High Court can interfere in revision with the discretion of the lower Court in giving its consent to the withdrawal of a prosecution under this section was left undecided in 1914 M.W.N. 776 at 778=13 Cr. L.J. 541=25 Ind. Cas. 841. It is for the Crown to consider whether a case is a fit one to be proceeded against or whether it is a proper one to be withdrawn or proceedings to be dropped. It is not competent to the High Court to quash proceedings on the ground that it is an harassment to the accused 5 Pat. 432. Where a Court permits a complaint to be withdrawn, it should record reasons in order that the High Court may be in a position to say whether the discretion vested in the lower Court has been properly exercised 1 Ran. 756. The High Court will be slow to interfere in revision with an order allowing withdrawal when reasons are given by the Court below for allowing the same, 24 Cr. L.J. 5=71 Ind. Cas. 53. Where a discretion has been exercised by a Court of competent jurisdiction which is not on the face of it arbitrary the practice of the High Court is that as a Revisional Court it will neither inquire into the reasons nor interfere, 2 Pat. 703. Where the Sessions Judge rejects an application by the Public Prosecutor under this section in a proper way the High Court will not interfere with his order in revision even though the reasons given by the Judge may not be the only reasons and on that ground it cannot be said that the Judge did not exercise a judicial discretion in granting or refusing permission to withdraw, 23 L.W. 101=27 Cr. L.J. 334 (1)=92 Ind. Cas. 750 (1). But where a private complainant was permitted to conduct the prosecution and after charge was framed a Prosecuting Inspector was allowed without consulting the complainant to withdraw the prosecution and the Magistrate acquitted the accused, the High Court in revision set aside the acquittal, 46 A. 88.

495. (1) Any Magistrate inquiring into or trying any case may permit the prosecution to be conducted by any person other than an officer of police below the rank to be prescribed by the Local Government in this behalf but no person, other than the Advocate General, Standing Counsel, Government Solicitor, Public Prosecutor or other officer generally or specially empowered by the Local Government in this behalf, shall be entitled to do so without such permission.

Permission to conduct prosecution.

(2) Any such officer shall have the like power of withdrawing from the prosecutions as is provided by section 494, and the provisions of that section shall apply to any withdrawal by such officer.

(3) Any person conducting the prosecution may do so personally or by a pleader.

(4) An officer of police shall not be permitted to conduct the prosecution if he has taken any part in the investigation into the offence with respect to which the accused is being prosecuted.

Scope of the section.—This section applies only to proceedings which could end in an acquittal or discharge of the accused; and not to proceedings under Chapter VIII of the Code where there is no accused in the strict sense of the term and there can therefore be no discharge or acquittal, 38 M. 315, See also 12 Cr. L.J. 533=12 Ind. Cas. 301. Sub-section (1) of the section does not in any way limit the scope of sub-section (3) There is nothing in this section to warrant the action of a Magistrate in taking the prosecution out of the hands of the complainant's pleader and handing it over to some other person who is not the Public Prosecutor, 25 Cr. L.J. 571=81 Ind. Cas. 59.

May permit any person.—The question whether a particular person should be permitted to conduct the prosecution is left to the discretion of the Magistrate. But such a discretion must, of course, be exercised in a judicial manner and the Magistrate should in a case of dispute give adequate reasons for his order whether he grants or refuses permission to person applying to him. The fact that the complainant in a case is also the Prosecuting Inspector of the Court does not deprive him of his right to prosecute the case in his private capacity as a private citizen, 17 Cr. L.J. 436=36 Ind. Cas. 166. It is doubtful whether the words "any person" in S. 495 of the Code would include an absolute stranger who had no connection in the remotest degree with the prosecution and whose desire to help the prosecution, was based on a personal grudge only, 11 A.L.J. 313 at 314=1 Cr. L. Rev. 202=14 Cr. L.J. 333=20 Ind. Cas. 213. The words 'any person' include persons other than certificated Pleaders. It is however discretionary with the Criminal Courts in each case to permit such persons to conduct the prosecution *M.H.C. Pro dated 2nd September 1892*. When a Magistrate has, after due consideration, exercised the discretion allowed by this section and allowed a particular person to appear for the prosecution, the High Court cannot as a Court of Revision set aside the order and direct the Magistrate to refuse to allow the person to appear, *Weir II 633*. The Officer who has power to withdraw is the Officer referred to in sub-section (1). A withdrawal, by a Police Inspector not coming within sub-section (1) is no withdrawal, 9 M.L.T. 203=(1911) 1 M.W.N. 106=11 Cr. L.J. 722=8 Ind. Cas. 867. See also 10 Cr. L.J. 501=4 Ind. Cas. 132, where it was held that a Police Officer who was not permitted by the Court to conduct the prosecution cannot legally withdraw from the prosecution and an acquittal based on such withdrawal is no acquittal at all.

Below the rank prescribed by Government.—No officer below the rank of a Head Constable shall be permitted to conduct a prosecution under this section. Before permitting him to conduct a prosecution, the Magistrate shall satisfy himself that the case is of a simple character, such as can properly be entrusted to him and that the services of the ordinary prosecuting staff are not available, G.O. No. 1564, *Jul. dated 19-7-1897. Mad. Cr. Rules of Pr. Rule No. 38*.

Other than an officer of police.—When a police-officer is himself the complainant in a case, the Court cannot refuse him the right to conduct his own case as a private citizen, 17 Cr. L.J. 436=36 Ind. Cas. 166.

Sub-section (2).—When a private complainant is permitted to conduct the prosecution it does seem to be highly improper that after he had closed his evidence and a charge had been framed, the prosecution should suddenly drop without consulting him. If there was no evidence against the accused at all, the accused were entitled to have a clear acquittal and not an acquittal at the instance of a Court Inspector who never went any where near the Court when the case was being tried and took no part in the trial and who was in no sense a Public Prosecutor, 45 K. 83. The word 'any such officer' in this sub-section refers to the Advocate General and other officers mentioned in sub-section (1). It is only those officers who are empowered to withdraw from the prosecution with the effect stated in S. 491, *supra*, and if an Advocate privately engaged by a complainant and permitted by the Magistrate to appear for the prosecution withdraws, the effect provided by S. 491, *supra*, does not follow; in other words the trial proceeds, 10 Cr. L.J. 14.

Sub-section (3).—The scope of this sub-section is not in any way limited by sub-section (1). There is nothing in the section to warrant the action of a Magistrate taking away the prosecution out of the complainant's Pleader's hands and entrusting the same to some one who is not the Public Prosecutor, 25 Cr. L.J. 571=81 Ind. Cas. 59.

Sub-section (4).—"When a Police-officer has been engaged in the investigation into the offence with respect of which the accused is being prosecuted attends the Court, his function should be confined to his examination as a witness and to the suggesting of questions to be put by the Prosecuting Police-officer. The Government of India thinks that it is undesirable that questions to be asked of witnesses should be suggested directly to the Magistrate by the investigating officer and the appointment of a police-officer to prosecute should be made in all cases in which such appointment is necessary for the proper conduct of the case" G.O. No. 1564, dated 19-7-1887 G.O. No. 148 Mfs. Pub., dated 20-2-1926. In all important cases, especially in grave offences such as murder, dacoity, etc., the investigating Police-officer should be examined regarding the circumstances of the investigation and to ascertain what each witness stated during investigation. Hence the exclusion of investigating officers, Ratanlal 173; 13 W.R. (Cr.) 18; 26 B 533; but the violation of the provisions of this sub-section is not fatal unless it has occasioned a failure of justice, 26 B. 533.

Revision.—The power of the High Court to interfere in revision with the discretion of a Magistrate giving his consent to the withdrawal of a prosecution, was left undecided in (1914) M.W.N. 776=16 Cr. L.J. 641=25 Ind. Cas. 841. It is submitted that when the discretion is arbitrarily exercised the High Court has power to interfere in revision.

CHAPTER XXXIX.

OF BAIL.

The word "bail" is not defined in the Code. "Bail" literally means either to carry or take away or to deliver or to give. In modern legal sense it means, "deliver on trust on certain conditions," "freeing or setting at liberty one arrested or imprisoned upon others becoming sureties for his appearance at a day and place assigned, he also entering into his own recognizance." When it is said "a man is let on bail," we mean, he is released from the custody of the officers of law to the custody of private persons who are sureties, and bound to produce him whenever called upon. The object of bail is to save a man from being in custody before conviction where there is a reasonable doubt as to his guilt. "Bail is not intended to be punitive but only to secure the attendance of the prisoner at the trial"—per Lord Russell, C.J. Bail is not to be withheld as a punishment. The requirements as to bail being merely to secure the attendance of the accused at the trial, the proper test whether bail should be granted or refused, is whether it is probable that the accused will appear to take his trial. The test should be applied by reference to the following considerations. (1) The nature of the accusation. (2) The nature of the evidence in support of the accusation. (3) The severity of the punishment which conviction will entail. (4) The character of the sureties, that is whether the sureties are independent or indemnified by the accused. (5) The character of the accused and his behaviour, 8 Pat. 802; 29 Cr. L.J. 128=99 Ind. Cas. 860; 27 Cr. L.J. 1063 (2)=97 Ind. Cas. 39(2). It is not usual to grant bail on charges of murder, Arch. Cr. Pl. Ev. and Pr. p. 87 (25th Ed.); 2 Ran. 346. The chief grounds for refusing bail are (1) a reasonable opinion that the accused will, if released on bail, fail to appear to answer the charge (2) a reasonable opinion if bail is granted he will abuse his liberty by tampering with prosecution witnesses or otherwise seek to impede the course of justice 8 Pat. 802. However serious the offence charged may be, if it is bailable and there is no reason to believe that the accused may abscond if released on bail, the seriousness of the offence alone will not justify a Court in refusing bail when under the law the accused is entitled to it 26 A L J. 363=29 Cr. L.J. 450=108 Ind. Cas. 689. The discretionary power of Court to admit to bail is not arbitrary but is judicial and is governed by established principles. The object of the detention of the accused being to secure his

attendance to abide the sentence of law, the principal inquiry is whether a recognizance would effect that end. In seeking an answer to this inquiry, the Court must have considered the seriousness of the charge, the nature of the evidence, the severity of the punishment prescribed for the offence, and in some instances, the character, means and standing of the accused. The discretion of the Court to grant bail under the amended Code is less fettered, 51 C. 402. There is no difference between the English and the Indian practice, 6 Pat. 802, but it was held in, 29 Cr. L.J. 470=109 Ind. Cas. 118, that it is not open to the Courts in India in view of the express provisions of the Indian Statute to follow English authorities which lay down the principle on which bail is granted in England. The decisions of the English Courts are necessarily a safeguard to the Courts in India in interpreting the sections of the Code and the English Cases will not help in cases of a really grave nature. The Code divides offences into two classes bailable and non-bailable. When the police arrest the person under S. 55, *supra*, they are bound to give the person arrested, the option of bail and that bail shall be, as the Code requires, not excessive but in accordance with the position in life occupied by the person arrested.....To deprive any person of his liberty is a most serious step to take and it is hardly too much to say that every step in the process should show extreme deliberation and care, and if a person has to be arrested previous to inquiry he should be given the option of release upon proper bail, 14 A. 43 at 47.

496. When any person other than a person accused of a non-bailable offence is arrested or detained without warrant by an officer in charge of a police-station, or appears or is brought before a Court, and is prepared at any time while in the custody of such officer or at any stage of the proceedings before such Court to give bail, such person shall be released on bail :

In what cases bail to be taken.

Provided that such officer, or Court, if he or it thinks fit, may, instead of taking bail from such person, discharge him on his executing a bond without sureties for his appearance as hereinafter provided :

Provided, further, that nothing in this section shall be deemed to affect the provisions of section 107, sub-section (4), or section 117, sub-section (3).

Amendment.—The proviso has been newly added.

Scope and object of the section.—The detention of an accused under trial is not penal, but its object is to secure attendance. The seriousness of an alleged offence, and some evidence of its preparation by the accused would however justify detention, 38 C. 174 at 179; 2 C.W.N. xxv. It is the intention of the law that when a person is arrested no needless impediments should be placed in the way of his being admitted to bail. The intention of the law undoubtedly is that a man is ordinarily to be at liberty; and it is only if he is unable to furnish such moderate security, if any, as required of him, as is suitable for the purpose of securing his appearance before a Court pending inquiry, that he should remain in detention. That is the almost universal application of law on this point, 20 Bom L.R. 121 at 123=19 Cr. L.J. 329=41 Ind. Cas. 343. See also 6 N.W.P.H.C.R. 363. Under S. 55, *supra*, an officer in-charge of a police-station may arrest any person who is by repute a habitual thief etc., but if such person is prepared to give bail as laid down in this section he must be released on bail. This section does not authorise a Police-officer to take a third person's bond for the appearance of the accused without taking an undertaking from the accused himself, 29 Cr. L.J. 491=103 Ind. Cas. 219. A Sessions Judge has power to grant bail when a person is arrested by the Police and is in the lock up. It is a mistake to suppose that the jurisdiction of the Judge arises only when the person arrested is put up before a Court. Further the restriction contained in this section that bail can be granted only to a

person other than a person accused of a non-bailable offence is not applicable to Court of Session, 30 Cr. L.J. 718=117 Ind. Cas. 99.

Other than accused of non-bailable offence.—The terms of this section are imperative and a Magistrate is bound to release on bail a person accused of a bailable offence, 32 C. 80; 30 Cr. L.J. 809=117 Ind. Cas. 623; 31 M. 315 (F.B.). In all bailable offences bail may be claimed as of right and a Magistrate is not competent to refuse the same. Persons arrested under S. 55, *supra*, should always be given the option of being let out on bail, 15 A. 43. In non-bailable offences owing to the serious nature of the the offences and their likelihood of producing dangerous consequences to the safety of the public and the tranquillity of the State, as of right bail cannot be asked for. Persons accused of non-bailable offences should not be released on bail as a rule, but they may be released if there are reasons for believing that the case against them is such that it is not likely to succeed or if there are special grounds justifying bail, under B. 497 and sub-section (5) of that section the High Court can set aside the order for bail and direct the accused to be arrested and committed to custody if there are no justifiable grounds for the lower Courts to grant bail, 26 Cr. L.J. 4=83 Ind. Cas. 483. It must be understood that while a wide discretion in granting bail in cases other than those involving capital punishments has been placed in the hands of the Magistrates they are bound when weighing the probabilities of the prisoner appearing at the trial to consider the nature of the offence charged, the character of the evidence against the prisoner and the punishment which if convicted is likely to be inflicted on him. Again mere vague allegations that if the person be released on bail he will tutor witnesses, should not be taken into account. The Magistrate will refuse bail where the prisoner is of such a character that his presence at large will intimidate witnesses or where there are reasonable grounds for believing he will use his liberty to suborn evidence, 3 Ran. 538 at 542; 27 Cr. L.J. 1063=97 Ind. Cas. 39. Bail should not be refused to a person proceeded against under S. 110, *supra*, 20 Sind. L. R. 122.

Shall be released on bail—In bailable offences there is no question of any discretion in granting bail. The words of the section are imperative, 32 C. 80. The Court may call for a report from the police as to the sufficiency of bail when admitting a person to bail. But the ultimate duties of deciding the sufficiency or otherwise is with the Court itself and not with the police, 15 C. 455. At the time of granting bail, the Court is not called upon to conduct a preliminary trial of the case and consider the probability of the guilt or innocence of the accused person. It may have incidentally to look at the weight of evidence against the accused person. But its proper function is only to inquire whether the giving of bail as opposed to arrest of the accused might lead to a real danger of his absconding and not appearing to take his trial or whether there is a real reason to suppose that he is likely to tamper with the witnesses who would be called against him, 22 L.W. 158=26 Cr. L.J. 1593=60 Ind. Cas. 665.

Save as provided, etc.—Section 107 (1) and B. 117 (2) permit the detention of an accused person until the completion of an inquiry and this section does not control those provisions. This has been made clear now and is in accordance with the decision in, 38 M. 474; 32 C. 80 and 12 Cr. L.J. 533=12 Ind. Cas. 301. Where certain persons proceeded against under B. 107, *supra*, executed bonds under S. 117(3) *supra*, pending inquiry but were re-arrested by the Magistrate in the representation of the Police that there was an imminent danger of the breach of the peace and were refused bail, it was held that the order refusing bail was illegal and bail was granted by the Patna High Court remarking that if the reasoning of the decision in 36 M. 474, is right in refusing bail then the provisions of not only S. 107 but also B. 117 (3) were exceptions to B. 496—a proposition which could not be accepted, 30 Cr. L.J. 809 at 812=117 Ind. Cas. 623.

For form of bail bond, see Form No. XLII in Schedule V. The terms of a bail bond should be in accordance with this form. This form and form XXV and other forms of bail bonds indicate what the contents of the bond with sureties should be. In order to be enforceable, a bail bond must be in accordance with these forms; unless in proper form no legal liability is incurred thereby, 29 Cr. L.J. 391=159 Ind. Cas. 219.

Bail.—This section coupled with form No. XLII contemplates two kinds of security—
 (1) simple recognizance of the principal, (2) security with sureties. The word "bail" is
 only applicable to the second kind of security and that is the meaning which has been
 attached to the word in the practice and procedure of the Courts, 15 C.W.N. 736 at 737.

197. (1) When any person accused of any non-bailable offence
 is arrested or detained without warrant by an
 officer in charge of a police-station, or appears, or
 is brought before a Court, he may be released on
 bail, but he shall not be so released if there appear
 reasonable grounds for believing that he has been guilty, of an offence
 punishable with death or transportation for life :

provided that the Court may direct that any person under the age
 of sixteen years or any woman or any sick or infirm person accused of
 an offence be released on bail.

(2) If it appears to such officer or Court at any stage of the inves-
 tigation or inquiry or trial, as the case may be, that there are not reason-
 able grounds for believing that the accused has committed a non-bailable
 offence, but there are sufficient grounds for further inquiry into his
 guilt, the accused shall, pending such inquiry, be released on bail, or,
 at the discretion of such officer or Court, on the execution by him of a
 bond without sureties for his appearance as hereinafter provided.

(3) An officer or a Court releasing any person on bail under sub-
 section (1) or sub-section (2) shall record in writing his or its reasons
 for so doing.

(4) If at any time after the conclusion of the trial of a person
 accused of a non-bailable offence and before judgment is delivered, the
 Court is of opinion that there are reasonable grounds for believing that
 the accused is not guilty of any such offence, it shall release the accused,
 if he is in custody, on the execution by him of a bond without sureties
 for his appearance to hear judgment delivered.

(5) A High Court or Court of Session and, in the case of a person
 released by itself, any other Court may cause any person who has been
 released under this section to be arrested and may commit him to custody.

Amendment.—To sub-section (1) a proviso has been added authorising the Court for
 reasons to be recorded to release on bail in a non-bailable offence any person under 16 years
 or any woman or sick or infirm person. Sub-section (4) is new and provides for bail to
 appear on the date fixed for pronouncing judgment; the opening words of sub-section (5)
 are new.

Scope of the section.—The section gives ample powers to Sessions Judges to grant
 bail in non-bailable offences but in practice bail is seldom granted in such cases. This is due
 to the fact that the principle on which bail should be granted is generally overlooked and
 so far as this principle is concerned there is hardly any difference between the English and
 Indian practice. In England bail in treason or felony is discretionary with the

or Court having jurisdiction to try the offence while bail in *misdeemeanour* is said to be of right in Common law. This distinction is reflected in S. 496 and this section which deal with cases of bailable and non-bailable offences. The discretionary power to grant bail is not arbitrary but is governed by established principles. It is well established that the purpose of bail is not punitive but to secure the attendance of the accused 32 C.W.N. xlii. This section which deals with cases of persons accused of non-bailable offences gives the Court a discretion in granting bail and the power is given to the High Court and the Court of Session to have the person released on bail, to be arrested and committed to custody when it appears that an accused who was released on bail attempted to pervert the course of justice by tampering with witnesses; the High Court under its inherent power under S. 661A *infra* can direct the cancellation of the bail bond and direct the accused to be committed to custody, 32 C.W.N. 839. In the case of under trial prisoners the present policy of the law is to allow them bail rather than refuse it, 27 Cr. L.J. 302(2)=92 Ind. Cas. 590 (2). Bail is not to be withheld merely as a punishment and the requirements as to bail are merely to secure the attendance of the accused at the trial 6 Pat 802. The amendment seems in the case of offences punishable with death or transportation for life, to limit rather than enlarge the powers of the Court in granting bail in non-bailable cases. In deciding the question of granting bail in non-bailable offences, the Magistrate must follow the provisions of this section but the High Court is not limited by the limitations specified in the section. It has an absolute discretion in the matter, but will not depart generally from the practice of refusing bail in cases punishable with death or transportation for life, 2 Ran. 516; 3 Ran. 538; 25 Cr. L.J. 1132=81 Ind. Cas. 956. In exercising a discretion under this section the Court should take into consideration, (1) the nature of the evidence, (2) character of the evidence available, (3) position in life of the accused, (4) chance of the accused evading justice, (5) seriousness of the punishment which will be inflicted if found guilty. See 51 C. 402 at 416; 27 Cr. L.J. 1063=97 Ind. Cas. 39; 30 Cr. L.J. 718=117 Ind. Cas. 99 or of his terrorizing prosecution witnesses *Ibid*. The fact that in case of conviction it would necessitate a severe punishment on the accused was held to be no sufficient ground for a refusal to grant bail, 30 Cr. L.J. 718=117 Ind. Cas. 99. The main question for consideration in determining matters of bail is whether there are reasonable grounds for believing the accused to be guilty of the offence charged. Other considerations must also arise in deciding the question and one of these which has always guided English and Indian Courts is whether there are any grounds for supposing the accused would abscond and attempt to escape justice avoiding or delaying an inquiry or trial. Under this section the accused should ordinarily be released on substantial bail until reasonable grounds are made out for presuming his guilt, 36 C. 174 at 177 following 10 C.W. N. 1093. This section is limited to the jurisdiction of the trial Courts while S. 498 *infra* invests the High Court and the Courts of Session with similar jurisdiction as a Court of superior appellate or revisional jurisdiction and the powers of the Courts of superior jurisdiction are not controlled by this section. The restriction as to bail if there appear reasonable grounds for believing that the accused has been guilty of an offence punishable with death or transportation for life is not applicable to the High Court and Courts of Session but the High Court and the Court of Session are not to act arbitrarily and must exercise the power on judicial grounds, 25 Cr. L.J. 1132=81 Ind. Cas. 956. But see 42 C. 23 and 39 Bom. L.R. 622 which took a different view and held that the restrictions contained in S. 497 (1) *supra* apply to the High Court also in granting bail. See also 29 Cr. L.J. 470=109 Ind. Cas. 118. Certain *dicta* of Judges in England on the subject of releasing offenders on bail have been referred to showing the governing principles guiding the Courts. The section says nothing about the likelihood or non-likelihood of the accused absconding or any other matter except, whether or not there are reasonable grounds for believing that the accused has been guilty of the offences charged. It is no doubt true that the High Court is not limited within these bounds and it has an absolute discretion in the matter, but the Legislature having placed the initial stage of dealing with crime with Magistrates and having in effect enacted that persons accused of non-bailable offences shall be detained in custody, except when there are no reasonable grounds for believing that the accused has committed the offence charged. The High Court is bound to follow the general law as a rule, and not to

depart from it except under special circumstances especially in the initial stage of the case, 2 Cr. L. Rev. 35. As a rule persons accused of non-bailable offences should not be released on bail. But if there are reasons for believing that the case against them will not stand and there are special circumstances justifying bail, they may be released on bail, 26 Cr. L.J. 4=83 Ind. Cas. 433. In considering an application for bail in a non-bailable offence the Court must be satisfied by examination of the investigation, inquiry or trial whether or not there are reasonable grounds for believing that the accused has committed such offence, 21 Cr. L.J. 161=54 Ind. Cas. 709; if after remand no incriminating evidence is forthcoming and the prosecution had sufficient time to adduce such evidence, the Court will reasonably come to the conclusion that such evidence was not forthcoming and should then release the accused on bail whatever be the nature of the offence, 36 C. 174; 6 M. 63; see also 51 C. 432. The law as it now stands does not say that bail ought to be refused merely because an offence is non-bailable. That is now restricted to offences punishable with death or transportation for life, 26 Cr. L. J. 1285=89 Ind. Cas. 150. This section empowers the High Court to grant bail in cases pending anywhere in the Presidency, 55 M L.J. 690 at 692.

If there appear reasonable grounds for believing:—This is certainly a matter of determination in each case according to the particular circumstances. The section does not say that in all non-bailable offences the Magistrate must refuse bail. It is left to the discretion of the Magistrate to release on bail, but the Magistrate shall not release an accused on bail if he is of opinion that there are reasonable grounds for believing that he has been guilty of the offences of which he is accused, see 38 C. 165 and 174. The rule in respect of non-bailable offences is that bail is not to be taken except in special circumstances, 8 Bom. L.R. 420=3 Cr. L.J. 439. But the special power of the High Court and Court of Session under S. 493, *infra*, is not limited by this section, Weir II, 657; 25 Cr. L.J. 1132=81 Ind. Cas. 956; 51 A. 603 but see 42 C. 25 and 30 Bom. L.R. 622; 29 Cr. L.J. 470=109 Ind. Cas. 118 which take a different view.

Offence punishable with death or transportation for life.—These words were substituted in the amending Act, 1923 for the words 'the offence of which he is accused' and this cannot but be regarded as the result of a liberalising influence on the policy of the Legislature, and the discretion of the Court is now less fettered than before. That being so, when the Court has been placed in possession of facts, which might enable it to entertain reasonable grounds for believing that the accused has been guilty of the offence with the commission of which he is charged, it ought to grant bail. The Court is not to be influenced merely by the fact that the charge against the accused is a serious one, 32 C.W.N. xliii. This phrase is not particularly an elegant one from a grammatical point of view and were it intended to be disjunctive, one could be inclined to favour the alteration of the phrase to "an offence punishable with death or with transportation for life." The phrase is however taken directly from the Indian Penal Code which deals with a number of offences in which either punishment may be inflicted at the discretion of the sentencing Court. The phrase must not be taken as extending to offences punishable with transportation for life only, 3 Ran. 533 but see 5 Ran. 276 (F.B.) where it was held that the view taken in 3 Ran. 533 was wrong and there can be no doubt whatever that the section lays down that a person accused of murder shall not be released on bail if reasonable grounds exist for believing him guilty of the offence charged. See also 30 Bom. L. R. 622=29 Cr. L. J. 201=111 Ind. Cas. 661, following 5 Ran. 276 (F.B.).

Proviso to Sub-section (1):—This proviso is new and exception is made in the case of juveniles, women, sick and infirm persons. Women have always been given a certain amount of consideration in cases where a discretion is to be exercised; women also do not often figure in criminal Courts as accused; so also juveniles and sick and infirm persons.

Sub-section (3).—A Magistrate may re-arrest under this sub-section if further evidence calls for such a step, even if the accused has been released on bail.

Sub-section (5).—This sub-section empowers the High Court to revise the order granting bail and cancel the same if circumstances warrant or demand such a course, 22 L. W. 135 = 26 Cr. L. J. 1593 = 90 Ind. Cas. 865. In an application of an urgent nature to the High Court, for the cancellation of bail granted by a Sessions Judge to certain accused persons, by the Public prosecutor under instructions from the District Magistrate, it is desirable that the Public Prosecutor should apply, if he has sufficient time to do and obtain the order of Government before making the application, 30 Cr. L. J. 845 = 117 Ind. Cas. 773.

Revision.—It is open to the High Court to grant bail when two Lower Courts have refused bail, 38 C. 174. But in case where there is no order whatever by any Court refusing bail the accused living in Police custody and not produced before any Court the High Court has no power to direct the offender to be released on bail either under this section or S. 498 *infra*, 44 C. L. J. 134. Where a Sessions Judge granted bail, holding that there are no grounds for believing the accused guilty, the High Court will not go behind the order, 10 M. L. J. 311. In prosecutions for cognizable offences the private prosecutor has no *locus standi*. The Crown is the prosecutor and the custodian of the public peace and if it decides to let go an offender no other aggrieved party can be heard to object, 2 Pat. 708. So when bail was granted by a sessions Judge, an aggrieved private party has no *locus standi* to move the High Court to cancel the bail. If the granting of bail is improper the Crown ought to move in the matter, Cr. Mis. Pet. 443 of 1927 (M. H. C.).

498. The amount of every bond executed under this Chapter

Power to direct admission to bail or reduction of bail.

shall be fixed with due regard to the circumstances of the case, and shall not be excessive; and the High Court or Court of Session may, in any case, whether there be an appeal on conviction or not

direct that any person be admitted to bail, or that bail required by a Police Officer or Magistrate be reduced.

Scope of the section.—The Powers of the High Court or Court of Session under this section are not controlled by the statutory limitations under S. 497, *supra*, of refusing to release an accused person on bail if there appear reasonable grounds for believing that he has been guilty of an offence punishable with death or transportation for life. The Powers under this section are not fettered by any of the rules defining the limits within which they should be exercised as in S. 497, *supra*. Though the exercise of the powers under this section is left entirely to the discretion of the Court without any fetter being imposed, the Court will not act arbitrarily but only on judicial grounds, 25 Cr. L. J. 1132 = 81 Ind. Cas. 958; 2 Ran. 548. There is no reason why any restriction should be placed upon the wide powers conferred by this section, 50 C. 969. This section gives the High Court and the Court of Session wide powers to admit to bail even when an accused has been convicted and has not appealed. Even in a non-bailable offence it is clear from the section that the accused may be admitted to bail. Admission to bail is a matter of discretion with the Sessions Judge and when the discretion has been exercised with proper care, the High Court will decline to interfere with the order of the Sessions Judge, 1903 A. W. N. 195 = 5 A. L. J. 419 = 8 Cr. L. J. 49. Magistrates should bear in mind in fixing bail the hope expressed in, 22 B. 549 at 550 that they "will always be lenient to accused persons, at any rate until they are convicted."

The provisions of this section are not controlled by those of the preceding section and it is open to the High Court or Court of Session to admit any person to bail for good and sufficient cause. The general rule, however, in respect of non-bailable offences is that bail is not to be granted except in special circumstances, Weir II, 657, 8 Bom. L. R. 320 = 3 Cr. L. J. 429; 51 A. 603; 1903 A. W. N. 193, but in 42 C. 75 it was held that the rule laid down in S. 497, *supra*, is a rule founded on justice and equity which should be followed by the High Court as well as by every other Court unless anything appears to the contrary. Both on principle and authority this section must be interpreted as being controlled by the provisions of S. 497 (1) *supra*. The extended powers of the High Court under this section are not to be used to get rid of the reasonable and proper provision of law contained in S. 497, *supra*.

29 Cr. L. J. 470=109 Ind. Cas. 118, following 37 C. 412 and 42 C. 25. See also 30 Bom L.R. 622, which holds that the High Court in exercising its discretion in granting bail should have proper regard to what is laid down in S. 497 (1) *supra*, to the effect that bail shall not be granted in a case where there appear reasonable grounds for believing the accused to be guilty of the offence punishable with death or transportation for life but 25 Cr. L.J. 1132=81 Ind. Cas. 956, which took a more liberal view and held that the powers of superior Courts like the High Court and the Courts of Sessions are not controlled by S. 497 (1) and the restriction in S. 497 (1) *supra* is not applicable to High Court, etc., but the High Court and the Court of Session are not to act arbitrarily but should exercise the power on judicial grounds; see also 30 Cr. L. J. 697=116 Ind. Cas. 748. The Court will be very cautious in interfering with the discretion of a Magistrate in a case of bail under this section especially when the prosecution has not tendered evidence to connect the accused with the offence, 6 M. 63 and 69; Ratanlal 892. The High Court and Courts of Session have wider powers under this section, 51 A. 603, and the superior Courts have an absolute discretion in the matter of granting bail in non-bailable cases: The Legislature has placed the initial stage of dealing with crimes with Magistrates and having in effect enacted that persons accused of non-bailable offences shall be detained in custody except when in the opinion of the Magistrate there are no reasonable grounds for believing that he had committed the offence charged against him, the High Court is bound to follow the general rule of law and not to depart from it except under special circumstances especially in the initial stages of the case, 2 Ran. 536. Under this section the High Court has concurrent jurisdiction with that of a trying Magistrate and not merely a revisional jurisdiction, 36 C. 174 at 177.

See 50 C. 585 where it was held that the High Court has no inherent power after disposal of a case before it, to grant bail pending appeal to Privy Council, but in 49 A. 237, a different view was taken and there it was held that the High Court, had inherent power to grant bail when the appeal was pending in the Privy Council and the sentence was likely to expire before the appeal is heard and disposed of by the Privy Council. The decision in 24 M. 161 is followed and that in 1908 P.R. (Cr) 15=8 Cr. L. J. 89 is distinguished and not followed. The High Court has also power to grant bail pending review of a conviction had at the High Court Sessions, on a certificate granted by the Advocate General. See Cr. M. P. No. 1009 of 1929 (M. H. C.).

Whether there be an appeal or not.—Whether there be an appeal or not, the High Court or Court of Session may release the accused on bail, but a Sessions Judge has no jurisdiction to release an accused person after convicting him on bail pending his appeal to the High Court. This section does not give him power in any way to alter or vary his order, 4 Bom. L.R. 55; 10 B. 176 (F.B.). When a Sessions Judge after considering the evidence comes to the conclusion that there are no reasonable grounds for believing the accused to be guilty, and admits him to bail, the High Court will not go behind the finding and discharge the accused on bail, 10 M.L.J. 411. The power of the High Court to grant bail to an accused person under this section is untouched by the provisions of the Criminal Law Amendment Act. But the conditions for release on bail provided by S. 497, *supra*, will apply 37 C. 412 and 439. Where there is a reasonable doubt as to the correctness and legality of the conviction had, or when the judgment is based on incorrect exposition of fact or law, or is based on mere surmises not warranted by the evidence on record or where the evidence is more consistent with the case set up by the accused, or where the sentence is unduly severe, or very short and will expire before the appeal is heard and decided, the appellate Court will be acting properly in releasing the appellant on bail.

In any case.—These words ought not to be construed in their widest and unlimited sense. The Code authorises only appellate Courts under S. 426, *infra*, and Courts of revision under S. 439 *supra*, to release the accused on bail. Therefore the Court has no power to grant bail because the accused wishes to move the Privy Council, 10 Sind. L.R. 59. These words cannot include a case in which the Court has reached finality and has no further jurisdiction to exercise, 50 C. 535 at 593, but see 49 A. 247 which took a different view and held that the High Court in its inherent power can grant the bail when an appeal against the High Court's decision had been admitted by the Privy Council and there is a fear that the sentence would

expire before the appeal can be heard and disposed of by the Privy Council. The provisions of this section regarding admission to bail are particularly wide and a Sessions Court may in any case direct any person to be admitted to bail. When proceedings were started against certain persons under S. 110, *supra*, and an order under S. 118, *supra*, being made, they being unable to furnish the security demanded, the proceedings were laid for orders under S. 123, *supra*, before the Court of Session. When bail was applied for, the Sessions Judge held he had no jurisdiction to grant bail. There are no words in S. 123 (2) controlling the provisions of this section. If a convicted person can apply for bail and a person against whom an order under S. 118, *supra*, is passed, can get the order revised by the Court of Session under S. 123, *supra*, it stands to reason that if bail can be allowed to a convicted person on appeal it is allowable to one against whom an order under S. 118, *supra*, is made which is subject to revision by the Sessions Court. THERE IS NO RESTRICTION SHOULD BE PLACED UPON THE WIDE PROVISIONS OF THIS SECTION, 50 C. 969 When bail is granted by the High Court and the Magistrate receives reliable information thereof, by means of a telegram sent by the accused's Counsel the Magistrate is bound to act immediately though he had not received the High Court's order. The High Court also remarked, it must lay down most stringently that all bail orders must be issued on the very day on which they are pronounced irrespective of the written order on record, 38 C. 293 where 2 C W N. 489 is followed.

499. (1) Before any person is released on bail or released on his own bond, a bond for such sum of money as the police officer or Court, as the case may be, thinks sufficient shall be executed by such person, and, when he is released on bail, by one or more sufficient sureties conditioned that such person shall attend at the time and place mentioned in the bond, and shall continue so to attend until otherwise directed by the police-officer or Court, as the case may be.

(2) If the case so require, the bond shall also bind the person released on bail to appear when called upon at the High Court, Court of Session or other Court to answer the charge.

Scope of the section.—A bail bond must be interpreted with reference to its own language if it is plain and no external evidence can be admitted to explain the conditions therein. Where A was released on bail pending a revision against his conviction on a bail bond executed by his surety which provided that A should attend the Chief Court on the day or days he will be ordered by the Court to attend and on his failure so to appear, the surety bound himself to forfeit the amount specified in the bond, and A failed to surrender to his bail after the disposal of the revision, it was held that the surety vouched for the appearance of A on the day or days he was ordered to do so and in the absence of any such notice to appear by the Court, the surety committed no breach of the bond when A absconded after the disposal of the revision. 1902 P.L.R. (Cr.J) 55 at p. 193. A Magistrate cannot take bail from a person to appear before a tribunal in a Native State but he can when the accused appears before him execute any warrant issued by the political Agent of any particular Native State and shall on security being given release such person from custody, 33 C. 1032 at 1033. A bail bond taken should specify the Court before which the accused was to appear, 1885 A.W.N. 44 and there is no duty cast on a surety for production of the accused to produce him before a Court to which the case had been transferred, 13 W.R. (Cr.) 59; 30 C. 107.

As the police-officer thinks sufficient—The Police-officer need not necessarily be an officer in-charge of a police station. 55, 57 (2) and 59 (3) empower any Police-officer to release any person on execution of a bond, etc., for appearance in Court.

Sufficient sureties conditioned that such person shall attend, etc—The sureties are required to guarantee that the person released on bail shall attend at the time and place mentioned in the bond and nothing more. Unlike S. 112 *supra*, the sureties do not make themselves liable for the good conduct of the person for whom they stand sureties. There is

nothing illegal in requiring the accused to execute a bond conditioned on their appearing in Court everyday, 6 M H.C.R. Appx. 33 at 39, but see 20 W.R. (Cr.) 23 at 29—11 B L.R. Appx. 8 at 12 When the bond taken was for appearance on the first day of inquiry or at other times required and the accused appeared on the first day but failed to appear on a subsequent date as required verbally by the Court, the bond can be forfeited, Weir II, 658. A surety who stands bail must be taken to know the date on which the accused has undertaken to appear, and if the accused does not appear the surety bond is liable to be forfeited, 19 Cr. L.J. 637=46 Ind. Cas. 47. It is perhaps greater hardship on a man of position brought up in luxury and holding a high position in society, to be subjected to jail rules, than it is to men who have to make their way in the world. In the absence, as yet, of convincing direct evidence, we are willing to yield to the petitioner's request to submit to conditions on being released on bail. He may be released on bail on condition of his being guarded at his own house and debarred from all communications with persons said, rightly or wrongly to be his associates in crime, 36 C. 166 at 172.

Until otherwise directed by the Police-officer.—These words indicate that a bond taken under S 497, *supra*, may be conditioned to appear before the Police and the provisions of S. 497, *supra*, are not limited to appearance before the Court, 14 Cr. L.J. 631=21 Ind. Cas. 679; a bail bond should be construed strictly, 28 Cr. L.J. 339=84 Ind. Cas. 933.

For Form of bond, see Schedule V, Form No. XLII.

500. (1) As soon as the bond has been executed, the person for whose appearance it has been executed shall be released; and, when he is in jail, the Court admitting him to bail shall issue an order of release to the officer in-charge of the jail, and such officer, on receipt of the order, shall release him.

Discharge from custody.

(2) Nothing in this section, section 496 or section 497 shall be deemed to require the release of any person liable to be detained for some matter other than that in respect of which the bond was executed.

501. If, through mistake, fraud or otherwise, insufficient sureties have been accepted, or if they afterwards become insufficient, the Court may issue a warrant of arrest directing that the person released on bail be brought before it, and may order him to find sufficient sureties, and, on his failing so to do, may commit him to jail.

Power to order sufficient bail when that first taken is insufficient.

This section applies only to cases where there are sureties and where through mistake, fraud or otherwise, insufficient sureties have been accepted; it does not apply to a case where, there are no such grounds, 38 M. 1088. A Court is justified in demanding increased bail if after further inquiry, the offence turns out to be a more serious one than was originally made out, 13 Cr. L.J. 474=19 Ind. Cas. 314.

502. (1) All or any sureties for the attendance, and appearance of a person released on bail may at any time apply to a Magistrate to discharge the bond, either wholly or so far as it relates to the applicants.

Discharge of sureties.

(2) On such application being made, the Magistrate shall issue his warrant of arrest directing that the person so released be brought before him.

(3) On the appearance of such person pursuant to the warrant, or on his voluntary surrender, the Magistrate shall direct the bond to be discharged either wholly or so far as it relates to the applicants, and shall call upon such person to find other sufficient sureties, and if he fails to do so, may commit him to custody.

Sub-section (2).—When once an application is presented by a surety and received by a Magistrate, there is no option left to the Magistrate but to act under this section. There is no such thing as hearing of the application on the merits, and the presentation of an application for cancellation imposes a duty on the Magistrate to issue a warrant for the arrest of the accused. The surety need not do anything further, 9 Bom. L.R. 1235=6 Cr. L.J. 385; 27 Cr. L.J. 848=93 Ind. Cas. 768.

CHAPTER XL.

OF COMMISSIONS FOR THE EXAMINATION OF WITNESSES.

The issue of a commission to examine a witness is not a very satisfactory mode of proceeding either in civil or criminal cases. On the one hand the Court has no opportunity of noting the demeanour of a witness and on the other hand of controlling irrelevant and unnecessary or harassing cross-examination of the witness. This chapter no doubt confers a wide discretion on the Court to issue a commission. But such discretion should be sparingly exercised and only in a case of real hardship and inconvenience, having due regard to the prejudice which is likely to be caused thereby to the opponent. O. XXVI C.P.C., which provides for the issue of commission to examine a witness residing within the local limits of the Court is more specific and limited than those in this Chapter (Ss. 503 and 506) which refers to commissions to examine witnesses generally, whether residing within the jurisdiction of the Court or not. Without in any way crystallising the grounds on which a criminal Court may issue a commission to examine a witness living within its local limits, in ordinary cases the provisions of O. XXVI, r. 1, C. P. C., may be accepted as a safe guide by criminal Courts also. This rule provides for the issue of a commission where the witness is either exempted under the Code or where he cannot attend the Court on account of illness or infirmity. Under this rule *pardanashin* ladies, and women who lead a life of seclusion have been exempted, unless the presiding Judge thinks it rightly desirable to note the demeanour of the witness. Personal attendance of Government officials is also dispensed with. A *Mahant*, however high his position may be, cannot claim exemption except where he has been exempted by special notification of Government, 27 Cr. L.J. 89=91 Ind. Cas. 393. It is desirable that it should generally be understood that objection as to appearing in a criminal Court to give evidence cannot be entertained and it should be a cheerful duty of every one to attend a Court of Justice when summoned to give evidence as a witness, particularly on behalf of the accused, 8 A. 663 at 671. It may be distasteful and unpleasant for a *Raja* to appear as a witness in a criminal Court, but it is his duty as one of Her Majesty's subjects living under the protection of law, to obey that law and attend before the Judge in obedience to a summons. The Judge will undoubtedly make every arrangement so that such attendance be as convenient and unobjectionable as possible and consistent with the interests of the accused, *Ibid* at 672. It is improper to examine an expert witness on commission in the absence of the accused. The evidence of an expert has always to be carefully weighed but when his evidence is given on commission, its value is very considerably reduced, 29 Cr. L.J. 377=103 Ind. Cas. 369. see also [1911] 1 N.W.N. 97=3 M.L.T. 335=12 Cr. L.J. 64=9 Ind. Cas. 347.

503. Whenever, in the course of an inquiry, a trial or any other proceeding under this Code, it appears to a Presidency Magistrate, a District Magistrate, a Court of Session or the High Court that the examination of a witness is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, such Magistrate or Court may dispense with such attendance and may issue a commission to any District Magistrate or Magistrate of the first class, within the local limits of whose jurisdiction such witness resides, to take the evidence of such witness.

When attendance of witness may be dispensed with.

Issue of commission and procedure thereunder.

(2) When the witness resides in the territories of any Prince or Chief in India in which there is an officer representing the British Indian Government, the commission may be issued to such officer.

(3) The Magistrate or officer to whom the commission is issued, or, if he is the District Magistrate, he or such Magistrate of the first class as he appoints in this behalf, shall proceed to the place where the witness is, or shall summon the witness before him, and shall take down his evidence in the same manner, and may for this purpose exercise the same powers, as in trials of warrant-cases under this Code.

(4) Where the commission is issued to such officer as is mentioned in sub-section (2), he may delegate his powers and duties under the commission to any officer subordinate to him whose powers are not less than those of a Magistrate of the first class in British India.

Scope of the section.—This section applies only to cases pending before Courts specified in this section, 10 Cr. L.J. 211, and a discretion is given to issue a commission or not, 25 Cr. L.J. 652=81 Ind. Cas. 140. Therefore a special Judge under the Malabar Ordinance, I of 1922, having only the powers of a Magistrate under S. 10, *supra*, cannot issue a commission for the examination of witnesses, 18 L.W. 859. An Additional District Magistrate authorised to exercise all the powers of a District Magistrate mentioned in Schedule III, Part IV (18) is empowered to issue a commission to a witness within his jurisdiction, 21 A.L.J. 791=24 Cr. L.J. 622=73 Ind. Cas. 510. There is no provision for taking evidence in *Foreign Countries*, 10 Cr. L.J. 571=4 Ind. Cas. 400, and there is no apparent reason why the Legislature has not given to criminal Courts the same power that is given to civil Courts under the Civil Procedure Code to issue commissions. This section is primarily intended for the purpose of getting the evidence of witnesses other than the parties principally concerned although it may include any party to a proceeding. This section speaks of persons whose presence could not be obtained without an amount of delay and expense which under the circumstances of the case, the Court considers unreasonable, 19 C. 113 at 121; see also 19 B. 749. The terms of the section are wide enough to include not only an inquiry and a trial but any other proceeding which authorises the examination of any witness and the complainant is certainly a witness, 42 C. 19 at 24. There is nothing in the language of the section to support the contention that the Court has no authority to issue a commission to examine a witness when he is within the jurisdiction, 6 B. 233; 24 C. 551. But the witness must be in British India or within the territories of a Prince or Chief in India in which there is an officer

representing the British Government, 5 B. 338. The High Court has no authority either to issue a commission or a letter of request to the English Courts for the examination of a witness in England in a criminal case. The High Court must look to the Code for authority to make such an order and no such authority exists in the Code, 10 Cr. L.J. 571=4 Ind. Cas. 400 where 5 B. 388 is referred to. Witnesses in criminal cases should not be examined on commission except in extreme cases of delay, expense or inconvenience, 5 A. 92; 12 A. 69. It is most unsatisfactory to examine a witness in a criminal case on commission in the absence of the parties and the High Court directed that the witnesses be examined in the presence of the parties with liberty to put question to them, 27 Cr. L.J. 840=95 Ind. Cas. 760. Issue of a commission is entirely a discretion of the Court and in 8 C. 896 a commission to examine an old man of 63 years who was ill was refused, the Court holding that in a criminal case the issue of a commission would be most unsatisfactory and one dangerous to the interests of the prisoner. Further what the Court should look to in issuing a commission is rather the 'ends of justice' than the convenience of the witness, 8 C. 896. Taking of evidence on commission in criminal cases is unknown to English practice, 5 A. 92 at 94. The Magistrate is to consider whether it is necessary at all to examine the witness and whether it is a proper case for issuing a commission, 12 Cr. L.J. 398=11 Ind. Cas. 582; where an expert witness is the principal witness in the case, his examination on commission should not be allowed, [1911] 1 M.W.N. 97=9 M.L.T. 334=12 Cr. L.J. 64=9 Ind. Cas. 347. A party who desires to have a witness examined on commission must apply for it after commitment either to the Court or to the particular Judge exercising original criminal jurisdiction or to the Sessions Court, as the case may be, 19 B. 749 at 756. A District Magistrate is given a discretion in the matter of issuing a commission. It may be issued for the examination of a witness if the evidence is necessary but his attendance cannot be secured without unreasonable expense, 23 Cr. L.J. 652=81 Ind. Cas. 140. It is for the Magistrate to decide whether he will issue a commission for the examination of a witness residing in a Native State under this section and once he has decided and issued a commission, it is not in the discretion of the officer to whom it is issued to decline to execute the a commission for the reason that it is inconvenient for him to do so and there exist other possible means of examining the witness. It is of course to be assumed that Magistrates do not and will not issue commissions unnecessarily, 8 Lah. 347. As regards power to issue a commission to a Court in a Colony or dependency to take evidence in criminal cases, see G. O. No. 1803, *Jud.*, dated 27-12-1901.

Sub-section (1).—Expense or inconvenience or delay in securing the attendance of witnesses is no valid ground for issuing a commission. Under the circumstances of each case the Court will have to find them unreasonable, 5 A. 224. There is no provision in the Code which protects *pardanashin* ladies from appearing in a Court of Justice and very rightly so, all necessary safeguards to protect their privacy that are reasonable, being adopted, but it is undesirable to compel their attendance. In the event of the Magistrate finding it absolutely necessary to examine a *pardanashin* lady he would do well to consider very seriously whether he should issue coercive process for the purpose of compelling her attendance, 12 A. 69 at 72. It will be a weakness to surrender as a general principle to be adopted in all cases that *pardanashin* ladies whose evidence is required in criminal trials are to be allowed to compel the Court to examine them in some place other than the Court-house itself, 12 A. 69 at 72-73. If a witness secures a house or room in close proximity to the Court house, her evidence may be recorded there, regard being had to the *gosha* being observed, 12 Cr. L.J. 501=12 Ind. Cas. 221, or she may be examined in the chambers of the Magistrate or Judge, 12 Cr. L.J. 398=11 Ind. Cas. 582. Applications under this section are granted on the principle that in matters of procedure the custom and habits of people are to be taken into consideration, 15 C. 775 at 779. *Pardanashin* ladies may be examined on commission under this section, 9 Cr. L.J. 249. They may be examined in Court in a *paliki* or otherwise on proper identification, 18 W.R. 230; 1 B.L.R. (Shn.) 5. Whenever the deposition of a *Gosha* woman has to be taken the Court should, if necessary, adjourn to a place where the witness can be examined with due regard to her privacy in the presence of the accused precautions being of course taken to make sure of her identity, *Mad Cr. Rules of Pr. Rule 169*. There

is no express provision in the section for such a course. The word "inconvenience" may empower a Court to allow examination of this class of ladies who do not appear in public and whose attendance cannot be compelled according to the customs and manners of the country, 4 C. 20; 15 C. 775; Weir II, 669; 42 C. 19. The fact that a woman is the daughter of a prostitute does not *ipso facto* make her the less a *pardashin* if she is lawfully married and observes *goshā* in fact, 14 Cr. L.J. 3-18 Ind. Cas. 157=1 Cr. L. Rev. 277. See 27 Cr. L.J. 89-91 Ind. Cas. 393 where a *Mahant* was allowed to be examined at his private residence. It is entirely within the discretion of the presiding Judge to require a witness to stand or permit him to sit while under examination, *Mad. Cr. Rules of Pr. Rule, 170.*

Sub-section (2).—This sub-section authorises the issue of a commission to the Officer representing the British Indian Government in the Territories of any Prince or Chief in India when the witness sought to be examined on commission resides in such territories. In 30 Cr. L.J. 913 (2)=118 Ind. Cas. 643, when the Officer representing the British Government in the Native State holding that he had no power to compel the attendance of the witness, a subject of the state, before him, informed the Court which issued the commission that he could not record the evidence, the Lahore High Court remarked thus on the view of the Agent "It is manifestly unfair to retain a provision in the enactment which has no practical utility or which the Courts concerned are incapable of enforcing or would consider it unfair to enforce: It is however inconceivable that the Government introduced a provision in the Code which has no legal sanction or to carry out which they have made no adequate arrangements. If it is a fact that the Officer representing the British Government in the territory of a Prince or Chief, has no power to compel the attendance before him of the witnesses residing in such territory, then the Government must consider the question of either securing such power, or of repealing the law which authorises criminal Courts to issue commissions to such Officer as it is unfair to all concerned that such Courts should be expected to pass orders which they cannot enforce."

Sub-section (3).—This sub-section provides that such officer shall proceed to the place where the witness is or shall summon him to appear before the officer and shall take down the evidence as in warrant-cases and sub-section (1) authorises delegation of powers by such officer to any officer subordinate to him. Thus it will be seen that the Code nowhere speaks of a Resident or Political Officer representing the British Government in such territories irrespective of the actual place of residence and also once a commission is issued under this section to the officer, it is his duty to proceed to the place where the witness is or summon him to appear before him or delegate his powers to a subordinate officer competent to execute the commission. But neither the code nor any other law leaves it to the option of such officer to decline to execute the commission on the ground of inconvenience or some other similar reason and sub-section (3) is mandatory in this respect, 9 Lah. 347.

Sub-section (4).—This was introduced to meet the difficulty which existed that when a commission was issued to a Political Agent in a Native State he was not empowered to delegate it to a subordinate, but was bound to execute it personally. The power of delegation is expressly given by this sub-section.

504. (1) If the witness is within the local limits of the jurisdiction of any Presidency Magistrate, the Magistrate or Court issuing the commission may direct the same to such Presidency Magistrate, who thereupon may compel the attendance of, and examine, such witness as if he were a witness in a case pending before himself.

Commission in case of witness being within presidency-town.

(1A) When a commission is issued under this section to a Chief Presidency Magistrate, he may delegate his powers and duties under the commission to any Presidency Magistrate subordinate to him.

(2) Nothing in this section shall be deemed to affect the power of the High Court to issue commissions under the Slave Trade Act, 1876, section 3.

Sub-section (1A) is new and permits delegation of powers and duties under the commission by the Chief Presidency Magistrate to another Presidency Magistrate.

Within Local Limits of Jurisdiction of Presidency Magistrates.—See S. 20, *supra*, which defines the local limits of the Presidency Magistrate's jurisdiction, see 16 C 238. Where the Calcutta High Court issued a commission to the Chief Presidency Magistrate, Calcutta, to examine on commission the captain and the second officer of a ship, in a case in which a British sea-man was charged with murder of a fellow sailor on board a British ship on the high seas and the evidence so taken on commission was admitted at the trial and the accused was convicted on such evidence.

The Slave Trade Act, 39 and 40 Vic., Ch. 46, S. 3, enables the High Court to obtain evidence on commission in cases of offences relating to slave trade or abetment of such offences committed on the high seas as if such offences had been committed in any place in British India, see Ss. 370, 371, 376, I.P.C.

505. (1) The parties to any proceeding under this Code in which a commission is issued, may respectively forward any interrogatories in writing which the Magistrate or Court directing the commission may think relevant to the issue, and the Magistrate or officer to whom the commission is directed, or to whom the duty of executing such commission has been delegated, shall examine the witness upon such interrogatories.

Parties may examine witnesses.

(2) Any such party may appear before such Magistrate or officer by pleader, or, if not in custody, in person, and may examine, cross-examine and re-examine (as the case may be) the said witness.

This section enables witnesses being examined on commission on interrogatories and the only restriction is that such interrogatories have to be approved as relevant to the issue by the Magistrate or Court issuing the commission.

506. Whenever, in the course of an inquiry or a trial or any other proceeding under this Code before any Magistrate other than a Presidency Magistrate or District Magistrate, it appears that a commission ought to be issued for the examination of a witness, whose evidence is necessary for the ends of justice, and that the attendance of such witness cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable, such Magistrate shall apply to the District Magistrate stating the reasons for the application; and the District Magistrate may either issue a commission in the manner hereinbefore provided or reject the application.

Power of Provincial Subordinate Magistrate to apply for issue of commission.

This section enables provincial Subordinate Magistrate to apply to the District Magistrate for the issue of a commission stating the reasons for the application, and it is left to the discretion of the District Magistrate to grant the request or not. S. 503 *supra* applies only to

cases pending before the Court specified therein. See 10 Cr. L.J. 211; a District Magistrate is empowered by this section to issue a commission to examine a female witness in suitable cases, 9 Cr. L.J. 249; 12 Cr. L.J. 398=11 Ind. Cas. 582.

507. (1) After any commission issued under section 503 or section 506 has been duly executed, it shall be returned, together with the deposition of the witness examined thereunder, to the Court out of which it issued; and the commission, the return thereto and the deposition shall be open at all reasonable times to inspection of the parties, and may, subject to all just exceptions, be read in evidence in the case by either party, and shall form part of the record.

(2) Any deposition so taken, if it satisfies the conditions prescribed by section 38 of the Indian Evidence Act, 1872, may also be received in evidence at any subsequent stage of the case before another Court.

Sub-section (2).—It was held in 19 C. 113 that evidence taken on commission before a committing Magistrate, viz., a Presidency Magistrate, in the course of a preliminary inquiry, cannot be used in evidence at the Sessions before the High Court, and this ruling was approved in 19 B. 749; see 6 C. 532. To meet this difficulty, this sub-section was enacted making the deposition so taken admissible at a late stage of the case provided the conditions prescribed by S. 38 of the Indian Evidence Act have been complied with. See 16 C. 238, where it was held that the evidence taken on commission was admissible in the trial of a seaman for an offence committed on the high seas.

508. In every case in which a commission is issued under section 503 or section 506, the inquiry, trial or other proceeding may be adjourned for a specified time reasonably sufficient for the execution and return of the commission.

May be adjourned for a specified time.—The adjournment contemplated by this section is for a specified time reasonably sufficient for execution and return of the commission and not limited to fifteen days at a time as under the proviso to S. 344, *supra*. The discretion given by the section must be exercised in a reasonable way so as not to subject the accused to unnecessary detention. In 19 C. 113 an application for adjournment of a trial for examining the *Niram of Hyderabad* as a witness after the Jurors were sworn in in a sessions trial, was refused.

CHAPTER XLI.

SPECIAL RULES OF EVIDENCE.

509. (1) The deposition of a Civil Surgeon or other medical witness, taken and attested by a Magistrate in the presence of the accused, or taken on commission under Chapter XL, may be given in evidence in any inquiry, trial, or other proceeding under this Code, although the deponent is not called as a witness.

(2) The Court may, if it thinks fit, summon
 Power to summon medical witness. and examine such deponent as to the subject-matter of his deposition.

Scope of the section.—This section is enacted to obviate the great inconvenience which would result from a Civil Surgeon being summoned to give evidence in a Court at a great distance from his station, especially when his evidence is likely to be of a formal character. The rule regarding the admission of medical evidence in the Sessions Court departs in a very marked particular from the ordinary rules of evidence in that the statement of the medical witness, if duly taken and attested by the Magistrate in the presence of the accused is admissible in evidence in the Sessions Court, although the medical witness is not himself called. It ought therefore to be recorded with the utmost care and accuracy and again the evidence should carefully be scrutinised by the Judge and if it appears that the deposition is essentially deficient or requires further explanation or elucidation, the Judge should summon and examine the witness. A medical witness is only excused from attendance because his time may be very valuable to him. This is a useful provision in ordinary cases but a Sessions Court ought not to hesitate to call him rather than attempt itself to explain what on the face of it does not appear clear. When in a murder case the method by which the murder was committed as given in the confessions did not fit in with the medical evidence, the Judge is not entitled to theorise which is unsound in principle and the learned Judge ought certainly to have called and examined the medical witness. To obviate further delay the High Court thought it proper to examine the officer in the High Court and satisfied itself that there was nothing in the medical evidence inconsistent with the confessions on record, 18 Cr. L. J. 330 at 331-32—33 Ind. Cas. 764. This section does not enact that deposition of a Surgeon shall be taken and attested by a Magistrate in the presence of the accused; what it does provide is that a deposition of a Surgeon, if so taken and attested, may be put in evidence. A Magistrate should take and attest a deposition in the presence of the accused and should also by the use of a few apt words on the face of the deposition make it apparent that he has done so, 10 A. 174 at 173-179, followed in 13 C. 129; 9 A. 720.

Taken and attested by a Magistrate.—The deposition may be taken by any Magistrate and not necessarily by the committing Magistrate who holds a preliminary inquiry, but it must be taken and attested by the Magistrate in the presence of the accused, 1893 A.W.N. 180. Where there is no attestation as required by this section the evidence is not admissible under this section, 3 C.W.N. 49 at 55. The defect can be cured by calling the committing Magistrate or any other person present in Court where the deposition was taken and able to testify to the facts under sub-section (3); the defect can also be cured by summoning and examining the deponent as a witness in the Sessions Court.

In the presence of the accused.—Except in the case provided for in B. 512, *infra*, the evidence of a medical witness should be taken in the presence of the accused. Otherwise the evidence is inadmissible against the accused when put on his trial, 8 C. 739; 9 A. 720; 10 A. 174; 13 C. 129.

Or taken on commission under Chapter XL.—This was introduced in the 1893 Code and enables the deposition of a medical witness taken on commission to be put in evidence, a provision which did not exist previously. It is not sufficient to ask the witness merely to attest the accuracy of the statements in the certificate, Weir II, 639.

Sub-section (2).—Ordinarily it is the practice to call and examine the medical witness in the Sessions Court when the death of a person is involved and the Sessions Judge is specially empowered under sub-section (2) to require the attendance of the medical witness to be examined in the Sessions Court. See 55 C. 565 as to the necessity of examining the Medical Officer in the Sessions Court in a Murder Case, where the medical report is inconsistent with the prosecution evidence.

A *post mortem* report is no evidence. It can only be used to refresh the memory of the witness while giving evidence, 27 C. 295; but the report itself is inadmissible in evidence. So when another medical officer is examined he cannot be asked his opinion

on the facts stated in such a report but from facts already on record, 9 C. 433; 11 W.R. (Cr.) 23; 27 C. 293. So also an inquest report by itself is not evidence, 1 B.H.C.R. (Cr. Ca.) 75. A mere letter of a medical officer, 12 W.R. (Cr.) 23 or his medical certificate is no evidence unless the medical officer proves the facts stated therein as a witness; see 9 C. 455 & C. 211.

510. Any document purporting to be a report under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government, upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any inquiry, trial or other proceeding under this Code.

Report of Chemical Examiner.

May be used as evidence.—In order that the report referred to in this section may be used as evidence it must purport to be signed by the officer who detected, say poison, in the articles submitted to him for examination, and who from personal knowledge could certify to the correctness of the result embodied in the report, Weir II, 661. It must be the original report bearing the signature of the Chemical Examiner and not merely a copy of the report that is evidence in the case, 6 B.L.R. Appx. 122—13 W.R. (Cr.) 49. An Additional Chemical Examiner's report was held to be inadmissible in evidence, as the section speaks of no such officer, 10 C. 1026, but to meet this ruling the word 'any' was introduced subsequently. The law makes the contents of the report of a Chemical Examiner to Government, evidence and dispenses with the necessity of examining him as a witness, but such report can be of no use unless there is proof of the identity of the articles found during investigation and sent to the Chemical Examiner with the articles examined by him 20 M.L.J. 637=1910 M.W.N. 77=7 M.L.T. 314=11 Cr. L.J. 222=6 Ind. Cas. 51. The Chemical Examiner must be satisfied on the evidence that the substances examined were in fact what they were said to be, 18 C.W.N. 180=15 Cr. L.J. 147=22 Ind. Cas. 723. Under this section any document purporting to be a report under the hand of a Chemical Examiner may be used as evidence. This does not however imply that without tendering it as evidence in the trial Court, it can be used for the first time in appeal. The report is only a piece of evidence which does not require formal proof but it must be tendered as evidence so that the accused may have an opportunity of questioning the identity of the material objects sent for Chemical examination, 21 A.L.J. 869=26 Cr. L.J. 200=83 Ind. Cas. 904 but a report made by a Government excise analyst does not come within this section, 30 Bom. L.R. 648. A certificate of a Professor of Anatomy as to identity of certain bones submitted to him for examination is no evidence under this section without examining the Professor as an expert witness, 47 B. 74. There is no provision in the Code authorising the Court to send up articles for chemical examination or the procedure of submitting the same; usually they are submitted during police investigation and the person who takes them is examined as a witness. A Court is entitled to send for examination a material object say a bottle alleged to contain opium to a chemical examiner to satisfy itself unless it found that it was necessary to have further evidence on the question whether the material object produced contained opium or not. The only legal way in which such a thing could be done is to take evidence regularly if necessary, then send for a report which should be formally put in evidence with additional evidence to prove that the thing sent for examination was the identical thing seized from the possession of the accused, 27 Cr. L.J. 1231=98 Ind. Cas. 177.

511. In any inquiry, trial or other proceeding under this Code, a previous conviction or acquittal may be proved, in addition to any other mode provided by any law for the time being in force—

Previous conviction or acquittal how proved.

(a) by an extract certified under the hand of the officer having the custody of the records of the Court in which such conviction or acquittal was had to be a copy of the sentence or order, or,

(b) in case of a conviction, either by a certificate signed by the officer in charge of the jail in which the punishment or any part thereof was inflicted, or by production of the warrant of commitment under which the punishment was suffered;

together with, in each of such cases, evidence as to the identity of the accused person with the person so convicted or acquitted.

This section deals with the mode of proving previous conviction or acquittal of an accused person

Previous Conviction.—The filing of a certified extract of the kind required by the section is not by itself proof of a previous conviction. The accused should be asked to plead to the previous conviction and if necessary evidence should be taken, 2 L.B.R. 53. In order to support a charge of a previous conviction there should be on record a copy of some judgment, or extract from a judgment, or some other documentary evidence of the fact of such previous conviction. The examination by the Magistrate of the accused in respect of such previous conviction is without legal warrant or justification, 28 C. 689; 26 C. 49. But under S. 310 (b) the accused may at the stage indicated therein be asked whether he has been previously convicted. A Presidency Magistrate is not absolved from the ordinary rules of evidence in taking proof of previous conviction, 43 C. 1128. A previous conviction must be strictly proved in the manner provided by this section, 17 Cr. L.J. 179=33 Ind. Cas 819, and unless strictly proved, the Court cannot take into consideration the previous conviction, 43 C. 1128. A finger-print expert, on a comparison of certain finger prints of accused taken in Court, with some other finger-prints on a paper which contained a record of such convictions which purported to be the convictions of the accused, pronounced them to be similar. It was held by the High Court that the previous convictions were not properly proved in the case as required by law, 21 C.W.N. 469=18 Cr. L.J. 362=39 Ind. Cas 302. See also 5 Cr. L.J. 220, as to the value of finger-impression evidence.

Evidence as to identity of the accused.—This identity of the accused with the person so convicted or acquitted is very essential, 9 B.L.R. Appx. 151=15 W.R. (Cr. 53); 1881 A.W.N. 144. The section does not say that the identity of the accused must be proved by calling witnesses or in any other particular way. What the section says is "in addition to any other mode provided by law for the time being in force." Any relevant evidence upon which the Court can properly act to find the accused before the Court was previously convicted is sufficient. For example finger impressions furnish a surer test of identity than any other comparable bodily features of a person. See 1 C.W.N. 33; 32 C. 759; 26 C. 49; but see 21 C.W.N. 469 noted above. The Jailor or some other Jail authority can be examined to prove the accused's identity, Ratanlal 52; 1900 A.W.N. 51, when some evidence as to the identity of the accused has been let in, the accused may be asked to explain the fact and if he admits, further proof is unnecessary, 9 Cr. L.J. 56.

512. (1) If it is proved that an accused person has absconded and

that there is no immediate prospect of arresting him, the Court competent to try or commit for trial such person for the offence complained of may, in his absence, examine the witnesses (if any) produced on

Record of evidence
in absence of the accused.

behalf of the prosecution, and record their depositions. Any such deposition may, on the arrest of such person, be given in evidence against

him on the inquiry into, or trial for, the offence with which he is charged, if the deponent is dead or incapable of giving evidence, or his attendance cannot be procured without an amount of delay, expense or inconvenience which, under the circumstances of the case, would be unreasonable.

(2) If it appears that an offence punishable with death or transportation has been committed by some person or persons unknown, the High Court may direct that any Magistrate of the first class shall hold an inquiry and examine any witnesses who can give evidence concerning the offence. Any depositions so taken may be given in evidence against any person who is subsequently accused of the offence, if the deponent is dead or incapable of giving evidence or beyond the limits of British India.

Record of evidence
when offender un-
known.

Scope of the section.—The general rule is that statements given against a person in his absence cannot be used as evidence against him in a criminal trial. Exceptions to the rule can be created by statute and when a statute permits something to be done which, a fundamental rule prohibits, it can only be done by compliance with the statute which creates the exception. Where two witnesses gave evidence against certain persons then under trial who happen to refer to an absconding person, their statements at the subsequent trial of the person who had absconded cannot be read as evidence merely because the witnesses happened to be absent and cannot give evidence. Evidence given at a trial for one purpose cannot be converted by an *ex post facto* operation into an equivalent of what is called a deposition under this section when at the time the witnesses gave their evidence the question of recording a deposition under this section was not contemplated, 43 A. 375. What this section requires is that it should be proved that the accused has absconded and there is no immediate prospect of arresting him and not that a finding to that effect should be recorded, 6 Lah. 439. This section is a departure from the ordinary rule that evidence must be taken in the presence of the accused and should therefore be construed strictly and every statement placed on record should be strictly proved, 1890 A.W.N. 100. A Court is given jurisdiction to record evidence in the absence of an accused person only in cases in which it has been proved (1) that the accused has absconded, (2) that there is no immediate prospect of arresting him. If these facts are not found, evidence recorded behind the back of the accused is inadmissible in evidence when he is put on his trial. When practicable the witnesses, whose statements had been previously recorded under this section in the absence of the accused, should again be examined, 22 W.R. (Cr.) 33.

If it is proved that a person has absconded—The word used here is "proved" and not "has reason to believe" as in S. 87, *supra*. This section nowhere says that the Magistrate must record a finding as to the absconding of the accused and that there is no immediate prospect of his arrest. 1900 A.W.N. 100; 1896 A.W.N. 182. The Magistrate before recording evidence in the absence of the accused ought to satisfy himself, first that the accused is absconding and that there is no immediate prospect of his arrest and it is certainly advisable that he should recite in his order that he finds this to be the case, 10 C. 1037; 21 W.R. (Cr.) 12; 1883 P.R. (Cr.) 31. If he fails to record clear findings on these questions although they may be clearly inferred from the evidence on record, the provisions of the section have been complied with, 41 A. 60 where 33 A. 29 which took a narrow construction of the section was distinguished. See also 3 A. 672; 1886 A.W.N. 182 and 10 C. 1037; 13 A.L.J. 1033. Under this section a Magistrate cannot decline to call for documents desired by the complainant or to record evidence on his behalf on the ground that the accused has absconded and no inquiry was, therefore, conducted by him. But he is bound by the

provisions of this section to record all the available evidence to prevent the complainant becoming a victim of serious injury, 2 Bom. L.R. 707.

Sub-section (2).—This sub-section was added in the Code of 1898 at the suggestion of the Bombay High Court. It applies only to cases of great gravity and should only be put in force under the orders of the High Court, and mere delay, expense or inconvenience in obtaining the presence of the deponent contemplated by sub-section (1) should not be a sufficient ground for recording the evidence during the absence of the accused and subsequently using it against him. Under this sub-section a deposition recorded thereunder may on the arrest of the absconder be given in evidence against him at his trial but if the witness who gave the deposition actually appeared in Court and said that he did not remember details of the occurrence, it cannot be said that he is incapable of giving evidence. If a witness becomes dumb or insane he could properly be held to be incapable of giving evidence, and the proper procedure where the witness says he does not remember details is to refresh his memory under S. 159, Indian Evidence Act, by reading out the deposition previously recorded and without doing so the deposition cannot be admitted in evidence, 25 Cr. L.J. 95-76 Ind. Cas. 31. The deposition taken under this section may be given in evidence not only when the witness is dead but also in cases where after diligent search the witness could not be found or where he resides outside British India or has become incapable of giving evidence, e.g., has become a lunatic. But if the witness is living and his presence can be procured, it cannot be treated as evidence, 12 Cr. L.J. 214-10 Ind. Cas. 119; 25 Cr. L.J. 95-76 Ind. Cas. 31. A proceeding under this sub-section is not an inquiry or trial within S. 517, *infra*, 25 Cr. L.J. 666-81 Ind. Cas. 154.

CHAPTER XLII.

PROVISIONS AS TO BONDS.

513. When any person is required by any Court or officer to execute a bond, with or without sureties, such Court or officer may, except in the case of a bond for good behaviour, permit him to deposit a sum of money or Government promissory notes to such amount as the Court or officer may fix, in lieu of executing such bond.

Except in the case of good behaviour.—The object of law in providing for security for good behaviour is that a surety, should be responsible for the good behaviour of the persons called upon to furnish security, while in the case of other bonds the object is merely to ensure attendance, in which case a deposit of cash security is permissible, 2 N.W.P. H.C.R. 295 Ratanlal 674. See Ss. 109 and 118, *supra*.

Execute a bond with sureties.—When a person executed a bond for a sum certain to be paid to government if he should within the period specified commit any offences, and two persons subscribe an undertaking to be sureties the proper procedure for the Magistrate who intends to confiscate the bond is to call upon the Government or its representative before him to declare against which of the persons liable it elects to proceed and for what amount and to pass orders accordingly. In no case can the amount be in excess of the amount secured by the bond be demanded or recovered from the person bound or his sureties jointly or severally, 12 Cr. L.J. 404-11 Ind. Cas. 588. The bond contemplated by Ss. 112 and 118, *supra*, is a single bond for a specific amount and is discharged on forfeiture by payment by either the principal or surety. In no case can an amount in excess of the amount secured by the bond be demanded or recovered from the person bound over or his sureties individually or collectively, 8 Lah. 448; 4 Lah. 462.

Permit the deposit of a sum of money, etc.—The deposit of money allowed under this section is in substitution only of the bond which the principal himself would otherwise execute and not in substitution of any bond which his surety executes, 32 B. 449 at 453.

514. (1) Whenever it is proved to the satisfaction of the Court by which a bond under this Code has been taken, or of the Court of a Presidency Magistrate or Magistrate of the first-class,

Procedure on forfeiture of bond.

or, when the bond is for appearance before a Court, to the satisfaction of such Court,

that such bond has been forfeited, the Court shall record the grounds of such proof, and may call upon any person bound by such bond to pay the penalty thereof, or to show cause why it should not be paid.

(2) If sufficient cause is not shown and the penalty is not paid, the Court may proceed to recover the same by issuing a warrant for the attachment and sale of the moveable property belonging to such person or his estate, if he be dead.

(3) Such warrant may be executed within the local limits of the jurisdiction of the Court which issued it; and it shall authorise the attachment and sale of any moveable property belonging to such person without such limits, when endorsed by the District Magistrate or Chief Presidency Magistrate within the local limits of whose jurisdiction such property is found.

(4) If such penalty is not paid and cannot be recovered by such attachment and sale, the person so bound shall be liable, by order of the Court which issued the warrant, to imprisonment in the civil jail for a term which may extend to six months.

(5) The Court may, at its discretion, remit any portion of the penalty mentioned and enforce payment in part only.

(6) Where a surety to a bond dies before the bond is forfeited, his estate shall be discharged from all liability in respect of the bond.

(7) *When any person who has furnished security under section 106 or section 118 or section 562 is convicted of an offence the commission of which constitutes a breach of the conditions of his bond, or of a bond executed in lieu of his bond under section 514B, a certified copy of the judgment of the Court by which he was convicted of such offence may be used as evidence in proceedings under this section against his surety or sureties, and, if such certified copy is so used, the Court shall presume that such offence was committed by him unless the contrary is proved.*

Extent of Amendment.—The word "distress" in sub-section (3) is omitted and the word "attachment" is substituted. In sub-section (6) the words "but the party who gave the bond may be required to find a new surety" are omitted; a new sub-section (7) has been added, which provides that proof of a conviction should be conclusive as to the breach

except where such conviction 'has proceeded solely on the plea of guilty in which case the surety should be allowed an opportunity to disprove the guilt of the principal. The decision in 1917 M.W.N. 195=18 Cr. L.J. 1=36 Ind. Cas. 833, to the effect that moveable property did not include debts and choses in action is no longer law by the new amendment substituting 'attachment' for 'distress'.

Scope and Object of the section.—This section provides that whenever it is proved to the satisfaction of the Court by which a bond under this Code has been taken, or of the Court of a Presidency Magistrate or Magistrate of the First-class, that such bond has been forfeited, the Court may call upon the person bound by such bond to pay the penalty thereof or to show cause why it should not be paid. It would be observed that the qualifying words of the section are "a bond under this Code", 30 Cr. L.J. 527=115 Ind. Cas. 763. The object of these surety bonds is as far as possible to ensure that the accused person shall not evade justice in the ordinary course, say, by flying from the country or from the jurisdiction of the Court. But if he elects to die sooner than face his trial, that can hardly be a sufficient reason for forfeiting the surety bond since that was an event which the sureties could not have had in contemplation, and which is not of the kind which would impose upon them any moral obligation or responsibility to the Court, 18 Bom. L.R. 683 at 685. The principle of forfeiture of rights in consequence of default in procedure by a party to a cause is a principle of punishment in respect of such default, but the punishment of the dead or the ranking of death under the category of default does not seem to be very stateable, 35 A. 331 (P.C.) referred to in 47 M. 171 at 173. The provisions of this section apply to all bonds whether executed by principals, sureties or witnesses for appearance in Court, 2 M. 169. A bond containing a provision that the person executing the bond shall be liable for any breach of peace by his servants and dependants is illegal, 1831 A.W.N. 152. A bail bond must come under the second part of sub-section (1) of this section and therefore it is necessary that the forfeiture should be established to the satisfaction of the Court before which the accused was bound by the bond to appear, and that is the Court to exercise the power. A bail bond cannot be forfeited on failure of the accused to appear in a Court to which the case is transferred when the obligation to appear in such Court is not specifically mentioned in the bond. A bail bond is to be construed strictly, 2 Ran. 581. When a person who stands bail to an accused person and undertakes to produce him before the Court when called upon and in default to forfeit a sum of money to Government is not discharged from his liability by the fact that the accused person had paid the amount of his bail bond. The person who stood bail is not a security to the accused's bond but the undertaking is to produce the accused in Court or in default to forfeit a sum of money, 10 Cr. L.J. 254=3 Ind. Cas. 470. The proper Court to direct the forfeiture of a bail bond is the Court before which the accused was bound by the bond to do a specific act and the forfeiture must be established to the satisfaction of the Court. The bond should be strictly construed and where the obligation is not specifically mentioned in the bond, the bond cannot be forfeited for failure to fulfil the obligation, 2 Ran. 581. It has been held that a security bond taken in accordance with form XLII, Sch. V, is wide enough to include the successor of a Court in which the case originally was; any other view of the law would produce most inconvenient results since if an accused were on bail when a case was transferred it would in every case be necessary before transferring the case to order his arrest or to require him to give fresh sureties 27 Cr. L.J. 377=52 Ind. Cas. 889. The section first deals with bonds generally and then with bonds for appearance and the procedure prescribed herein is an exception to the general rule that a person charged can be convicted only on evidence taken in his presence. If the person called upon to show cause why the penalty should not be paid then he should be afforded an opportunity of cross-examining the witness on whose evidence the rule to show cause is issued. If the accused had an opportunity already before the Magistrate to show cause in a proceeding for a breach of the peace or for any other offence then there is no necessity for giving him any further opportunity, § C. 865 (F.B.). Bonds taken under the City Police Act for appearance before the police are not bonds under this Code or for appearance before a Court and such bonds cannot be forfeited by a Presidency

Magistrate purporting to act under this section, 42 B 400; see 11 C. 77. Bond to secure attendance of an accused person before a Magistrate is not invalid for the reason that it was taken by a Magistrate other than the one before whom the accused is to appear, 2 Bom. L.R. 589. Where a person stood surety for the appearance of an accused person before a particular Magistrate before whom the case was being tried and the accused failed to appear before a Magistrate to whom the case was transferred subsequently, it was held that the surety did not commit a breach of the bond, 6 C.W.N. 835.

Whenever it is proved to the satisfaction of the Court.—These words are of the widest character and there is no time limit for exacting the penalty. When the principal and his sureties contract that the principal will not commit an offence within a fixed period mentioned in the bond and if he does commit an offence or cease to be of good behaviour then there is nothing in the Code to prevent the penalty being executable at any time. It would be preposterous to suppose that the principal and his surety should go free because the principal commits some grave offence with such skill that he is not detected till after the period of the bond had expired; yet that is the conclusion which necessarily follows if the plea of limitation ruled is accepted. It may be a hardship to exact state claims against the subject but if that becomes the general practice, no doubt, the Legislature will interfere, 27 Cr. L.J. 326=92 Ind. Cas. 742. See also 26 A. 232. Breach of condition mentioned in the bond must be strictly proved before the bond is forfeited, 11 W.R. (Cr.) 52; 11 B.H.C.R. 170. An inquiry should be held before declaring a bond forfeited and the party must have an opportunity of cross-examining the witnesses upon whose evidence he was called upon to show cause why the bond should not be forfeited, 4 C. 855 (F.B.). Before forfeiting a bond for good behaviour an inquiry after notice to the sureties should be held to prove that the person under security has committed an offence and not merely a reasonable suspicion entertained by the Police of his complicity with an offence. Evidence recorded before issue of notice to surety to show cause cannot be looked into and an order of forfeiture cannot be passed on such evidence on surety's non-appearance, 51 C. 134. In the case of a bond for appearance before a particular Court under this section proceedings to have the bond forfeited can be initiated only by that Court. This section in its opening clause deals first of all with bonds generally and then with a bond for appearance before a Court. So far as bonds generally are concerned there is a provision that action may be taken by the Court by which bonds have been taken or by the Court of a Presidency Magistrate or a Magistrate of the first-class but in the case of a bond for appearance before a Court, the tribunal indicated is that Court and no other, 14 C.W.N. 259; 15 Bom. L.R. 83. Failure to appear before a Magistrate other than the one named in the bond cannot work a forfeiture, 30 C. 107. An attempt to poison another is not an offence which would probably occasion a breach of the peace working a forfeiture of the bond for keeping the peace, 15 Cr. L.J. 605=25 Ind. Cas. 517. When a person under a bond to keep the peace under S. 107, *supra*, instituted a civil suit to enforce his right in respect of the subject-matter of the dispute, the act of instituting the suit does not involve a forfeiture of the security bond taken. In instituting the civil suit the party is not guilty of any wrongful act as he was acting within his rights. It is clearly not the intention of the Legislature to prevent persons bound over from seeking to enforce their rights both in civil and criminal Courts. Otherwise the result will be that no one bound over will be able to enforce his rights in Courts without endangering a forfeiture of his bond, 1 Lah. 310.

That a bond taken under this Code has been forfeited.—It is not necessary that there should be first of all a conviction of the person bound over for a forfeiture of the bond and then to call upon the surety why he should not be proceeded against under the bond. If, in the proceedings taken against a surety, it is proved that the person bound over had committed an offence that would be sufficient to lead to a forfeiture of the bond, 80 A. 686 at 693. The record of conviction of the principal is sufficient evidence against the surety and it is not necessary for Government to prove over again the *factum* of conviction to render the sureties liable, 12 Cr. L.J. 494=11 Ind. Cas. 533. The use of the word 'probably' in Form, X Bch. V of the Code, limits forfeiture to cases in which a breach of the peace is

a probable result of the act of the person bound over to keep the peace and there is no reason for holding that a breach of the peace was the probable result, if the person bound over commits the offence of abduction of the wife of one who had nothing to do with the security proceedings against the executant of the bond, 1905 P.R. (Cr. J.) 7=4 Cr. L.J. 278. When during the investigation of a reported case of burglary the police seized four bullocks and handed them over to S on his executing a bond to produce them before a Court or the police, fixing a penalty in default and when the case was ultimately sent up for trial before a Magistrate and when called upon by him to produce the bullocks, on his failure to produce them the Magistrate directed another bond to be executed for the production of the bullocks on a particular date, and on his failure to produce them on that date, the bond was forfeited, it cannot be contended that the bond so taken is not a bond under this Code. S. 516A, *infra*, shows that when any property regarding which an offence appears to have been committed is produced before the Court during any inquiry or trial the Court may make such order for its proper custody pending the inquiry or trial. Even though the bullocks were not actually produced in Court, it seems clear that S having already received the custody of the bullocks by giving an undertaking to produce them did by executing a fresh bond to the Court waive the necessity of their production in Court and admitted that he received their custody from the Court on the date he executed the bond and such a bond is covered by 516A. *infra* 30 Cr. L.J. 827=115 Ind. Cas. 763.

To show cause why the amount should not be paid—Where a Magistrate recorded some evidence and came to a conclusion that a person under security had committed an offence within the period during which security was taken and then issued notice to the sureties to show cause why the bond executed should not be forfeited and on their failure to appear on the date fixed forfeited the bond acting solely on the evidence previously recorded, it was held, that the order for forfeiture was bad (1) because no evidence was recorded after notice to the sureties, (2) because the evidence recorded before notice was not such as would ground a finding of fact against the sureties or even against the person bound over that he had in fact been guilty of an offence, 44 C.L.J. 170. The mere fact that no immediate action was taken under this section against a person under recognizance to keep the peace or against his surety on conviction of the former for an offence involving a breach of the peace is no bar to the taking of such proceedings at subsequent time, *e.g.*, after the time for appealing had expired or after the appeal by the principal has been dismissed, 26 A. 202, dissenting from 1 C.L.R. 134 and 3 C.L.R. 406. The view taken in 26 A. 202 was followed in 27 Cr. L.J. 326=92 Ind. Cas. 742. See also the new sub-section (7) which supports this view. If a criminal Court knowing that a person charged before it is under security to be of good behaviour, in sentencing him takes no step to confiscate the security, it is not competent to that Court or any other Court in a subsequent or separate proceeding to take such steps, 25 Cr. L.J. 4=75 Ind. Cas. 693; 14 Cr. L.J. 67=18 Ind. Cas. 403. After a conviction under S. 323, I.P.C., a bond for good behaviour can be forfeited and the amount of the bond can be recovered from the principal or surety, but not from both, 4 Lah. 462. The bond taken under S. 118, *supra*, is one bond for one amount and is discharged on forfeiture, by payment of the amount due either by the principal or surety. In no case can an amount in excess of the amount secured by the bond, be demanded or received from the person bound over or his sureties individually or collectively, 5 Lah. 443, following 1894 P.R. (Cr. J.) 2; 12 Cr. L.J. 404=11 Ind. Cas. 588 and disapproving 36 C. 562. If there is nothing in the section to deprive a Magistrate from taking a particular line of action, it does not lie with the superior Court to reverse that decision, 27 Cr. L.J. 238=92 Ind. Cas. 742. A Magistrate when forfeiting a bond for security for good behaviour cannot forthwith commit the person under security for the unexpired portion of the term for which security has been taken and there is no provision in the Code for such a procedure and the remedy may be to start fresh proceedings against the person under Chapter VIII of the Code, 1906 A.W.N. 442=3 Cr. L.J. 556.

Or his estate, if he be dead—These words were newly added in the 1893 Code to meet certain rulings which held that the representative of a deceased surety is not liable to be proceeded against in a summary proceeding under this Chapter.

Sub-section (4).—When the penalty of the bond is not paid, the first step which the Court should take is to recover the sum by issuing a warrant for the attachment and sale of the moveable property belonging to the person liable under the bond, or his estate if he be dead. It is only when a penalty is not paid and cannot be recovered by attachment and sale that the person bound is liable to imprisonment under this sub-section, 30 Cr. L.J. 346 at 348=114 Ind. Cas. 682.

Sub section (5).—Where a person who has been let out on bail commits suicide the sureties are discharged from their obligation to produce him and no legal order forfeiting the bonds of the sureties could be passed, as in such a case, there is no neglect or default on their part to make them liable on the bond, 37 M. 156; 16 C.W.N. 550. Where a surety is unable to produce a person for whom he has given bail owing to some circumstance which was not really under his control, e.g., the imprisonment of the person bailed into the King's service or his arrest on a charge of felony or the like, the surety will not be compelled to discharge his bail in the ordinary circumstances. What constitutes discharge of the surety is discussed in 37 M. 156 and 16 C.W.N. 550. (1) act of God, (2) act of law, (3) act of parties. Since the person for whom the surety stood bail had been arrested on a charge of dacoity in another Province the case falls under "act of law" which includes also cases where a person is sent abroad under an Alien Deportation Act, becoming a Peer, being sentenced to transportation or being impressed by the Press Gang, 4 Pat. 259; see also 18 Bom. L.R. 683=17 Cr. L.J. 393=35 Ind. Cas. 825. It is the duty of the surety to see that the accused does not run away. Where the surety has failed to produce the accused by reason of an illegal order passed by the Magistrate which the surety was not bound to carry out and where there is no connivance or negligence on his part, it cannot be said that the surety acted irresponsibly and should be penalised, 49 A. 825. Where a person stands surety for the production of an accused person in Court when called upon and in default to forfeit a sum of money, the surety is not discharged from his obligation by the mere fact that the accused for whom he stood surety has paid the amount of his bail bond, 17 Cr. L.J. 294=3 Ind. Cas. 470. When a surety bound himself to produce the accused at the trial was unable to do so he cannot successfully plead that the accused is absent on account of an engagement between the accused and the complainant which agreement was within his knowledge but in such a case full amount of the bond should not be exacted, 8 Lah. L.J. 402=27 Cr. L.J. 1152=97 Ind. Cas. 676.

Sub-section (6).—Where a surety dies before the bond is forfeited his estate shall be discharged from all liability in respect of the bond. But the bond taken for the principal's appearance from a surety was held enforceable when the principal failed to appear before the Magistrate even in a case in which the arrest under a warrant of the principal, was found to be illegal and unauthorised. The nature of the obligation of the principal has no reference to the obligation of the surety, 2 Lah. 204.

Sub-section (7).—If the bond is broken by the commission of an offence by the person so bound, this sub-section provides that the commission of that offence may be proved by production of a certified copy of the Judgment of conviction. If as held in various decisions that it was the duty of the Court convicting him to enforce the bond and if no other Court could do so, the sub-section would be meaningless. To meet those decisions that the convicting Court should immediately take action and cannot do so afterwards by appeal, proceeding this sub section has been enacted, 27 Cr. L.J. 328=92 Ind. Cas. 752.

fresh security in accordance with the directions of the original order, and if such security is not furnished, such Court or Magistrate may proceed as if there had been a default in complying with such original order.

This section has been newly added to meet cases where a surety to a bond becomes insolvent or dies. The person from whom security was demanded may be called upon to furnish fresh security in accordance with the directions of the original order and in case of default the Magistrate may proceed against him for breach of the condition of the original order. If a person bound over happens to be convicted before proceedings are taken against a surety, reference should be made in the notice and a certified copy of the Judgment may be used as evidence in proceedings under this section. It is nowhere laid down that the person giving the bond should actually be convicted before proceedings are taken against the surety, 50 A. 666 at 668.

514B. *When the person required by any Court or officer to execute a bond is a minor, such Court or officer may accept, in lieu thereof, a bond executed by a surety or sureties only.*

Bond required from a minor.

This section is new. It deals with a bond required from a minor. In such a case a bond executed by a surety or sureties only may be accepted. See S. 29 (4) Mad. Children Act IV of 1920 which enacts that if the bond is not executed, the minor may be ordered to be sent to a certified school, like the Borstal Institute in Tanjore.

515. *All orders passed under section 514 by any Magistrate other than a Presidency Magistrate or District Magistrate, shall be appealable to the District Magistrate, or, if not so appealed, may be revised by him.*

Appeal from, and revision of, orders under section 514.

This section provides an appeal from orders passed under S. 514, *supra*, by any Magistrate other than a Presidency Magistrate or a District Magistrate. The District Magistrate is also given the power of revision, but the general power of the High Court to exercise revision under S. 439, *supra*, is not thereby taken away. The jurisdiction of a superior Court cannot be taken away except by express words or necessary implication. The general power of revision vested in the High Court, cannot be taken away because a power of revision is expressly given to the District Magistrate under this section. When a District Magistrate exercised his powers of revision under this section, the High Court has still power to revise such orders passed by the District Magistrate, 13 Cr. L.J. 31=13 Ind. Cas. 223 relying on 4 B. 523, where it was held that the jurisdiction of a superior Court cannot be taken away except by express words or necessary implication. A District Magistrate cannot divest himself of his powers as an appellate Court under this section and make a reference to the High Court under S. 438, *supra*, doubting the correctness of certain rulings of the High Court, 1914 F.W.R. (Cr.) 14. A bond taken for keeping the peace is not given to any particular person, but to the Court and a private person therefore is not entitled to appeal under this section against an order refusing to forfeit a bond. But it is open to the District Magistrate to exercise his judicial discretion in the matter, 23 Cr. L.J. 435=77 Ind. Cas. 733.

516. *The High Court or Court of Session may direct any Magistrate to levy the amount due on a bond to appear and attend at such High Court or Court of Session.*

Power to direct levy of amount due on certain recognizances.

Scope of the section.—This section does not authorise the delegation of power to initiate forfeiture proceedings, but deals with the power of the High Court and Court of Session to direct the levy of the amount on a forfeited bond on failure to appear and attend the High Court or Court of Session. This section is only concerned with the power to direct the levy of the amount due and not forfeiture which is a condition precedent to the levy. The procedure on forfeiture is defined in S. 514, *supra*, 14 C.W.N. 259=10 Cr. L.J. 243=3 Ind. Cas. 113.

CHAPTER XLIII.

OF THE DISPOSAL OF PROPERTY.

516A. *When any property regarding which any offence appears to have been committed, or which appears to have been used for the commission of any offence, is produced before any Criminal Court during any inquiry or trial, the Court may make such order as it thinks fit for the proper custody of such property pending the conclusion of the inquiry or trial, and, if the property is subject to speedy or natural decay, may, after recording such evidence as it thinks necessary, order it to be sold or otherwise disposed of.*

Order for custody and disposal of property pending trial in certain cases.

This section has been newly added, empowering the Court to make orders as to the proper custody of property produced before it *pending inquiry or trial* and in cases where the property is subject to speedy or natural decay to sell or otherwise dispose of it. When during the investigation of a reported case of burglary, S was entrusted with four bullocks seized by the Police on his undertaking to produce them on demand before the Court or the Police with a penalty for default, and when the case was sent up for trial before a Magistrate on S's failure to produce the bullocks on an appointed date, the Magistrate directed him to execute another bond to produce the bullocks, and on his failure so to do, the bond was forfeited under S. 514; it cannot be contended successfully that this section did not apply on the ground that the bullocks were not produced before the Court during the inquiry or trial within the meaning of the section. Even though the bullocks were not actually produced in Court it seems clear that S having already received their custody on giving an undertaking to produce them did by executing a fresh bond to the Court waive the necessity for their production in Court and returned to him, in other words he admitted that he received the custody of the bullocks from the Court on the date he executed the bond to the Court and such a bond is covered by the provisions of this section, 30 Cr. L.J. 527=115 Ind. Cas. 765.

Proceedings under this section by a person from whose custody property was seized pending an inquiry into an offence for restoration of the property to him after the termination of the inquiry are of a quasi Civil nature and when a party against whom an application for restoration has been made fails to appear after notice the Court is not bound to wait for him and may hold the inquiry as to restoration of the property during his absence and pass an order against him *ex parte*, 30 Cr. L.J. 346=115 Ind. Cas. 632.

517. (1) When an inquiry or a trial in any Criminal Court is concluded, the Court may make such order as it thinks fit for the disposal *by destruction, confiscation or delivery to any person claiming to be entitled to the possession thereof or otherwise* of any property or document produced before it or in its custody or regarding

Order for disposal of property regarding which offence committed.

which any offence appears to have been committed, or which has been used for the commission of any offence.

(2) When a High Court or a Court of Session makes such order and cannot through its own officers conveniently deliver the property to the person entitled thereto, such Court may direct that the order be carried into effect by the District Magistrate.

(3) When an order is made under this section, such order shall not, except where the property is live-stock or subject to speedy and natural decay, *and save as provided by sub-section (4)*, be carried out for one month, or, when an appeal is presented, until such appeal has been disposed of.

(4) *Nothing in this section shall be deemed to prohibit any Court from delivering any property under the provisions of sub-section (1) to any person claiming to be entitled to the possession thereof, on his executing a bond with or without sureties, to the satisfaction of the Court engaging to restore such property to the Court if the order made under this section is modified or set aside on appeal.*

Explanation.—In this section the term “property” includes, in the case of property regarding which an offence appears to have been committed, not only such property as has been originally in the possession or under the control of any party, but also any property into or for which the same may have been converted or exchanged, and anything acquired by such conversion or exchange, whether immediately or otherwise.

Extent of Amendment.—In sub-section (1) the mode of disposal is indicated by addition of the words “by destruction, confiscation, delivery to claimant or otherwise,” Sub-section (3) is re-drafted, sub-section (4) is new.

Scope and Object of the section—An order under this section does not decide the question of ownership but only the right to possession till a Civil Court decides the question of ownership, 20 Cr. L.J. 332=50 Ind. Cas 668. As a general rule the Magistrate acting under this section should pass orders according to his discretion without making further inquiry and it is only in very exceptional cases further inquiry should be made, 24 Cr. L.J. 238=71 Ind. Cas. 702. To enable a Court to act under this section the property or document in question (1) must be produced before it, (2) must be in its custody, (3) it must appear that an offence has been committed regarding it, or (4) it must have been used for the commission of an offence, and at least one of these conditions must exist in an inquiry or trial in such Courts. It is not necessary that an offence should have been committed in respect of the property, 34 C 347. After a trial and conviction for felony, property found in the possession of the felon when he was apprehended but which has not been shown to be part of or connected with the stolen property or the proceeds of it cannot be disposed of in any particular manner, 27 L.J. (M.C.) 231. Property in respect of which criminal breach of trust has been committed is as much stolen property as property the possession of which is transferred by theft according to S. 410, I.P.C. Such property should be handed over by the criminal Court back to the possession of the real owner unconditionally, 3 Luck 494 at 505. The essential of this section is that the property or document must be

proved to have been used in the commission of the offence or regarding which any offence appears to have been committed. So cash found on a person convicted of illegally importing opium cannot legally be confiscated, 25 Cr. L.J. 615=81 Ind. Cas. 103. So also cash which cannot strictly be said to be property except in so far as it is capable of being possessed and identified in specie. If actual coins found on thieves or receivers, are the actual coins which have been the subject of theft, then it is advisable to treat such cash as stolen property, 26 Cr. L.J. 1315=89 Ind. Cas. 239. Where a Magistrate in proceedings under S. 145, *supra*, cancels the preliminary order on the ground that there was no likelihood of a breach of the peace, he has no jurisdiction to order one of the parties to reap the crop on the disputed land and such order is liable to be set aside as illegal, 3 C.L.J. 573=3 Cr. L.J. 466. Where pending inquiry under S. 145, *supra*, crops on the disputed lands were ordered to be cut and deposited with a third party and the Magistrate on inquiry found he had no jurisdiction, as the parties were in joint possession, and dropped the proceeding he had a discretion to pass orders as to the disposal of the crops with the third party and the High Court declined to interfere with the order directing the crops to be divided equally between the parties, 18 Cr. L.J. 616=39 Ind. Cas. 984 (2). The object of the section is to enable the Magistrate to direct it to be given to some person to whom it appears to belong or allow it to continue in the possession of the person in whose possession it was found, 9 C.W.N. 597. The section does not limit the power of a Court which has omitted to pass an order for disposal of exhibits as part of its judgment convicting the accused, so as to deprive it of all power subsequently to pass orders for the disposal of property. The Court of Appeal or Revision is not so limited and S. 620, *infra*, expressly authorises the separate consideration where necessary, of matters referred to in this section, 26 Cr. L.J. 518=85 Ind. Cas. 338 where 35 B. 253 is referred to. The Magistrate is invested with a discretionary power and it is a rule of law that such power should be exercised judicially, i.e., according to sound principles of law and not arbitrarily. If there are materials, the Magistrate's discretion comes into operation, otherwise he should return the property to the person from whom it was produced, 11 Bom. L.R. 16=9 Cr. L.J. 162=1 Ind. Cas. 103; 2 Bom. L.R. 748. This section is limited to the offences actually under investigation. Property used for the commission of an offence not under investigation, or property regarding which no offence appears to have been committed, cannot be dealt with under this section, Ratanlal 500. This section applies only to the property in respect of which an offence has been committed and not to which the stolen property is exchanged or converted, 20 Bom. L.R. 604. The Magistrate is not entitled to proceed under this section when question of title is involved, 19 Cr. L.J. 758. Where property the subject of the offence has passed into the hands of third parties and a question of *bona fides* and title by purchase or otherwise arises, the duty of the Criminal Court is to leave the complainant to his remedy in the Civil Court if he thinks he has one, 24 Cr. L.J. 803=74 Ind. Cas. 703. This section applies only to moveable property and does not extend to immoveable property, 12 L.W. 227=21 Cr. L.J. 110=59 Ind. Cas. 414; 35 C. 44; 18 C.W.N. 1156; 1900 A.W.N. 81. This section cannot apply where the property has already passed out of the custody of the Court, [1921] Pat. 128. An order directing delivery of property to a person on his application into the absence of any criminal proceeding or inquiry before the Magistrate or any other Magistrate, is without jurisdiction, 6 C.L.J. 707. There is no time limit within which an application under this section or S. 620, *infra*, is to be made to a Court, 4 Lah. 49. Where in the course of an investigation by the police in a case of dacoity certain persons produced cash, jewelry etc. before them and also made certain statements concerning the discovery and production of the articles and they were charged with dacoity and convicted but acquitted on appeal on the ground that the articles produced were not proved to be part of the property lost in the dacoity, it was held that the trial Court cannot make an order subsequently under this section relying on the statements made by the accused before the police at the investigation making over the properties to the complainant. Although the statements could be relied on if they are proved as required by law it was not open to the trial Court to hand over the same to the complainant, as the appellate Court found them not to form part of the property dacoited, but the articles should have been returned to the accused, complainant being left to his remedy in the Civil Court, 26 Cr. L.J. 737=86 Ind. Cas. 273.

Inquiry or Trial is concluded.—Proceedings under the preventive sections of Chapter VIII of the Code come within the expression 'inquiry or trial' within this section and therefore the Magistrate has jurisdiction for sufficient cause to confiscate property produced before it or in its custody even in the absence of proof that an offence has been committed in respect of it or it was used in the commission of an offence, 42 M. 9. An order can only be made at the conclusion of the inquiry and any order made after conclusion of the inquiry on the application of a party is without jurisdiction, 4 Lah 460. An order cannot be made under this section before the conclusion of the trial, Ratanlal 257; 19 W.R. (Cr.) 3. Under this section, the jurisdiction of the Court is confined to an order at the conclusion of the trial for the disposal of property. It need not be in the possession of the Court but it must be still capable of being earmarked and such an order can only be made at the conclusion of the trial and in the presence of the parties who have a right to be heard. An order made not at the conclusion of the trial but several months after it, is bad, 24 Cr. L.J. 804=74 Ind. Cas. 708. When the person charged dies before trial no order can be made, 24 M. 375; 23 B. 844; 17 B. 748; 6 C.L.J. 707; 5 C.L.J. 229; but see 26 B. 552. A Magistrate is bound to hold an inquiry of some sort before he makes an order for the disposal of property seized and produced before him, 25 Cr. L.J. 666=81 Ind. Cas. 153.

May make such order as it thinks fit.—Wide discretion is given to the Court and the discretion is a judicial discretion, 2 Bom. L.R. 768; 11 Bom. L.R. 16=9 Cr. L.J. 162=1 Ind. Cas. 103. Property should generally be restored to the person from whom it was taken, 1 B. 630; 9 M. 448; 24 C. 499; 10 B. 197; 17 B. 748; 22 B. 814; Weir II, 663, 668 and 667; 28 Cr. L.J. 548=102 Ind. Cas. 432. Where title to the property seized is doubtful, it should be returned to the person from whom it was seized unless there are special circumstances which would render such a course unjustifiable, 50 M. 916; where a person is charged with abetment of theft of an elephant found in his house and acquitted, the elephant which had been compulsorily taken away from him by the Police should be restored to him and a wrong order passed by the lower Court as to the handing over of the elephant was set aside by the High Court in revision and it was ordered to be restored to the accused, petitioner, 34 C. 223. There is no authority for the proposition that an order under this section can only be passed in favour of a person from whose possession the property was recovered. Such orders, would, in the majority of cases be confined to orders restoring stolen property to thieves or receivers. No order can be passed under this section until the case is concluded and after that and within a reasonable time, the Magistrate who heard the case is empowered to pass an order as to disposal of property. He may do so at the time of pronouncing his order or later on within a reasonable time. The words "at the time of passing such judgment" which occurred in the Code of 1869 have been deliberately omitted in the later Acts, 26 Cr. L.J. 1433=89 Ind. Cas. 973 where 4 Lah. 460 is not followed. Where conflicting claims to property before the Court were put forward, the proper order for the Court to make was one to keep it in Court subject to any order that might be made by a competent Court of Civil jurisdiction, 28 C.W.N. 1094. When an accused is acquitted, the property seized from him should be restored to him, 1 C.W.N. 561; 3 M.L.T. 334; Weir II, 538, 668 and 669; 2 A. 276, but the Magistrate in special cases can order delivery of the subject-matter of the alleged theft to some party other than the party from whom it was taken, 34 M. 94; 11 Bom. L.R. 16. When property was used by the complainant for concocting a false case of theft against the accused, the Magistrate is not bound to restore it to the complainant to whom it undoubtedly belongs but he may confiscate the same, 24 M.L.J. 1=1913 M.W.N. 851=14 Cr. L.J. 27=18 Ind. Cas. 171. The objects found in the complainant's premises when complainant was convicted of preferring a false charge of theft under S. 132, I.P.C., can be confiscated, 9 C.W.N. 887. When a mother prosecuted a daughter of theft of jewels some of which were joint family property and others self-acquisition of the daughter and the Magistrate discharged the daughter of theft and restored the jewels to the mother and daughter on their joint receipt, it was held that the order was good and the daughter, because of her discharge was not entitled as of right for the return of the jewels to her, 34 M. 94. When an accused person is acquitted of cheating, the Court has no power to restore property found in possession of the accused to the complainant. The proper order to be made in such a case

will be that the property should remain in the possession of the person in whose custody they were, 27 Cr. L.J. 853=95 Ind. Cas. 933. A Magistrate cannot by his order direct a party to whom property is delivered to produce it when called upon to do so, 19 M.L.J. 516=11 Cr. L. J. 65=5 Ind. Cas. 875.

For the disposal by destruction, etc.—The different modes of disposal are now specified, viz., destruction, confiscation delivery to claimant. See 34 C. 936, which held that disposal does not include forfeiture, is no longer law. The power of confiscation has been given to the Magistrate by the amended Code and any order of confiscation made before the amendment was without authority, 28 C.W.N. 1093. It would be unsafe to direct the confiscation of all monies found on the person arrested in a common gaming house, 27 Cr. L.J. 951=96 Ind. Cas. 503; where 41 A. 366; 26 B. 641; 44 B. 686, are followed, no order of confiscation of property, the subject of an offence can be passed under this section without giving notice to the complainant and hearing his objection, 17 Cr. L.J. 207=34 Ind. Cas. 319, when a party does not after notice choose to appear before the lower Court in the main proceedings and an order was made as to disposal of property, he cannot be heard to say that he had no notice from the proceedings in the appellate Court against the order of the trial Court, 51 M. 606. It would be straining the language to hold that a cart, pony and harness used in the commission of rash driving an offence punishable under S. 279, I.P.O., come within the meaning of this section and then order them to be sold and the sale proceeds to be paid over to the complainant when convicting the driver of rash driving in a public way, 1904 P.L.R. (Cr. J.) 4 p. 9. Whenever counter-felt coins have to be disposed of, they shall be forwarded together with any dies, mould, etc. to the nearest treasury or sub-treasury with a request to remit the same to the mint for examination. In the case of forged currency, notes, the disposal moulds, dies etc. confiscated by Court, they should be handed over to the Police-officer for destruction and not to be sent to the Currency Office for destruction, *Mad. Cr. Rules of Pr. Rule 185*.

Of any property or document produced, etc.—The word "property" means moveable property, 35 C. 44; 18 C.W.N. 147; 12 L.W. 227=22 Cr.L.J. 410; 1900 A.W.N. 81. It is no longer necessary that the property should have been used for the commission of an offence or the subject-matter of an offence. The Court can now make an order for the disposal of property produced before it or in its custody, 21 Cr.L.J. 414=56 Ind. Cas. 62. Property produced in the course of an inquiry under S. 109 or S. 110 *supra* can be dealt with under this section, 42 M. 9; 34 C. 347; 21 Cr. L.J. 414=56 Ind. Cas. 62; so also property produced by a witness, 12 B.H.C.R. 217; 21 Cr. L.J. 414; a printing press in which seditious matters have been published cannot be dealt with under this section, 34 C. 936; a boat used for committing theft is not an instrument for committing theft and therefore cannot be dealt with under this section, 8 C.W.N. 837; but property produced under search-warrant can be so dealt with, 25 M. 525; money tied to a gambler's cloth but not actually staked cannot be confiscated, 41 M. 644; 26 B. 641; 26 A. 270; 27 Cr.L.J. 951=96 Ind. Cas. 503; 41 A. 366; 43 B. 686.

Any property regarding which an offence has been committed.—These words may include moveable property regarding the possession of which a quarrel is started or a riot takes place, whatever may be the offence which might ultimately be committed in the course of that quarrel or riot, 51 M. 606.

Used in the commission of offence.—These words must refer to cases of the nature of instruments like guns, swords, etc. produced in Court, a printing press being a remote instrument, 34 C. 936. Money used in bribing a public servant, *Weir I*, 534; *Weir II*, 568. But cash is not strictly speaking property except in so far as it is capable of being identified *in specie*. 26 Cr.L.J. 1313=89 Ind. Cas. 259; property used in concocting a false charge against a person is within the section, 24 M.L.J. 1=1913 M.W.N. 851=14 Cr. L.J. 27=13 Ind. Cas. 171; 9 M. 443; 9 C.W.N. 527; *Ratanlal* 689. In 19 M.L.J. 254 it was held that a bottle of brandy smuggled by an accused person who was convicted under the *Madras Abkari Act* could not be forfeited, see also 8 C.W.N. 837 with regard to a boat used for committing theft. While acquitting the accused of criminal trespass and mischief

with regard to the cutting and removal of bamboos by the accused from complainant's bamboo clump, the Court cannot validly pass an order to avoid a breach of the peace, that the complainant should retain the bamboo clump until the matter is settled by a Civil Court, 20 C.W.N. 1302=18 Cr. L.J. 442=38 Ind. Cas. 1002.

Sub-section (2).—This sub-section provides that when the High Court or Court of Session cannot conveniently deliver the property to the person entitled thereto the District Magistrate may be directed to carry out the order.

Sub-section (3).—One month's time is specially mentioned now irrespective of the filing or the pendency of an appeal. An appeal from a sub-Magistrate's order lies to the District Magistrate and not to a Sub divisional Magistrate, 42 M.L.J. 491=20 M.L.T. 251=1922 M.W.N. 191=15 L.W. 534=23 Cr. L.J. 387=67 Ind. Cas. 339

Sub-section (4).—This sub-section is new and provides for delivery to any person entitled on his executing a security bond for restitution, by producing it in Court when called upon. There was no express authority for restitution before the amendment; 18 M.L.J. 516, which held that under this section a Magistrate cannot direct a party to whom property is delivered to produce it when called upon, is no longer law.

Explanation—Where a prisoner was convicted of stealing money and he was at the time of conviction, the owner of a horse which was on the evidence purchased with the stolen money, an order for delivery of the horse to the prosecutor was held legal, 7 C. & P. 640. The words "conversion" and "exchange" must be taken in their ordinary meaning. They apply to acts such as melting down of gold and silver jewels and exchange of currency-notes into cash, 12 Cr. L.J. 473=12 Ind. Cas. 81. Current coins, property in which pass by mere delivery, cannot be the subject of an order under this section, 7 M.H.C.R. 233; 3 C. 379 but when the coin is not a current coin of the realm it can be dealt with under this section, 25 B. 702; see also 12 Cr. L.J. 397=11 Ind. Cas. 581. A Jubilee £5 piece, if not part of the currency may be restored, 19 Cox 324.

Revision—The words "any proceedings in S. 425" are wide enough to empower the High Court to revise orders under this section, Weir II, 669 and 538. This section gives a discretion to the Magistrate to pass such orders as he thinks fit. That discretion is to be used judicially and unless the High Court is satisfied that it has not been so used it ought not to interfere in revision with the order, 24 Cr. L.J. 238=71 Ind. Cas. 702. The discretion exercised by the Magistrate under this section is open to correction by the High Court when it has been exercised in violation of the accepted judicial principles, 17 Bom. L.R. 922; 15 Cr. L.J. 553=24 Ind. Cas. 863. When at the time of acquitting an accused of theft the Magistrate makes an order restoring property to the accused the District Magistrate had no jurisdiction to set aside such an order, 46 A. 623. Where the trial Court acquits the accused and passes also an order as to the disposal of property, the Sessions Court as a Court of revision under S. 435, *supra*, cannot set aside the order under this section but the only course open to it is to report to the High Court under S. 498, *supra*. 6 Ran. 259 following 42 B. 664; 46 A. 623, 34 C. 347. Where a Magistrate directed delivery of certain property to the complainant merely upon complaint made to him, that an accused person is unlawfully detaining them the High Court in revision set aside the order passed, as illegal, but refused restoration on the ground that it will be illegal to do so, 8 C.L.J. 229. It is clearly just that when the lower Court has made over property to a person not entitled to its possession the High Court should remedy the error by restoring it to the person properly entitled to the same, 5 Ran. 553, following 21 Cr. L.J. 581=57 Ind. Cas. 81 and 6 Cr. L.J. 125, is dissented from.

The Court before reversing an order under this section should not act without giving notice to the person in whose favour the order is made. It should not act on the mere representation of one of the parties, 35 B. 253 and 44 M.L.J. 56 at 59; 5 Ran. 553.

518. In lieu of itself passing an order under section 517, the Court may direct the property to be delivered to the District Magistrate or to a Sub-divisional Magistrate, who shall in such cases deal with it as if it had been seized by the police and the seizure had been reported to him in the manner hereinafter mentioned.

An order under this section can be made only in respect of property (1) regarding which an offence appears to have been committed, or (2) which has been used for the commission of an offence, or (3) which has been produced before a superior Court, or (4) which has been in the custody of the superior Court, Ratanlal 496. The words "in the manner hereinafter mentioned" refer to S. 523, *infra*. When a Court makes no inquiry under S. 517, *supra*, it is competent to make a reference under this section, 14 C.W.N. cxxv.

519. When any person is convicted of any offence which includes, or amounts to, theft or receiving stolen property, and it is proved that any other person has bought the stolen property from him without knowing, or having reason to believe, that the same was stolen, and that any money has on his arrest been taken out of the possession of the convicted person, the Court may, on the application of such purchaser and on the restitution of the stolen property to the person entitled to the possession thereof, order that out of such money a sum not exceeding the price paid by such purchaser be delivered to him.

Scope of the section.—Compensation under this section can be given only from the money found on the person of the accused and it is not competent to award the same out of the fine imposed on a convicted person, 3 Bom. L.R. 764; Weir II, 671. A person who was convicted of stealing a pony and selling it to a third person was convicted and sentenced to a term of imprisonment and a fine of Rs. 20 and the pony was ordered to be returned to its owner on his receiving out of the fine Rs. 9 as compensation under this section. *Held* that the order is unsustainable and also no such conditional order can be passed, 3 Bom. L.R. 449 see also Ratanlal 631; Weir II, 672. Compare the provisions of S. 545, *infra*, where unlike this section compensation can be given, to be recoverable out of the fine imposed on the accused person.

520. Any Court of appeal, confirmation, reference or revision may direct any order under section 517, section 518 or section 519, passed by a Court subordinate there to to be stayed pending consideration by the former Court, and may modify, alter or annul such order and make any further order that may be just.

Scope of the section.—It is only when an order is passed under S. 517, *supra*, by the subordinate Court, the appellate Court is empowered to modify, alter or annul such order. In an appeal from a conviction, the appellate Court has no jurisdiction to pass an order as to disposal of property when no order under S. 517, *supra*, had been passed by the trial Court and to such a case this section has no application, Weir II, 676 but it is submitted that S. 423(1) (d) *supra* empowers the appellate Court to pass any consequential or incidental order that may be just or proper, see 24 Cr. L.J. 833—74 Ind. Cas. 1050. Where a Sessions Judge on appeal

set aside a conviction of the appellant under S. 411, I.P.C., and no order is passed by the trial Court or by the Court of session under S. 517, *supra*, with regard to the disposal of the property seized from the accused by the police in the course of their investigation, an application can be made under this section to the Sessions Court on which an order for the restoration of the property seized from the petitioner can be passed, 3 Lah. 49. Such an application to the Court of appeal mentioned herein is in no sense an application by way of appeal against any order of disposal of property but an independent application with a view to take action under S. 517, *supra*, or this section. No period of limitation is prescribed for such an application which should be made within a reasonable time from the date of the original acquittal or conviction, *Ibid* at p. 51. See also the observations in 50 M. 916, where the trial Court had acquitted the accused and passed an order under S. 517 *supra*, the Sessions Court had no jurisdiction to interfere with the order in its revisional jurisdiction under S. 435, *supra*, and the only course left open to it is to report the case for the orders of the High Court under S. 438, *supra*, but he cannot himself set aside the order, 6 Ran. 259, following 42 B. 664; 46 A. 623 and 34 C 347. This section being thus applicable only to orders passed under Ss. 517, 518 or 519, *supra*, cannot apply to an order made by a Magistrate when acquitting or discharging the accused in a case under S. 363 I.P.C., to the effect that a child alleged to have been kidnapped by the accused should be returned to her parents and a Sessions Judge had no jurisdiction to entertain an appeal from such an order under this section and set aside the order restoring the child. 27 Cr. L.J. 574 (2) = 94 Ind. Cas. 142 (2). The jurisdiction under this section is distinct from the appellate jurisdiction of a Court of appeal.

Court of Appeal or Revision.—It was held in 3 C. 379 that the words "Court of Appeal" are not necessarily limited to Courts before which an appeal is pending. It may very often happen that the question of the propriety of the order under S. 517 may, in no way, concern a convicted person, and it is unreasonable to construe this section in a way as shall make the power of the Judge to modify, alter or annul the order affecting one person contingent on the accident whether another person has or has not chosen to appeal. The same view was taken in, 9 M. 448; 2 A. 276; Weir II, 673. But in 42 B. 664 a different view was taken. It was held there, that when acquitting an accused person of theft, the Magistrate ordered the cattle, the subject of theft, to be returned to him. The Sessions Judge modified this order. The accused then applied to the High Court in revision, and it was decided that the Sessions Judge had no jurisdiction under this section as he was never a Court of appeal or revision, 35 B. 253 was followed and 9 M. 448 was disapproved. The words 'Court of Appeal' refer only to Courts hearing appeals ordinarily and not to Court like a Sub-divisional Magistrate who hears appeals from Sub-Magistrates being invested with appellate powers by virtue of delegation by District Magistrate. If there is an appeal, whether it be against the conviction, or against an acquittal, an order under S. 517 can be revised only by the Court seized of the appeal. If the case comes up for confirmation or on reference the Court empowered to deal with those matters is competent to revise such an order. If an application is made for revision, the revising Court is similarly competent. The difficulty arises where an order under S. 517, *supra*, is brought before a Court independently of any appeal, reference or revision or submission for confirmation. In such a case the only remedy is by way of revision as the Code provides no appeal against orders under S. 517, *supra*, but S. 524 (2) not merely gives right of appeal but also indicates the Court to which such appeal lies. Authorities are by no means uniform but the procedure followed by Courts in this Presidency is that the District Magistrate is to hear such applications and not drive the party to the High Court for revision. That practice is more convenient, 1928 M.W.N. 557 (F.B.) The Court of appeal within this section is the Court to which an appeal lies in the particular case and not the Court to which appeals would ordinarily lie from the Court deciding the particular case, 42 B. 664 at 666, followed in 46 A. 623 but see 12 Cr. L.J. 400 = 11 Ind. Cas. 594. The words 'Court of Appeal etc.' seem to designate Courts which can modify alter or annul the order passed under the preceding sections and not to specify the nature of the application which has to be made to them, compare Ss. 125 and 195 *supra*, as to the analogous powers of superior Courts. In all these cases the Court designated has been given special jurisdiction to pass what order, it thinks fit, and that it is not necessary to read into the

section provisions regarding appeals. So an application to the Court of appeal under this section cannot be dismissed on the ground that it was time-barred and no satisfactory explanation for the delay in filing the appeal is forthcoming. 50 M. 816, see also 4 Lah. 49 at 51 which holds that there is no limitation for applications under this section but they should be made within a reasonable time from the date of original acquittal or conviction. The Court of revision in such a case will be the High Court and not the Court of Session, 32 B. 637; see also 45 M. 162 following 35 B. 253. Under this section the Sessions Court cannot be a Court of appeal reference or revision entitled to vary an order of a Sub-divisional Magistrate declining to direct the restoration of property to the accused on his acquittal in appeal from a conviction had by a Second-class Magistrate, 47 M.L.J. 491=20 L.W. 521. A District Magistrate has no jurisdiction to set aside an order made under this section directing property to be restored to an accused person who was acquitted. He cannot be held to be a Court of appeal because no appeal lay to him against the acquittal. Nor is he a Court of confirmation, reference or revision as the only Court which could pass orders on reference or revision is the High Court, 46 A. 623.

Court of Reference.—A Court of reference means a Court to which references are made and which on such references is entitled to go into the matters and dispose of them. The High Court is a Court of reference in Jury cases where the Judge differs from the Jury, 47 M.L.J. 491=20 L.W. 521=(1923) M.W.N. 806=25 Cr. L.J. 1247=82 Ind. Cas. 173.

Make any further order that may be just.—These words did not exist in the 1882 Code and were introduced in the 1893 Code for the first time and must have been done with an object. It must be presumed that the Legislature was aware of the ruling in, 33 A. 374 while amending the Code in 1923. If the wide and liberal interpretation put on the words of the section in 33 A. 374 was not justified undoubtedly the amending Act of 1923 would have omitted the words or would have at any rate introduced some restrictive phraseology and this omission clearly indicates that the Legislature accepted the interpretation in 33 A. 374 as correct. The policy of law seems to be that in the absence of any statutory provision to the contrary, the appellate Court should dispose of once and for all every outstanding matter in controversy. S. 423 (1) (d) *supra*, authorises the appellate Court to pass incidental orders and omission by trial Court to pass an order for disposal of property can be set right by the appellate Court 10 Lah. 187. These words are obviously intended to cover cases where property is erroneously disposed of by the trial Court and the superior Court is empowered to intervene and pass such order as may be just, 4 Lah. 49. The intention of the Legislature in adding to the section "and may make any further order that may be just" was obviously to enable a superior Court to give effect to an order setting aside the order of the Court of first instance if that order has been carried out by directing a restitution of the property. 13 Cr. L.J. 21=13 Ind. Cas. 213. This will enable a superior Court to give effect to an order setting aside the order passed by the Court of first instance if that order is carried out by ordering restitution. When a remedy is allowed by law, it must be assumed that the Legislature intends the tribunal invested with jurisdiction shall enforce the order in the manner it considers most suitable, even though there is no express provision for doing the same, 19 Cr.L.J. 595=48 Ind. Cas. 175, 44 M.L.J. 56 at 59; 18 C.W.N. 959=15 Cr. L.J. 184=22 Ind. Cas. 760. Though this section does not say that the issue of notice to any person is necessary before making an order under this section, yet on general principles no order to the prejudice of a party should be made by any authority without that party being heard, 20 Cr. L.J. 823=53 Ind. Cas. 823; 33 B. 253; 46 M. 162. An accidental omission to make an order restoring property under this section can be subsequently corrected under S. 369, *supra*, 23 Cr. L.J. 159=71 Ind. Cas. 511. Where a subordinate Court has made over possession of property to a person not entitled to possession it is clearly just that the High Court should remedy the error by restoring it to the person properly entitled to the same, 3 Ran. 533 where 21 Cr. L. J. 551=57 Ind. Cas. 81 is followed and 6 Cr. L.J. 126 is not followed. The High Court has power to order restitution of property, say, an elephant, wrongly ordered to be delivered to a person other than the one from whom the police had compulsorily taken the same, when acquitting

that person of abetment of theft with regard to the elephant, 54 C. 284; when the question as to the right to property is not between the complainant and the accused but between the complainant and a third party, no order of restitution can be passed in favour of the complainant without due notice to such third party and hearing him, 5 Ran. 553.

Revision.—Application to lower Court must precede the application to High Court in revision, 2 A. 278; High Court has ample powers to revise an order passed by the Appellate Court, 4 Lah. 49; 18 C.W.N. 959; 19 Cr. L.J. 995=43 Ind. Cas. 175

521. (1) On a conviction under the Indian Penal Code, section 292, section 293, section 501 or section 502, the Court may order the destruction of all the copies of the thing in respect of which the conviction was had, and which are in the custody of the Court or remain in the possession or power of the person convicted.

(2) The Court may, in like manner, on a conviction under the Indian Penal Code, section 272, section 273, section 274 or section 275, order the food, drink, drug or medical preparation in respect of which the conviction was had, to be destroyed.

This section relates to destruction of libellous matter, etc., on conviction. So also destruction of any noxious food, drink, drug, etc. When the conviction is set aside, the order passed also falls to the ground and the Court is entitled to act under S. 423 (1) (d), *supra*.

522. (1) Whenever a person is convicted of an offence attended by criminal force, or show of force or by criminal intimidation, and it appears to the Court that by such force or show of force or criminal intimidation, any person has been dispossessed of any immoveable property, the Court may, if it thinks fit, when convicting such person or at any time within one month from the date of conviction, order the person dispossessed to be restored to the possession of the same.

(2) No such order shall prejudice any right or interest to or in such immoveable property which any person may be able to establish in a civil suit.

(3) An order under this section may be made by any Court of appeal, confirmation reference or revision.

Amendment.—In sub-section (1) after the word force, the words "or show of force or criminal intimidation" have been added, and "when convicting such person or at any time within one month, from the date of conviction" have been newly added to give wider powers to the Court to restore possession. Sub-section (3) is newly added to give power to any Court of appeal confirmation, reference or revision to pass orders restoring possession.

Object of the section.—The object is to enable a Court by a summary order to restore the state of things which existed at the time of dispossession by a convicted person. It cannot go behind the state of affairs at the time of forcible ejection leading to the criminal prosecution. Sub-section (2) provides that the right of third parties cannot be affected and such third party in case of eviction under an order passed under this section must seek his remedy in a Civil Court, 5 C.W.N. 374, where 23 B. 494 is referred to; when

neither party is in actual possession this section cannot apply, Weir II, 675. An order under this section is not passed against any person but is passed in favour of the party dispossessed provided the conditions necessary to give the Court jurisdiction to pass the order are present, 22 Cr. L.J. 573=62 Ind. Cas. 591. This section is the only provision which enables a Magistrate to restore a dispossessed party and the power can be exercised only in cases in which there has been a conviction of an offence attended by criminal force or show of force or criminal intimidation, Weir II, 98; 26 M. 49; 31 C. 691; 36 C. 41; 25 A. 341; 27 C. 173; 20 Cr. L.J. 488=51 Ind. Cas. 472; 28 Cr. L.J. 819=104 Ind. Cas. 433. It is an essential ingredient of this section that the offence of which the person concerned is convicted must have been attended by criminal force or at the very least attended by show of force, and when there was no finding that the offence was attended by criminal force but only an offence of criminal trespass, the order under this section was set aside, 21 A.L.J. 593=25 Cr. L.J. 42=75 Ind. Cas. 730. Where there is no finding as to the use of criminal force or show of criminal force whereby a party was dispossessed an order under this section is bad in law, 18 Cr. L.J. 898=42 Ind. Cas. 130; 9 Lah. 322; 28 Cr. L.J. 327=100 Ind. Cas. 544, following 20 Cr. L.J. 488=51 Ind. Cas. 472. See also 28 Cr. L.J. 964=105 Ind. Cas. 676; 26 M. 49; 27 C. 173; 25 A. 341; 1919 P.R. (Cr.) 16. In S. 349, I.P.O., the term "force" is defined as being an application of force when used in connection with human body and under this section delivery may be made to the person who has been dispossessed, when accused is convicted of an offence attended by criminal force. Rioting need not necessarily be use of criminal force, but may be causing violence in prosecution of the common object, *vis.*, violence to a fencing and uprooting the same, and not to any person, and in such a case no order under this section could legally be made, 18 C.W.N. 1150=7 Cr. L. Rev. 14=15 Cr. L.J. 720=26 Ind. Cas. 168; 22 Cr. L.J. 329=61 Ind. Cas. 57. But an order directing restoration of possession to the complainant can validly be made where it is found that the accused were putting a fence round the land where the complainant reached the spot and prevented the accused by show of force from taking possession, 27 Cr. L.J. 495=93 Ind. Cas. 895. By the new amendment the words "or show of criminal force or by criminal intimidation" have been added; when a party takes possession of complainant's house and threatens to use force against him and is convicted under Ss. 448 and 143, I.P.C., the Court was competent to pass an order under this section restoring possession of the house to the complainant, 4 Pat. 438. While acquitting certain accused charged with criminal trespass and mischief in regard to the cutting and removal of certain bamboos from complainant's bamboo clump, the Magistrate is not entitled to order that the complainant was to retain the bamboo clump until the matter was settled by a Civil Court, 20 C.W.N. 1332=18 Cr. L.J. 442=38 Ind. Cas. 1002.

Show of Criminal Force.—It was held in 5 C.W.N. 230; 2 C.W.N. 303; 4 C.W.N. 307; 25 C. 434 that the term criminal force must be understood as defined in S. 350, I.P.C., and to justify an order actual force must be used and not mere show of force. To meet these decisions, the amendment is now made and 'show of criminal force' is sufficient to give jurisdiction to order restoration of possession of immovable property under this section.

When a person is convicted—To act under this section there must be a conviction, 12 C.W.N. 269. The discretion to pass an order or not is vested in the trial Court by the section which says that the Court may pass such order if it thinks fit. There is no case in which a Court of appeal or revision has compelled a Court to pass such an order in a case in which, in the exercise of its discretion it has declined to do so. In 30 C. 699 it was held that a Court of appeal or revision has no power to do so. The High Court in revision will pass an order only in very exceptional circumstances, 45 A. 553 at 554. When the lower Court has failed to pass the necessary order, the appellate Court had no jurisdiction, but the High Court in revision can pass the order where the case is a gross one and in the absence of such an order the complainant will be forced to institute fresh proceedings in a Civil Court soon after a successful litigation, 45 A. 92. Conviction for show of criminal force is newly added in accordance with the decision in 11 C.W.N. 467; 16 A.L.J. 439. There was conflict of authority about the validity of the order passed not simultaneously with the order of conviction. See 16 A.L.J. 439; 4 C.W.N. 303; 23 B. 494; 14 Cr. L.J. 172. This conflict is set at rest now

To the person entitled to the possession thereof.—The Magistrate does not decide the question of title but merely decides the question of possession. The fact that the accused had been in possession when the charge was made is not conclusive. The question will be, who is entitled to possession of the property, 12 Bom. L.R. 232=11 Cr. L.J. 339=5 Ind. Cas. 972; 17 B. 749. When a third party appears and alleges that the things seized by the police under a search-warrant are his, the Magistrate is bound to hear him and if necessary to restore the property to him. There is a power inherent, apart from this section, in every Court to satisfy itself that the things produced before it under a search-warrant are the things which it is necessary or desirable should be kept in custody, 26 B. 552. When certain property was recovered from the house of a person charged with theft, but the complainant did not claim it as his, a Magistrate acts illegally in entering upon an inquiry as to how such person came to be in possession of the property. His duty is simply to restore the property to the custody of the person from whom it came. The fact that the account given by such person as to how he came by the property did not satisfy the Magistrate will not justify him to inquire and pass an order under this or S. 524 *infra*, 17 Bom. L.R. 79=18 Cr. L.J. 207=27 Ind. Cas. 767.

Disposal or delivery of property.—The word "disposal" is something different from delivery, 12 Bom. L.R. 232=11 Cr. L.J. 339=5 Ind. Cas. 972. Disposal is more wider and delivery is one of the modes of disposal. The words "Disposal of such property or" were added to give wider discretion to the Court.

Revision.—The High Court has power to set aside the order of a Magistrate under this section especially when the order is based on no materials on record and even order restitution, 21 Cr. L.J. 561=37 Ind. Cas. 81=10 L.B.R. 151; see also 6 Cr. L.J. 125=5 L.B.R. 14; 1 B. 630; 14 C. 834; 1893 P.R. (Cr.J.) 5 (F.B.); 13 C.W.N. 1147=15 Cr. L.J. 222(1)=22 Ind. Cas. 1003 (1).

524. (1) If no person within such period establishes his claim to such property, and if the person in whose possession such property was found is unable to show that it was legally acquired by him, such property shall be at the disposal of the Government, and may be sold under the orders of the Presidency Magistrate District Magistrate or Sub-divisional Magistrate, or of a Magistrate of the first class empowered by the Local Government in this behalf.

(2) In the case of every order passed under this section, an appeal shall lie to the Court to which appeals against sentences of the Court passing such order would lie.

This section deals with the procedure to be adopted by the Court when no claimant appears within six months. It is only when those six months have expired that the provisions of the section come in and the person in whose possession it was found can come forward and show that it was his own, 22 J. 756. The property is confiscated only when the person in possession is unable to show that it was legally acquired by him. The words "at the disposal of Government" mean that Government shall be free to sell the property to hold it as a trustee for the true owner, 5 Pat. L.J. 311=1923 Pat. 253=21 Cr. L.J. 475=55 Ind. Cas. 597; 9 B. 131; 43 B. 202; Wele II, 838. It is only when action is to be taken under this section that orders of the special class of Magistrates mentioned herein are to be obtained while acting under S. 523, *supra*, the Magistrate to whom a report is sent is competent to act on his own responsibility, 28 Cr. L.J. 1043=87 Ind. Cas. 989. See S. 523 (4), *infra*, which enacts that if a Magistrate not empowered sells property in good faith, his proceedings shall not be set aside merely because of his not being empowered to do so.

Sub-section (2).—The appeal allowed by this section comes under Chapter XXXI of the Code and its provisions govern the appeal. It is a regular appeal on the merits and cannot be disposed of by the appellate Court in a summary way, 1881 A.W.N 150: As this sub-section allows an appeal from the order passed under sub-section (1) it is doubtful whether the law allows a remedy by way of suit, 19 B. 668.

525. If the person entitled to the possession of such property is unknown or absent and the property is subject to speedy and natural decay, or if the Magistrate to whom its seizure is reported is of opinion that its sale would be for the benefit of the owner, or that the value of such property is less than ten rupees, the Magistrate may, at any time, direct it to be sold; and the provisions of sections 523 and 524 shall, as nearly as may be practicable, apply to the nett proceeds of such sale.

Power to sell perishable property.

By the new amendment the Magistrate is given power to sell property when its value is less than ten rupees. Property of trifling value is put on the same category as property subject to speedy and natural decay. See S. 529, cl. (b) which validates sale by Magistrates in good faith when not empowered to do so.

CHAPTER XLIV.

OF THE TRANSFER OF CRIMINAL CASES.

526. (1) Whenever it is made to appear to the High Court;—

(a) that a fair and impartial inquiry or trial cannot be had in any criminal Court subordinate thereto, or

(b) that some question of law of unusual difficulty is likely to arise, or

(c) that a view of the place in or near which any offence has been committed may be required for the satisfactory inquiry into or trial of the same, or

(d) that an order under this section will tend to the general convenience of the parties or witnesses, or

(e) that such an order is expedient for the ends of justice, or is required by any provision of this Code; it may order—

(i) that any offence be inquired into or tried by any Court not empowered under sections 177 to 184 (both inclusive), but in other respects competent to inquire into or try such offence;

(ii) that any particular case or appeal, or class of cases or appeals, be transferred from a Criminal Court subordinate to its authority to any other such Criminal Court of equal or superior jurisdiction;

(iii) that any particular case or appeal be transferred to and tried before itself; or

(iv) that an accused person be committed for trial to itself or to a Court of Session.

(2) When the High Court withdraws for trial before itself any case from any Court other than the Court of a Presidency Magistrate, it shall, except as provided in section 267, observe in such trial the same procedure which that Court would have observed if the Case had not been so withdrawn.

(3) The High Court may act either on the report of the lower Court, or on the application of a party interested, or on its own initiative.

(4) Every application for the exercise of the power conferred by this section shall be made by motion, which shall, except when the applicant is the Advocate General, be supported by affidavit or affirmation.

(5) When an accused person makes an application under this section, the High Court may direct him to execute a bond, with or without sureties, conditioned that he will, (if so ordered), *pay any amount which the High Court has power under this section to award by way of costs to the person opposing the application.*

(6) Every accused person making any such application shall give to the Public Prosecutor notice in writing of the application, together with a copy of the grounds on which it is made; and no order shall be made on the merits of the application unless at least twenty-four hours have elapsed between the giving of such notice and the hearing of the application.

(6A) Where any application for the exercise of the power conferred by this section is dismissed, the High Court may, if it is of opinion that the application was frivolous or vexatious, order the applicant to pay by way of costs to any person who has opposed the application *any expenses reasonably incurred by such person in consequence of the application.*

(7) Nothing in this section shall be deemed to affect any order made under section 197.

(8) If, in the course of any inquiry or trial, or before the commencement of the hearing of any appeal, the Public Prosecutor, the complainant or the accused notifies to the Court before which the case or appeal is pending his intention to make an application under this section in respect of such case or appeal, the Court shall

Notice to Public Prosecutor of application under this section.

Adjournment on application under this section.

without sureties, of an amount not exceeding two hundred rupees, that he will make such application within a reasonable time to be fixed by the Court, adjourn the case for such a period as will afford sufficient time for the application to be made and an order to be obtained thereon :

Provided that nothing herein contained shall require the Court to adjourn the case upon a second or subsequent intimation from the same party, or, where an adjournment under this sub-section has already been obtained by one of several accused, upon a subsequent intimation by any other accused ”;

(d) to sub-section (9) the following Explanation shall be added, namely :—

“ *Explanation.*—Nothing contained in sub-section (8) or sub-section (9) restricts the powers of a Court under section 344 ”; and

(e) after sub-section (9) as so amended the following sub-section shall be added, namely :—

“ (10) If, before the argument (if any) for the admission of an appeal begins, or, in the case of an appeal admitted, before the argument for the appellant begins, any party interested intimates to the Court that he intends to make an application under this section, the Court shall, upon such party executing, if so required, a bond without sureties of an amount not exceeding two hundred rupees that he will make such application within a reasonable time to be fixed by the Court, postpone the appeal for such a period as will afford sufficient time for the application to be made and an order to be obtained thereon.”

ACT No. XXI OF 1932.

[AS PASSED BY THE INDIAN LEGISLATURE.]

(Received the assent of the Governor General on the 1st
October, 1932.)

**An Act further to amend the Code of Criminal Procedure, 1893,
for a certain purpose.**

V of 1898.

WHEREAS it is expedient further to amend the Code of Criminal Procedure, 1898, for the purpose hereinafter appearing; It is hereby enacted as follows:—

V of 1898

1. This Act may be called the Code of Criminal Procedure ^{Amend} (Amendment) Act, 1932.

2. In section 526 of the Code of Criminal Procedure, ^{Amend} 1898,— ^{section} ^{Act V}

(a) in sub-section (5), for the words “has power under this section to award by way of costs” the words “may under this section award by way of compensation” shall be substituted;

(b) in sub-section (6A), for the word “costs” the word “compensation” shall be substituted, and for the words “any expenses reasonably incurred by such person in consequence of the application” the words “such sum not exceeding two hundred and fifty rupees as it may consider proper in the circumstances of the case” shall be substituted;

(c) for sub-section (8) the following sub-section shall be substituted, namely:—

“(8) If in any inquiry under Chapter VIII or Chapter XVIII or in any trial, any party interested intimates to the Court at any stage before the defence closes its case that he intends to make an application under this section, the Court shall, upon his executing, if so required, a bond without

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adjourn the case or postpone the appeal for such a period as will afford a reasonable time for the application to be made and an order to be obtained thereon.

(9) *Notwithstanding anything hereinbefore contained, a Judge presiding in a Court of Session shall not be required to adjourn a trial under sub-section (8) if he is of opinion that the person notifying his intention of making an application under this section has had a reasonable opportunity of making such an application and has failed without sufficient cause to take advantage of it.*

Amendment.—The closing words of sub-section (5) are new which empowers the High Court to direct a bond to be executed for the costs of the person opposing the application, and sub-section (6A) has been newly added empowering the High Court when dismissing the application to award costs incurred by any person opposing the application and such costs shall be recovered as if they are fines. By the amendment in sub-section (8) it is made clear that, if in the course of any inquiry or trial or before the commencement of the hearing of the appeal, it is notified to the Court of the intention to apply for transfer, the Court shall exercise the power of postponement of the hearing. A Sessions Judge shall not be required to adjourn a trial, if in his opinion the complainant or the accused has had a reasonable opportunity of making such an application and has failed to do so without sufficient cause but such a power is not conferred on Magistrates.

Scope of the section.—The scope of the section has been considerably enlarged now and every case tried by a criminal Court comes within the purview of the amended section. The omission of the word *criminal* in sub-section (1) is very significant. Under the old Code there was a conflict whether proceedings under Chapter VIII or B. 145 of the Code could be called a criminal case. But all doubt on the subject has now been set at rest by deleting the word *criminal*. An inquiry therefore under S. 14 of the Legal Practitioners Act conducted by a Magistrate is within this section, 27 Cr. L.J. 476=93 Ind. Cas. 700.

Object of the section.—The position of an accused person is at all times one of grave anxiety and Courts trying criminal cases should be specially on their guard not to do anything which may have the effect of increasing their anxiety, 20 Cr. L.J. 539=51 Ind. Cas. 817. The policy of the law as enacted in this section is to inspire confidence in the mind of the accused person in the administration of justice and in the integrity of the Magistracy. The superior Courts are expected to have due regard to the susceptibilities of accused persons and if they are satisfied that there are reasonable grounds, i.e., grounds which a reasonable person placed in the position of the accused considers to be sufficient for entertaining the apprehension that he will not have a fair and impartial trial an order for the transfer of the case should be made, 29 Cr. L.J. 295=107 Ind. Cas. 783. It is incontrovertible that one of the most important duties of a Court of law is to create and maintain confidence in the administration of justice and to conduct itself in such a manner as to produce in the minds of the parties an impression that nothing but absolute justice would be done to them, 29 Cr. L.J. 212 at 219=107 Ind. Cas. 100. This section being thus enacted to maintain full confidence in the administration of justice, this can only be done by giving every citizen an assurance so far as practicable that no one will be forced to undergo a trial before a Judge or Magistrate whom he has reasonable ground for suspecting to be prejudiced against him. The well known case of *Sergeant v. Dale*, laid down the rule that if a Magistrate has any legal interest in the decision of a case he is disqualified in trying it, no matter how small that matter may be. The law does not measure the amount of interest which a Judge possesses. If he has any legal interest in the decision of the question one way, he is disqualified, no matter how small the interest may be. The law in laying down this strict rule had regard not so much perhaps to the motive which might be supposed to bias the Judge as to the susceptibilities of the litigant

parties. One important object at all events is to clear away everything which might engender suspicion and distrust of the tribunal, and to promote the feeling of confidence in the administration of justice which is so essential to social order and security, 20 C. 857 at 866; see also 23 C. 495; 8 C.W.N. 75; 10 C.W.N. 441 at 443; 26 Cr. L.J. 163=83 Ind. Cas. 723; 27 Cr. L.J. 1333=98 Ind. Cas. 405. No hard and fast rule can be laid down for transfer of criminal cases. The circumstances of one case would differ from those of another but the general principle is, if there are circumstances in a case which raise a reasonable apprehension in the mind of an accused person that he will not have a fair trial, the case ought to be transferred to a calmer atmosphere, 25 Cr. L.J. 590=81 Ind. Cas. 78; 27 Cr. L.J. 802=95 Ind. Cas. 456. It is of paramount importance that persons arraigned before criminal Courts should have full confidence in the impartiality of those Courts and if a person has a reasonable apprehension that the Court before which he is to be tried is not completely free from bias, a transfer should be directed. What is reasonable apprehension, must depend on the degree of intelligence of the accused, 3 Lah. 443. One of the considerations for the transfer of a case will be the convenience of the parties concerned, 8 C.L.J. 59; 6 Lah. 396. Application for transfer cannot be granted lightly on fanciful and sentimental grounds and as a rule it is not the practice to grant such applications when they are supported by false affidavits, 29 Cr. L.J. 220 at 221=107 Ind. Cas. 108. A case cannot be transferred on the ground that the trying Magistrate would not give effect to a certain legal objection which might be taken at the trial, 29 Cr. L.J. 289=107 Ind. Cas. 773.

Whenever it is made to appear to the High Court.—One of the most important duties of the High Court is to create and maintain confidence in the mind of the litigant public in the administration of justice; this can be done only by giving to every citizen an assurance as far as possible that, so far as practicable he will never be forced, to undergo a trial before a Judge or Magistrate when he has reasonable apprehension of the judicial officer being adjudged incapable of properly performing his duty. Magistrates should not fail to remember that it is their duty no less to preserve an outward appearance of impartiality than to maintain the internal freedom of bias which is incumbent on all judicial officers and if they allow the executive zeal to appear to outrun their judicial discretion, their action is certain to attract the delay consequent on an application for transfer to the High Court. The High Court has no desire whatever to impose restrictions on the proper functions of the executive. But the public sense of security is as much dependent on confidence in the judicial administration as on the efficiency of the police and it is in times of public excitement that it is most necessary for the confidence to be kept alive. A general belief that the High Court has relaxed its control over the executive would cause nearly as much alarm in a District as the failure of the executive to suppress a crime. The high prestige which executive officers enjoy in India is largely due to the knowledge that so long as the Courts do their duty the strong protector can never become an oppressor, 1 Sind. L. R. 8. Power is therefore given to the High Court to transfer cases on any one of the grounds mentioned in the section. The party applying to the High Court for transfer must have moved the local authorities. The High Court as a rule of practice does not interfere unless all the other remedies provided by law have been previously exhausted. When an order for transfer can be made by the District Magistrate under S. 528, *infra*, it is the duty of the person who considers himself prejudiced to go first to the District Magistrate before approaching the High Court for transfer under this section, 1 Cr. L. Rev. 475; see 18 L.W. 651; 43 A. 397; 36 C. 643 see also 26 Cr. L.J. 960=87 Ind. Cas. 112 where 11 A.L.J. 751 is followed, see 4 Bom. L.R. 490, but where notices have been issued and the explanation of the Magistrate on the allegation made has been obtained by the High Court and the matter argued on the merits, the case may be dealt with by the High Court in spite of the objection raised to avoid further delay in the disposal of the case.

Inquiry or Trial in any Subordinate Criminal Court.—The High Court is empowered to transfer proceedings under S. 145, *supra*, 26 M. 128, where 25 B. 179, which took a different view is disented from; the Calcutta High Court in 2 C.L.J. 614, took the same view as the Madras High Court and explained the doubt raised in 28 C. 709. The omission of the word "Criminal" in sub-clause (ii) and (iii) has practically overruled the view

taken by the Bombay High Court, proceedings under S. 110, *supra*, have been held by the later rulings of the Allahabad High Court to be transferable under this section, 12 A L.J. 736; 32 A 642, although the earlier rulings in 16 A. 9; 19 A. 291 and 30 A. 47 took a different view. The Madras High Court in 34 M. 186 applied the principle of the decision in 16 A. 9 and 30 A. 47 to applications for transfer of proceedings under S. 195, *supra*, and held that such proceedings could not be transferred, as any transfer so made would be ineffective and futile unless the Court to which it was transferred was subordinate to such Court. An inquiry under the provisions of Act XIII of 1951 (Breach of Contract) is not outside the purview of this section and can be transferred by the High Court. The inquiry under the said Act is an inquiry by the Magistrate or Criminal Court within the Code, 45 A. 700 at 701.

Fair and Impartial Inquiry cannot be had.—In dealing with applications for transfer the High Court has to consider not merely whether there has been any *real bias* in the mind of the Presiding Judge against the accused, but also whether incidents may not have happened, which though they may be susceptible of explanation, and may have happened, without any *real bias* in the mind of the Judge, are nevertheless such as are calculated to create in the mind of the accused a reasonable apprehension that he may not have a fair and impartial trial, 8 C.W.N. 75 and 589; 30 Cr. L.J. 728 at 730=117 Ind. Cas. 213; 15 Cr. L.J. 196; 27 Cr. L.J. 835=95 Ind. Cas. 755; 19 A. 64; 10 C.W.N. 441. "It is not merely of some importance but of fundamental importance that justice should, not only be done but should manifestly and undoubtedly be seen to be done"—*per Hewart, C.J.* in [1924] 1 K.B. 256; see also [1927] 2 K.B. 475, *actual bias* need not be proved, 3 Lah. 433; 6 Lah. 396, followed in 9 Lah. 537; 29 Cr. L.J. 887=111 Ind. Cas. 431; 10 Lah. 223. Bias is one thing the mere possibility of bias, however remote is another. Bias cannot be inferred from the mere refusal on the part of the Magistrate to grant adjournments or other exercise of discretion, Ratanlal 590, but a Magistrate telling the pleader for the accused that unless the accused effected a compromise with the complainant the accused will be convicted and also the fact that the trying Magistrate issued bailable warrant to arrest the accused in a summons-case are sufficient to raise a reasonable apprehension of bias in the mind of the Magistrate, 28 Cr. L.J. 933=103 Ind. Cas. 812. Where the clerk of the Justices was a member of a firm of Solicitors who were professionally prosecuting a claim for damages before the Justices, the Court quashed the proceedings holding that the clerk could not serve two masters and it was improper for him to be present with the Justices where they were considering the case although there was not the slightest suggestion that he influenced the Justices. Of course it is not every apprehension of this sort that should be taken into consideration, but where the apprehension is of a reasonable character, then notwithstanding there may be no real bias in the matter, the fact of the incident having taken place being calculated to raise such reasonable apprehension ought to be a ground for allowing a transfer 23 C. 435; 19 A. 64; 3 Lah. 433; 25 C. 727 at 733; 33 C. 1183 at 1185; 18 Cr. L.J. 641=40 Ind. Cas. 252; 18 Cr. L.J. 719=43 Ind. Cas. 719; 9 C.W.N. 613; 8 C.W.N. 77. The law requires that it should be made to appear to the High Court that a fair and impartial trial cannot be had, before it can act under this section and the High Court should not be doing its duty if it pretended to accept as reasonable grounds which it knew to be insufficient and unreasonable, simply because the litigants were foolish enough to entertain them. To extend the rule further will be to encourage a distrust in the integrity and independence of the Magisterial Courts in this country which would amount to a serious evil. It is the duty of the High Court to apply the rule unless it is satisfied that there is a reasonable apprehension that the accused will not have a fair and impartial trial in the Court before which their case is at present, 10 C.W.N. 441 at 441=3 Cr. L.J. 379, followed in 30 Cr. L.J. 728 at 730=117 Ind. Cas. 213. It has been pointed out over and over again that what the High Court has to consider is not whether any *real bias* exists in the mind of the Presiding Judge against an accused but the question is whether circumstances do not exist which though they may be susceptible of explanation are nevertheless calculated to create in the mind of the accused a reasonable apprehension that he would not have a fair and impartial trial. In determining whether it is reasonable or not we have not to come to a conclusion on abstract principles but have to bear in mind the degree of intelligence of the accused. As observed in *Sergeant*

v. Dale, in such matters the law has regard not so much to the motives which might be supposed to bias the Judge as to the susceptibilities of the litigating parties. One important object is to clear everything which might engender suspicion and distrust of the tribunal and so to promote the feeling of confidence in the administration of Justice so essential to the social order and security, 6 Lah. 396, followed in 30 Cr. L.J. 129=113 Ind. Cas. 321; 28 Cr. L.J. 787=104 Ind. Cas. 227; 21 Cr. L.J. 504=56 Ind. Cas. 664; 22 Cr. L.J. 726=64 Ind. Cas. 28; 26 A.L.J. 1250=29 Cr. L.J. 750=110 Ind. Cas. 686. The question is not whether the belief is reasonable or unreasonable but whether it exists or not, though the only way of deciding whether it exists or not is to see whether it might reasonably be expected to exist in a person of the standard of intelligence and honesty common in the class to which the accused belongs, 27 Cr. L.J. 835=95 Ind. Cas. 755, followed in 28 Cr. L.J. 188 (2)=99 Ind. Cas. 860 (2); See also 29 Cr. L.J. 620 (1)=109 Ind. Cas. 812 (2). Next in importance of deciding a case fairly and impartially is the importance of conducting oneself in such a manner as to inspire in the minds of the parties a confidence that nothing but absolute justice would be done to them. And if by reason of the words or conduct of a Magistrate or Judge before whom a case is pending, any party reasonably apprehends that there is a bias against him in the mind of the officer concerned, it would be expedient in the ends of justice to transfer the case from his file although there may not be actual bias, 23 C. 709; 25 C. 727; 20 Cr. L.J. 566=52 Ind. Cas. 54; 35 A. 5. Although the facts alleged do not show bias, or prejudice in the mind of the Magistrate yet if they are such as is likely to raise a reasonable apprehension in the mind of the accused that he is not likely to have a fair and impartial trial, it is advisable to order a transfer, 12 A.L.J. 736; 19 A. 64; 35 A. 5; 28 C. 297; 25 B. 179; Weir II. 678; 21 Cr. L.J. 504=56 Ind. Cas. 664; 25 Cr. L.J. 590=81 Ind. Cas. 78; 25 Cr. L.J. 638=81 Ind. Cas. 126; 29 Cr. L.J. 750=110 Ind. Cas. 686. To decide what is reasonable, regard must be had to the degree of intelligence possessed by the accused, 3 Lah. 443. It is difficult to lay down any hard and fast rule under which a transfer should be made, for the circumstances of one case might differ from those of another. The principle underlying the decisions of the various cases goes to establish that if there are circumstances in a case which raise a reasonable apprehension in the mind of the accused person that he would not receive fair dealing at his trial, the case should be transferred to a calmer atmosphere, 5 Pat L.T. 63=25 Cr. L.J. 590=81 Ind. Cas. 78; 15 Cr. L.J. 543=24 Ind. Cas. 951; 33 A. 5. It is one of the elementary principles of administration of justice that a judicial Officer who is called upon to decide a matter of controversy must exercise his own independent judgment after hearing the parties concerned. It is the privilege as well as the duty of the Presiding Officer of a Court of justice to form his own opinion on the question for decision before him and to act accordingly. He ought not if it were, to mortgage his mind to another officer and to seek instructions from the latter whenever he is called upon to decide a difficult or important question. A magistrate who does so abdicates his proper functions and discloses a lamentable lack of sense of responsibility. Both the Subordinate Magistrate who consults his superior and the superior Magistrate in advising him in connection with judicial matters in which orders have to be passed by the trying Magistrate himself, though acting with the best of intention cannot be deemed to have acted properly and such conduct was certainly calculated to raise in the mind of the accused a reasonable apprehension to bring the case within the rule laid down in *Seargent v. Dale* which is regarded by the Courts in England and India as the leading authority on the subject of transfer of cases, 9 Lah. 537 at 542. The use of strong language by a Court is never calculated to satisfy the litigant public before it. An officer is sometimes bound to feel strongly on particular occasions but as soon as he expresses himself strongly he gives himself away and if he raises by his language an apprehension in the mind of a party that an officer is prejudiced he has only himself to thank. Besides, a calm state of mind is absolutely essential for the disposal of all cases, 47 A. 233. Transfers ought, in principle to be very difficult to obtain because nothing so undermines the feeling of responsibility of Magistrates and their own self-respect in the adjudication of cases as ordering transfers from their files when they are once in possession of a case. But on the other hand, when it is found that there is a degree of association between the Magistrate and one or other of the parties to a case and one of the parties may have some financial hold over the Magistrate, it is undesirable to have the

case adjudicated by that Magistrate, 21 Cr. L.J. 543=58 Ind. Cas. 923. The High Court while making an order in a transfer application cannot take into consideration the effect its order would have on the authority and reputation of the officer concerned. The High Court will not transfer the case merely in deference to the susceptibilities of the accused. The application for transfer must be based on the ground that the applicant will not have a fair and impartial trial, and the apprehension must be shown to be reasonable, 10 C.W.N. 431; Weir II, 578; 36 A. 239; 10 Cr. L.J. 244=3 Ind. Cas. 88. The mere fact that a case against a Hindu of desecrating the tomb of a Mahomedan saint is tried by an Honorary Mahomedan Magistrate will not give a reasonable cause for apprehension that he will not have a fair trial. An intolerable position would arise if it were open to any accused person in a case of communal or quasi communal nature to object to a Hindu Magistrate trying the case merely because the accused happens to be a Mahomedan or *vice versa*, 28 Cr. L.J. 893=105 Ind. Cas. 226. It is not sufficient that the accused apprehends that he will not have a fair trial but he must satisfy the Court by clear and unimpeachable evidence that the trying Magistrate has by sure personal conduct rendered himself unfit or is unlikely to give the accused a fair trial, 28 Cr. L.J. 73=89 Ind. Cas. 105; see also 28 Cr. L.J. 902 (1)=105 Ind. Cas. 230 (1); 28 Cr. L.J. 898=105 Ind. Cas. 626; 27 Cr. L.J. 335=95 Ind. Cas. 755. Decided cases seem to suggest that the right of transfer is to be governed by what the accused thinks are his prospects of securing a fair and impartial trial and not as to whether prejudice exists or not in the mind of the trial Magistrate. 29 Cr. L.J. 750=110 Ind. Cas. 686. It is difficult to follow this reasoning. It is for the High Court to satisfy itself that on the facts disclosed there is a reasonable apprehension of the accused not having a fair trial. The law laid down in, 36 A. 239, after a full and exhaustive review of all the authorities is certainly in consonance with the general principles of law and the meaning and spirit of this section, otherwise the discretion of the High Court would be fettered and controlled by the opinion of the accused, 18 Cr. L.J. 670 at 671-72=40 Ind. Cas. 318. See 29 A.L.J. 1250=29 Cr. L.J. 229=107 Ind. Cas. 160; 10 Lah. 223. What would amount to reasonable apprehension would depend on circumstances of each case and should be decided with reference to the incidents of the case and the surrounding circumstances. In determining whether the application is reasonable, it is the duty of the Court to place itself in the position of the accused and consider the facts and circumstances attending his position. Abstract reasonableness ought not to be the standard, 33 C. 1183. Confidence in the administration of justice is an essential element in good Government, and a reasonable apprehension of a failure of justice in the mind of the accused should be taken into consideration on an application for transfer, 36 C 904. The Court in considering whether the apprehension of the accused is reasonable, will have to try and place itself in the position of an accused person and look at the matter from that point of view. The matter does not depend on the way in which the Judge would regard it himself, 39 C.L.J. 330=25 Cr. L.J. 934=81 Ind. Cas. 560. Where a Magistrate commenced the trial of a case on a gazetted holiday at the request of the Police Officer and examined all the witnesses for the prosecution on the same day, it was held that that fact was sufficient to create a reasonable apprehension in the mind of the accused that he will not have a fair and impartial trial, 29 Cr. L.J. 291=107 Ind. Cas. 779. So also where a magistrate receives private communication from parties or their Counsel in pending cases, 30 Cr. L.J. 1043 at 1049. There is no rule of law against a pleader appearing in the Court of his father, the Presiding Officer, and the mere fact that the son of the Magistrate appears as a pleader in a case before him cannot be urged as a valid ground for transfer of the case 28 Cr. L.J. 440=85 Ind. Cas. 56. If a case was to be transferred on every occasion on which a Magistrate several years before had rubbed shoulders with somebody who was either a complainant or a respondent or an Advocate in the case, the whole of the judicial work in this country would come to an end, 30 Cr. L.J. 522=115 Ind. Cas. 541. But the Calcutta High Court in 26 Cr. L.J. 1183=83 Ind. Cas. 607, held that it was undesirable that a member of the legal profession should practice in a Court presided over by a near relation and where one of the practitioner's engaged is a near relation of the presiding Magistrate, the case ought to be transferred to some other Magistrate. The position of an accused person must always be one of anxiety and suspense and it is not right that the painfulness of such a position should be enhanced by anything that could suggest to

him that his guilt is a foregone conclusion in the mind of the Magistrate who is to try him. The accused or his Counsel should not be put to the necessity of removing any impression from the Court which is not based on any evidence in the trial. It is important that all parties should have confidence in the tribunal before which they appear. It is also important that nothing should be done to encourage any want of confidence when there is no sufficient foundation for that want of confidence 6 Bom L.R. 856. There is a tendency on the part of accused persons to come up to the High Court for a transfer whenever there is an order passed by the trying Court adverse to them but such an order passed *bona fide* even though mistaken or erroneous in the exercise of his jurisdiction can be no ground for a transfer but it will be otherwise if the Magistrate had acted upon information outside the record or acted otherwise irregularly which would naturally raise a reasonable apprehension in the mind of the accused, 30 Cr. L.J. 728 at 731=117 Ind. Cas. 213. It is inadvisable for a Magistrate to offer a seat on the dais while he is trying a case, to a private person more especially if he is interested in the case. It is unfortunate for Judges and Magistrates to invite their friends to come to Court while the Court is sitting and give them seats on the dais. The practice is one that should be discouraged for a Court of Law is not a place of amusement. A Magistrate will be ill-advised in receiving visits from the parties before him, as by so doing, he lays himself open to an imputation which no doubt may not contain a grain of truth. Judicial officers should be careful to avoid the opportunity of having such imputations made against them. Where a Magistrate trying a case has been acting indiscriminately in the manner stated above, it will certainly give rise to a reasonable apprehension of not having a fair trial and it is desirable that the case should be transferred to some other Magistrate, 27 Cr. L.J. 498=93 Ind. Cas. 862. The trying Magistrate accepting in ignorance the hospitality of the complainant's son in a case before him will raise a reasonable apprehension in the mind of the accused that he will not have a fair and impartial trial before the Magistrate, 27 Cr. L.J. 565=94 Ind. Cas. 133. The apprehension that a Subordinate Magistrate will be influenced by the ill-will which his superior Magistrate bore towards an accused is no ground for transferring a case outside a sub-division. To allow such transfers would, as observed in 10 C.W.N. 441=3 Cr. L.J. 379, be to encourage a distrust in the integrity and independence of the Magisterial Courts in this country which would amount to a serious evil, 27 Cr. L.J. 802=95 Ind. Cas. 466. See also 9 Cr. L.J. 251. Unless some cause is shown for believing that a Magistrate is likely to be prejudiced or influenced by any improper motive in the decision of the case, the High Court will support the Magistrate trying the case. It is highly improper by a transfer of the case by the High Court to throw a gratuitous insult on the Magistrate, Ratanlal 323. Granting bail in a non-bailable offence is a matter of discretion with the Court and failure to grant bail is no ground for transferring the case to another Court, 27 Cr. L.J. 859=95 Ind. Cas. 939. The mere fact in another case on other evidence the Court may have come to a particular conclusion is not by itself sufficient ground for a transfer, 10 Cr. L.J. 244=3 Ind. Cas. 88 where 1 C.W.N. 426 is followed. Opinion expressed in a cross case on the evidence judicially recorded is not *ipso facto* a sufficient ground for transfer 29 Cr. L.J. 589 (1)=109 Ind. Cas. 605; 28 Cr. L.J. 769=110 Ind. Cas. 861; 33 A. 583; 36 C. 904. A case should not be transferred where the apprehension in the mind of the accused that he will not have a fair and impartial trial is created by the accused himself in casting grave aspersions on the character of the trying Magistrate in the transfer application itself, 27 Cr. L.J. 939=96 Ind. Cas. 395. Granting of unnecessary adjournments on several occasions for enabling the complainant to appear is no ground for transferring a case, 27 Cr. L.J. 1022=96 Ind. Cas. 878; while prompt disposal of a criminal case is a matter of importance it is equally even of greater importance to pay proper attention to the procedure prescribed by law so as to ensure on the one hand a fair trial to the accused and at the same time to leave no loophole for any failure of justice resulting from the defects of procedure, 29 Cr. L.J. 769=110 Ind. Cas. 801. When personal allegations are made against a trying Magistrate for a transfer of a case pending before him such allegations are to be clearly established before the case is transferred, Ratanlal 590. Where a Magistrate had interested himself in a case pending before him in the way of obtaining a settlement by the parties, it was to the interest of both parties and also fair to the Magistrate himself that he should not hear the case, 47 A. 411 where 18 C. L. J. 150=14 Cr. L.J. 602=21 Ind. Cas. 474 is followed;

26 Cr. L.J. 1317=89 Ind. Cas. 261. The fact that the Magistrate of the District may be cited as a witness for the prosecution in a case tried before another Magistrate in the same District will not afford a valid ground for transfer of the case as it will not prejudice the accused in any way, 27 Cr. L.J. 344=92 Ind. Cas. 836. There is no clear law as regards the procedure in counter-cases, a defect which the Legislature ought to remedy. It is a generally recognized rule that counter-cases should be tried in quick succession by the same Judge who should not pronounce judgment until the hearing of both cases is finished. This precludes the danger of an accused being convicted before his whole case is before the Court and also prevents there being conflicting judgments upon similar facts. But at the same time the rule involves obvious difficulty. It seems to infringe the fundamental principle that the Court must not import any facts into a case which are not to be found on the record.....The only way in which such a procedure can be justified is by setting up a fiction that the case and counter-case are really one and this fiction should be made a reality by statute.....But whether there be a statutory enactment or not the point remains, that for practical purposes a case and its counter are one, 1929 M.W.N. 883 at 884. Counter-cases should be tried simultaneously and contemporaneously. Cross-complaints should ordinarily be disposed of by the same Magistrate, 29 Cr. L.J. 934=111 Ind. Cas. 854. But they should be dealt with wholly separately from each other, each on its merits and upon facts and circumstances appearing therein; judgment in both cases should be pronounced, if possible, after both the trials are completed at one and the same time, 23 C.W.N. 437=26 Cr. L.J. 65=83 Ind. Cas. 625; 29 Cr. L.J. 1059=112 Ind. Cas. 563. The Court ought to keep the evidence in each case separate and deliver separate judgments, 28 Cr. L.J. 254=99 Ind. Cas. 126. But see the observations in 1929 M.W.N. 883 at 884 given above. In the absence of any relevant procedure to be followed in the Code, no definite law could be laid down as to procedure when there are two counter-cases between the same parties. Each case has to be decided according to its requirements. Whether the accused in one case should be allowed to go on with the counter-case in which he is the complainant or should not be compelled to go with his case before the case against him is finished are considerations which should be decided by the Court in the circumstances of each particular case, 49 C.L.J. 383 following 42 C.L.J. 83. A case and counter-case arising out of the same affair should always, if practicable be tried by the same magistrate as no Court can grasp the real facts unless it tries both cases; when the charge against one of the contending parties is triable by the Magistrate but the one against the other party is triable by the Court of Session the proper procedure is to commit both the cases to the Court of Session, 1929 M.W.N. 881. The Code is silent with regard to the procedure to be adopted in the trial of counter-cases and it should not be laid down as a rigid rule of law that a particular course should be adopted, 26 Cr. L.J. 1615=90 Ind. Cas. 719; and if a Magistrate in trying counter cases makes an emphatic pronouncement in one case so as to prejudice the defence in the counter-case on the merits, it will afford a good ground for the transfer of the case left undisposed of to some other Magistrate, 30 M. 233; 9 M.L.T. 162=1910 M.W.N. 735=11 Cr. L.J. 702=8 Ind. Cas. 721; 13 Cr. L.J. 532=15 Ind. Cas. 804 but see 1 C.W.N. 425; 6 Bom. L.R. 1092 and also 33 A. 593 where it was held that the fact that a Court before which two cross cases of rioting were tried, expressed opinions to some extent unfavourable to the accused in the second case is no ground for holding that the court was incompetent to try the second case. The fact that in a similar case the Magistrate came to a particular conclusion on the evidence in that case is no ground for a transfer, 36 C. 934. The principle maintained is that the accused has no reasonable ground for apprehension that he will not have a fair trial merely because the Judge in the former proceeding arising out of a counter-case to the present case has expressed certain views upon the evidence in that case as to which of the two versions is correct. The basis of the ruling is that Judges are presumed to be up-right men who will approach each case from the point-of-view of that case alone and not permit their minds to be affected in any way by anything that has gone before that case. It cannot be believed that Judges are so easily prejudiced that because one incidental part of the case before them has been decided in a previous case they will shut their eyes entirely to anything that may be alleged in favour of the accused in a subsequent trial, 1917 Pat. 37=1 Pat. L.J. 377=13 Cr.L.J. 53 at 95=37 Ind.

Cas. 159. The fact that the trying Magistrate in his executive capacity is subordinate to the District Magistrate who has taken a strong view of the case is by itself no ground for a transfer of the case, 22 Cr. L.J. 257=60 Ind. Cas. 657. The fact that the District Magistrate took action against the accused, being satisfied that a *prima facie* case was made out which ought to be inquired into by the Criminal Court and even sent a note to the trying Magistrate asking him to inform him whether the accused was charged or discharged, is no ground for a transfer of the case outside the District unless it was proved that the District Magistrate was influencing the result of the case directly or indirectly, 28 Cr. L.J. 190=89 Ind. Cas. 862. Where a Hindu Mahomedan dispute is involved in a criminal case, it is desirable that the District Magistrate himself should inquire into it, 26 Cr. L.J. 1056=87 Ind. Cas. 976; 16 Cr. L.J. 213=27 Ind. Cas. 837. See also 27 Cr. L.J. 1391=98 Ind. Cas. 607 and in such a dispute an European Magistrate, if possible, should try the case, 28 Cr. L.J. 599=102 Ind. Cas. 556.

Some question of law of unusual difficulty is likely to arise.—In 7 Bom. L.R. 637, the Bombay High Court transferred a case on the file of a Magistrate on the sole ground that it was quite possible that some questions or several questions of law of unusual difficulty may arise, and directed the commitment of the case to the Court of Session remarking that the trying Magistrate is as competent as any other Magistrate in India to try the case. If a Bench of Magistrate, before whom a case is pending is of opinion that the case involves difficult questions of law which cannot be properly tried by the Bench, it should move the matter officially and not leave it to a private party to move for a transfer of the case, 29 Cr. L.J. 124=106 Ind. Cas. 716.

View of the place is necessary: Sub-section (1) (c).—Ss. 539B and 556, *infra* permit a Magistrate to view the place in which an offence is alleged to have been committed and such inspection should be made for the purpose of enabling the Magistrate to understand better the evidence which is laid before him and it must be strictly confined to that and he should then invariably be accompanied by both parties or their representatives, 19M. 253 at 266; 45 M.L.J. 279=18 L.W. 113; 37 C. 340; 19 A. 302.

Tend to the general convenience of parties or witnesses: Sub-section (1) (d).—When a complainant chose to go to a particular District and as the accused also wished to be tried there only, it was held that the High Court could under this section direct that the trial might be proceeded with before the Sessions Judge of that District although the offence was alleged to have been committed in another District, 2 Bom. L.R. 394, and in 8 C.W.N. 75, when a transfer was made at the instance of the accused the complainant pleaded poverty and alleged that the transfer would subject him to unnecessary expense which he could not afford to incur, the Court directed that the expense of the witnesses should be borne by the Crown; convenience of the parties is one of the chief considerations for a transfer, 8 C.L.J. 59. For purposes of transfer under this section it is the convenience of the accused rather than that of the complainant that ought to be taken into consideration, 27 Cr. L.J. 563=94 Ind. Cas. 131.

Order expedient for the ends of justice or required by some provision of law: Sub-section (1) (e).—This clause refers to the expediency for the ends of justice and not to expediency from any political point-of-view. It is the duty of the High Court to have due regard for the importance of securing the confidence of the public generally, and of every section of the community interested in the result, in particular in the fairness and impartiality of the trial that is going to be held; but it is equally its duty to see that no undue regard is shown to abnormal susceptibilities of any section of the public from an apprehension of ulterior consequences. If that were done it would result in the obvious injustice of showing greater consideration to the less peaceful than to the more peaceful, 25 C. 727 at 731. The importance of having a fair and impartial trial ranks very much higher than the convenience of parties and witnesses and the convenience of the Court in having a local inspection, *ibid* at 735. See also 23 C. 493.

"Courts are established for the due administration of justice and they must be prepared to make every sacrifice to bring it about. Delay, expense, inconvenience or public policy are nothing before it. Everything must be done subject to the one object of rendering

justice". The fact that an accused person finds it unable to secure the attendance of a competent practitioner of the locality for his defence on account of the influence wielded by the complainant was held to be a good ground for transfer, 26 Cr. L.J. 1272=88 Ind. Cas. 1049. The fact that the complaint is the out-come of communal feeling at the locality and the inability of one party to produce their witnesses before the Court and give evidence without a certain amount of fear as regards the safety of the witnesses at the hands of the opposite party, was held to be a sufficient ground for a transfer of the case from the Magistrate of the particular locality trying the case, 27 Cr. L.J. 1391=98 Ind. Cas. 607 (2). Counter cases should be tried simultaneously and contemporaneously. But they should be dealt with wholly separately from each other, each upon its own merits and upon facts and circumstances appearing therein; the judgment in both cases, should if possible be pronounced at the same time after both the trials are over, 28 C.W.N. 437=26 Cr.L.J. 65=83 Ind. Cas. 625. The Code is silent with regard to the procedure to be adopted in such circumstances and it should not be laid down as a rigid rule of law that a particular course must be adopted in all cases, 26 Cr.L.J. 1615=90 Ind. Cas. 719. See the observations in 1929 M.W.N. 883 at 884 in this connection. If a Magistrate in trying counter-cases makes an emphatic pronouncement in one case on the merits so as to prejudice the defence of the accused in the other case it will afford a good ground for the transfer of the case left undisposed of to some other Magistrate for the ends of justice, 30 M. 233; 13 Cr. L.J. 532=15 Ind. Cas. 804; 4 C.W.N. 824. In the absence of any relevant procedure in the code no definite law could be laid down as to the procedure to be followed when there are two counter-cases between the same parties. Each case has to be decided according to its requirements, whether the accused in one case should be allowed to go on with the counter-case in which he is the complainant or should not be compelled to go on with his case before the case against him is finished are considerations which should be decided by the Court in the circumstances of each particular case, 49 C.L.J. 338 following 42 C.L.J. 83. Where a Magistrate was present at a search made during police investigation and in all probability he came to know of some facts in connection with the case it is expedient that the case should be tried by some other Magistrate, 5 C.W.N. 864 see also 27 Cr. L.J. 844=95 Ind. Cas. 764. The fact that a Sessions Judge has heard and disposed of the appeals of several convicted persons accused of a particular dacoity, will not necessarily debar him from hearing the appeals of other persons jointly accused of the same dacoity but were arrested and convicted subsequently, 22 Cr. L.J. 416=61 Ind. Cas. 656.

See the provisions of Ss. 191, 487 and 556 *infra* where a transfer is necessitated by the provisions of the Code.

Sub-section (1), (11); Any particular case or appeal.—This section which clothes the High Court with power to transfer any case from one Court to another controls Ss. 195 (3), 476A and 476B, *supra*, 26 Cr. L.J. 736=85 Ind. Cas. 423. The High Court can transfer only appeals actually existing. It cannot direct that appeals in future shall when filed not be heard by the authority to which they are presented, Ratanlal 973. A case which has not been validly instituted before an inferior Court cannot be transferred by the High Court to another Court so as to confer jurisdiction on the latter Court to try the case, 17 L.W. 69, following 9 A. 191 (P.C.); 3 Bom. L.R. 121. The High Court can transfer under this section an appeal from one district to another district. The grounds stated for transferring an appeal to the High Court in 6 M. 32 at 35 were as follows: "The public mind has for several months been in a state of abnormal excitement about the convicted person. The most conflicting views have been entertained as to his conduct and character by various officials as is apparent from the reports published from time to time in the public journals. He is an old servant of Government who had been holding a very important post. And it seems desirable on all these accounts that the case should be transferred to the High Court, where it will have the advantage of being heard before two Judges of the highest tribunal, instead of by the single Judge of the subordinate tribunal, whose decision as a Judge of an Appellate Court could not be expected to have the same weight as that of the High Court. The transfer is likely to tend to the quieting of the public mind and to be conducive to the interests of justice in that and other ways". The High Court can transfer a case on the file

of a Village Panchayat Court under this section read with S. 5, *supra*, 49 A. 189, following 48 A. 167; 48 A. 23.

Sub-section (I), (III). May be transferred to and tried before itself.—The High Court can transfer an appeal filed in the Sessions Court to itself for hearing, 6 M. 32; Katanial 110.

Sub-section (2).—This sub-section deals with transfer to itself from Courts other than the Court of a Presidency Magistrate, and prescribes the procedure to be followed in the trial of such cases by the High Court, which is to be the same as that which would have been followed by the lower Court. The exception is that continued in S. 267, *supra*, which lays down that the trial before the High Court is to be by Jury.

Sub-section (3).—This sub-section enables the High Court to pass an order for the transfer of a case on a reference made to it by an inferior Court, or on the application of a party or it may act *suo motu*. The Crown, the accused, and the complainant are the only persons entitled to apply under this section. A person who merely lodges information and who is not a complainant in the case has no *locus standi* to apply under this section, 4 Pat. L.J. 656=20 Cr. L.J. 649=52 Ind. Cas. 424 5 Bom. L.R. 869. A person at whose instance a case is instituted, say, by the police, is a party interested within the meaning of this section. But he is not a complainant within the meaning of sub-section (8) of this section. If the Legislature intended that the words "party interested" should have the same meaning as the word "complainant" occurring in sub-section (8) there is no reason why different words are introduced in the two sub-sections. Therefore the right of a person interested to apply for a transfer is subordinate to that of the Crown, i.e., if the Public Prosecutor or other person conducting the prosecution on behalf of the Crown is unwilling to have the case transferred, the person at whose instance the case was launched, has no right to get the case transferred, 26 Cr. L.J. 1249=88 Ind. Cas. 993 where 4 Pat. L.J. 656=20 Cr. L.J. 649=52 Ind. Cas. 424, is followed. The expression 'party interested' occurring herein does not necessarily mean only a complainant i.e., a person presenting a complaint as defined in S. 4 (1) (h) *supra*, but may include a police informant. But where the conduct of a case is in the hands of a Public Prosecutor and where there is a conflict between the Public Prosecutor and the party interested the right of the former must prevail as the Public Prosecutor and not the informant who is primarily responsible for the conduct of the case, 57 M L J 547=30 L W, 640 following 26 Cr. L J. 1249=88 Ind. Cas. 993 and 6 Lah. 541; see also 21 Cr L.J. 641=57 Ind. Cas. 657.

Sub-section (4)—This sub-section lays down the manner in which an application under this section is to be made by a private party, and is in accordance with the decision in 1 C 219 (F.B.). Every application is to be by motion supported by an affidavit or affirmation. The Legislature undoubtedly intended to protect an accused person from the ordeal of examination as a witness and to render him incapable of making false statements on oath or otherwise as long as his case is *sub judice*, 19 A. 200 at 201. It is an unusual practice for Courts to receive affidavits or statements on oath of the accused persons for the purpose of applications for transfer and the practice even if it be legal is not altogether a convenient one, and it would be a better practice certainly, if such affidavits setting forth the grounds of transfer are made by persons other than the accused, 28 A. 331 at 332 where 19 A 200 is followed. The affidavit of an accused person cannot be accepted as a proper one, as no oath could be administered to him, and no prosecution for perjury will lie with regard to the allegations in his affidavit, Weir II, 686. It had been an invariable practice of the Madras High Court not to accept the accused's affidavit in support of application for transfer, but having regard to the provisions contained in the new s. 539A, *infra*, a practice has now sprung up of allowing the accused to swear to his own affidavit in support of his application for transfer and such affidavits are now received by the High Court without any objection being raised. It was held in 3 Lah. 46 that the prohibition contained in S. 342, *supra*, evidently referred to the statement made by the accused in answer to questions put to him by the Court and did not preclude the accused from making an affidavit in support of an application under this section. An application for transfer is not a part of the defence of an accused person and statements made by an accused in an affidavit in support of a transfer

application do not enjoy the immunity conferred by S. 342, *supra* upon answers to questions put to accused by the Court trying the case. This view taken in 3 Lah. 46 where the Allahabad view was considered and disented from and was approved in 6 Lah. 34; see also 28 Cr. L.J. 168=99 Ind. Cas. 600; but in 29 Cr. L.J. 336 at 339=103 Ind. Cas. 124 it was held that there can be no doubt whatever according to the practice of the Allahabad High Court an accused person can legally tender his own affidavit in support of an application for transfer whether the affidavit is tendered and application made in a subordinate Court or on the High Court and he can be prosecuted in regard to any false statements made in the affidavit. According to the well recognised practice which prevails wherever the members of the English Bar practise, Counsel should never file an affidavit in a case in which he appears professionally. The reason is obvious. To begin with it hampers with his freedom of action as an Advocate. Besides he gives up his dignified position of detachment as an Advocate and lowers himself to the level of a witness who has to support the case of a particular party by giving evidence on his behalf. A Counsel when giving an affidavit does not exercise proper judgment as a Counsel and he is ill-advised in adopting the course, 29 Cr. L.J. 220=107 Ind. Cas. 103. No affidavit is necessary when an application for transfer is made by the Advocate General.

Sub-section (5)—Before the amendment, the High Court's power to direct the accused to execute a bond for payment of costs to the person opposing the application was conditioned on the conviction of the accused. By the new amendment an order can be made without any reference to the accused being convicted in the case.

Sub-section (6)—This sub-section enacts that 'twenty-four hours' notice in writing to the Public Prosecutor is necessary before hearing the application made by an accused person; such notice may not be necessary when the application is made by a complainant.

Sub-section (6A) is new and empowers the High Court to award reasonable costs in favour of the person opposing the application when dismissing the same as frivolous or vexatious. This sub-section enables the Public Prosecutor to claim costs in the High Court.

Sub-section (7).—S. 197, *supra*, refers to prosecution of Judges and Public Servants, and, under that section, the Government is empowered to determine the Court in which the trial is to be held.

Sub-section (8).—This sub-section has been redrafted and considerably modified to benefit the accused, and to enable him to move the High Court for a transfer of the case when he reasonably apprehends he will not have a fair and impartial trial. The intention of the Legislature however is not that the provision may be abused, and trial wantonly protracted, 29 Cr. L.J. 935=111 Ind. Cas. 853. An application for the adjournment of a case can now be made at any stage in the course of an inquiry or trial; 57 M.L.J. 763 at 765=30 L.W. 883, no discretion is allowed to the Magistrate and he is bound to adjourn without imposing any conditions, 30 Cr. L.J. 1043=119 Ind. Cas. 327. Before the amendment, the accused person was to notify his intention to apply for transfer before the commencement of the hearing, and the Court was bound to adjourn the case only before the accused was called to enter on his defence; before the amendment a Magistrate may record the whole of the prosecution evidence before adjourning the case, but he has no such power now. The reference in this sub-section to 'inquiry or trial' is clearly intended to apply to those inquiries or trials which are specially referred to in the earlier portion of the Code and it cannot apply to such things as the recording of a complaint which is not the intention of the law. It may be that S. 526 applies also to certain cases of quasi-civil nature such as inquiries into disputes about immoveable property but that does not in any way touch the question, 5 Pat. 223. 'Inquiry or trial' cannot therefore refer to the hearing of a transfer application under S. 523, *supra*, by a District Magistrate and this obviously cannot have been the intention of the Legislature. A District Magistrate hearing an application for transfer of a case pending before a Subordinate Magistrate is not holding any inquiry into the guilt or innocence or into the rights and liabilities of a party. The present law even at the risk of having its solicitude abused provides parties with ample opportunities of staying proceedings and unless it would not be right to add to those opportunities by accepting

an interpretation of this sub-section by insisting a stay of the hearing of the transfer application by the District Magistrate to move the High Court to restrain the hearing of the transfer application by the District Magistrate 5 Pat. 229; see also 6 Pat. 553, which took the same view. In 6 Pat. 553 at 555, it was held that this sub-section applies only to cases arising out of an offence under the criminal law and not to proceedings of a civil nature under S. 145, *supra*, where we have neither the Public Prosecutor nor complainant or the accused to apply for a transfer and so such proceedings do not require the exercise of the very summary power of which this sub-section confers. See also 50 C.L.J. 331, to the same effect. Similarly when an application is made under this sub-section to postpone the hearing of security proceedings under S. 107, *supra*, the Court is not divested of all jurisdiction to pass emergent orders under S. 117 (3), *supra*. If the intention of the Legislature was to oust all jurisdiction it would be of no use to legislate that when immediate measures are necessary the Court could without deciding the case pass an urgent order until the final disposal of the case under S. 117 (3) *supra*. Therefore it is unnecessary for the Court to stay all further proceedings completely, 26 A.L.J. 398 = 28 Cr. L.J. 173 = 99 Ind. Cas. 605. When an application is made for postponement of the inquiry or trial, its jurisdiction does not entirely cease and it can pass any emergent order which the law authorises it to pass, 29 Cr. L.J. 448 = 108 Ind. Cas. 563. In this sub-section the expression "before the accused is called on for his defence" which occurred before the amendment is now omitted. Therefore it is the duty of the Court when the accused notifies his intention to apply for a transfer to postpone the hearing at once. The adjournment cannot be refused on the ground that it was made after the trial had begun as such application can be made in the course of the trial and must be granted. To refuse an adjournment for the purpose of moving the High Court for a transfer is contrary to the terms of the section and to deny the accused the absolute right conferred on him by the statute and such refusal vitiates the whole proceedings, 57 M.L.J. 763 = 30 L.W. 883. But the pronouncing of the judgment is not part of the trial which is over before the judgment is pronounced. When an intention to apply for a transfer was expressed after the arguments were closed but before the pronouncement of the judgment, the Magistrate's refusal to adjourn was not a violation of the imperative provision contained in this sub-section as the trial had been closed before the application was made, 52 M 335. The Magistrate is not entitled to record any evidence after an application is made for an adjournment to move for a transfer, but should at once adjourn the case, 22 A.L.J. 430 = 26 Cr. L.J. 139 = 83 Ind. Cas. 699, where it was held that it was the duty of the Court under the amended Code to postpone the case at once. The language of the sub-section is imperative. See also 9 Lah. 539; 29 Cr. L.J. 536 = 107 Ind. Cas. 360, but the restriction as to the application being made before the hearing of an appeal still exists. Subsequent proceedings after the application for adjournment will certainly be void, 8 C.W.N. 77; 23 C. 211; 31 C 715; 33 C. 1183; 9 Lah. 537; 22 Cr. L.J. 717 = 63 Ind. Cas. 877; 10 Cr. L.J. 570 = 4 Ind. Cas. 379. See 33 M 701, as to the meaning of the words "commencement of hearing" which now applies to appeal only. There seems to be some misapprehension at the Bar as regards the provisions of this sub-section as to the granting of the adjournment contemplated. It seems to be thought that the postponement could be had in two instalments, one in order to apply to the local authorities, District Magistrate etc. for transfer, and another time to apply to the High Court for transfer. It is overlooked, however, that the sub-section in making it imperative to adjourn the proceedings is confined to this section only and not to S. 528, *infra*. To obtain an adjournment the accused has to notify his intention to apply 'under this section' and there is no compulsion to adjourn for every intention to apply for a transfer to any Court other than the High Court. A District Magistrate when moved under S. 528, *infra*, has power to withdraw any case or recall any case he has made over to any Subordinate Magistrate and this power he may exercise even at his own motion. S. 528, *infra*, does not impose any duty to adjourn the hearing on the trial Court. The reason is that the District Magistrate is on the spot and not at a distance like the High Court and therefore there would be no necessity to adjourn the hearing to move the District Magistrate who is on the spot. It is only when the intention is to apply to the High Court which is at a distance, there is a necessity to adjourn the hearing to enable the accused to cover the

distance and apply to the High Court. If an application is made, for an adjournment, it will be presumed that the application is to be made to the High Court and not to the District Magistrate and once a case has been adjourned and the accused has not taken advantage of it to move the High Court, he would not be entitled to a second adjournment. The intention of the Legislature is not that the provisions of this sub-section may be abused and the applicant be entitled wantonly to protract the trial in the first Court, 29 Cr. L. J. 935—111 Ind. Cas. 855. Application for transfer ought to be filed at the earliest opportunity after the occurrence of whatever facts and circumstances which are alleged as affording reasonable basis for such application. If an accused person notifies his intention to apply for a transfer of the case it is the duty of the Magistrate to adjourn the case so as to give the accused reasonable time to make the application for transfer. If after applying unsuccessfully to the High Court once, he again notifies his intention to apply a second time the Magistrate cannot refuse to adjourn the case and it is again bound to afford him a reasonable time, 1929 M.W.N. 503. Following this decision it has been held in several cases recently that the Magistrate is bound to adjourn a case even when the accused notifies his intention to apply for a transfer a second or even a third time as the language of this sub-section makes no such restriction and in some of the applications for transfer to the High Court the cases were transferred solely on the ground of the Magistrate's refusal to adjourn the case as required by law. If an accused person with materials in his hand for a transfer elects to sit quiet and allows the trial to proceed, and a charge is framed against him he has only himself to thank, 15 Cr. L. J. 536—24 Ind. Cas. 848; see also 17 C.W.N. 536; 14 Cr. L.J. 382—20 Ind. Cas. 142; 8 C.W.N. 910, 31 C. 715; 19 M. 375. When a party applies to a Magistrate under this sub section for the postponement of the hearing to enable him to make an application for transfer to another Court, it is highly improper for the Magistrate to hold an inquiry into the grounds of transfer himself, as such a course would naturally cause, apprehension in the mind of the party that he is not likely to have a fair and impartial trial, 27 Cr. L. J. 382—92 Ind. Cas. 884. Refusal by the Magistrate to adjourn the hearing is a sufficient ground for transfer from his file unless there was no intention whatever to move for a transfer, 20 Sind. L.R. 12, see also 26 A.L.J. 1321—29 Cr. L. J. 671—110 Ind. Cas. 223.

Sub-section (9).—This sub-section is new and it is enacted that a trial before the Sessions Court need not be adjourned if the Presiding Judge is of opinion that the applicant having had a reasonable opportunity of moving the High Court had failed to do so. As matter of practice Sessions cases are posted for trial for definite dates and adjournments are rarely granted or never granted.

526A. (1) *Where any person subject to the Naval Discipline Act or to the Army Act or to the Air Force Act is accus-*

High Court to transfer for trial to itself in certain cases.

ed of any offence such as is referred to in proviso (a) to section 41 of the Army Act, the Advocate General shall, if so instructed by the competent authority, apply to the High Court for the committal or transfer of the case to that High Court and thereupon the High Court shall order that the case be committed for trial to or be transferred to itself and shall thereafter proceed to try the case by jury.

(2) The Governor General in Council may, by notification in the Gazette of India, declare any officer to be the competent authority for the purpose of issuing instructions under sub-section (1) in regard to any class of cases specified in the notification.

This section has been newly added by Act XII of 1923 empowering the High Court to transfer to itself certain cases on the application of the Advocate General. See in this connection, 29 & 30 Vict. C. 109; 44 & 45 Vict. C. 58; 7 & 8 Geo. 5 C. 51.

official or demi-official letter from the District Magistrate as representing the Crown but by the Public Prosecutor moving in open Court for transfer under this section, 22 A.L.J. 1102 = 25 Cr. L.J. 367 = 84 Ind. Cas. 719.

Sub-section (2).—For purposes of this section all Presidency Magistrates are subordinate to the Chief Presidency Magistrate, *Mad. Cr. Rules of Pr. Rule 12*. A Magistrate who is subordinate to the Sub-divisional Magistrate is also subordinate to the District Magistrate for purposes of this section, 14 M. 399. A District Magistrate and a Sub-divisional Magistrate have co-ordinate authority over Magistrates subordinate to the latter; and therefore where Sub-divisional Magistrate refused to transfer a case, District Magistrate can entertain an application for transfer and also transfer the case; but in so doing he cannot examine the reasons given by a co-ordinate authority and find that authority to be wrong and has transferred or refused to transfer on insufficient grounds, 26 M 13; 130 Cr. L.J. 782 = 17 Ind. Cas. 414; 5 L.W. 372; 40 M. 791; 14 M. 399; see also 30 Cr. L.J. 654 = 116 Ind. Cas. 751. Under this section a Sub-divisional Magistrate has power to withdraw any case pending before a Subordinate Magistrate. But the section cannot be so read as to imply that after a District Magistrate has transferred a case from one file to the file of another Magistrate, a Sub-divisional Magistrate who is subordinate to the District Magistrate, has jurisdiction to nullify that order by ordering a fresh transfer of the case to his own file. There is a clash of jurisdiction and authority in a case like this and the order of transfer by the Sub-divisional Magistrate was *ultra vires* 47 A. 288. Where a competent Magistrate had transferred a case after hearing both the parties a superior Magistrate will not be acting properly in transferring the case to the Magistrate on whose file the case was at first without hearing the complainant, 1920 M.W.N. 767 = 12 L.W. 633 = 22 Cr. L.J. 199 = 60 Ind. Cas. 55. An Additional District Magistrate is subordinate to the District Magistrate for purposes of this section, 34 C. 918. An additional Chief Presidency Magistrate is subordinate to the Chief Presidency Magistrate who has power under this section to make an order withdrawing a case made over by the former to another Presidency Magistrate for disposal, 51 C. 820 where 40 M. 791 and 14 M. 399 are relied on and 26 M. 130 not followed. It is only after withdrawing a case pending before a Subordinate Magistrate, that a District Magistrate can pass orders in the case, 30 C. 449. The transfer of a case means the whole case. After the transfer of the case a Magistrate ceased to exercise any jurisdiction and had no power to issue warrants, 22 C. 893; 27 C. 979; 30 C. 449; 4 C.W.N. 242; 3 C.W.N. 490; 3 C.L.J. 87, but see 39 C. 119 which took a different view. Before a case is transferred the question has been often raised whether notice should be given to the parties concerned. There is nothing in the section as to the giving of notice but on the general principle, no order to the prejudice of a party should be made without hearing him; all the High Courts are agreed that notice should be given and an order passed without notice is liable to be set aside, 39 M.L.J. 714; 6 M.L.T. 14; 8 M.L.T. 222; 22 Cr. L.J. 199; Weir II, 691, 692; 22 B. 549; 21 Bom. L.R. 276 = 20 Cr. L.J. 320 = 50 Ind. Cas. 496; 6 Bom. L. R. 856; Ratanlal 590, 460, 655; 2 Pat. 233; 8 C. 393; 7 C.W.N. 114; 8 C.L.J. 241; 28 A. 421; 3 A. 749; 13 Cr. L.J. 32 = 13 Ind. Cas. 224; where such notice is not given before the transfer is made the order is liable to be set aside by the High Court on that ground, 51 M. 610; followed in 30 L.W. 401 = 1929 M.W.N. 255 = 30 Cr. L.J. 1043 = 119 Ind. Cas. 335; see 28 Cr. L.J. 517 = 102 Ind. Cas. 213 where it was held that though notice is not provided for by the section, it is generally given to the parties affected thereby so as to enable them to come forward and show cause why such transfer should not be made. Omission to issue a notice to the accused before ordering transfer is irregular, but not illegal, 23 Cr. L.J. 33 = 99 Ind. Cas. 70. The section is general and although as a rule of practice it is desirable that notice should be given, it cannot be said that the law is mandatory on the point and omission to do so is in itself no reason for setting aside the order of transfer, 2 Pat. 333; 6 Lah. 541. When a transfer is made *suo motu* by the Magistrate for administrative purposes no notice is necessary, 24 M. 317, 52 B. 151, following 24 M. 317 and 21 Bom. L.R. 276. An order of transfer made without giving notice to the parties cannot be said to be a final order and on sufficient grounds being shown against such transfer the case can be retransferred or transferred to some other Magistrate, 51 M. 610. Although sub-section (2) does not say that notice shall be given to the accused when an application for transfer that concerns him is made, the

practice of the Court seems to be to hold that it is advisable in the interests of justice that such notice should be given and a transfer made without notice is liable to be set aside. 30 L.W. 401=1929 M.W.N. 265=30 Cr. L.J. 1043=119 Ind. Cas. 235, following 6 M.L.T. 14; 8 M.L.T. 222; 51 M. 610; 28 M. 41.

Sub-section (4).—This sub-section is newly added and gives wider powers by way of recalling a case made over by him under S. 192 (2) and inquire into it himself.

High Courts' Power to interfere with transfer orders.—It is not the usual practice of the High Court to interfere with an order made under this section by a subordinate Court in the exercise of its jurisdiction under this section. Nevertheless it has power to interfere and will interfere when there are good reasons for interference with the order of transfer. The convenience of the Court must be regarded in considering the question whether a fair and impartial trial is likely to be had and when it is clearly made out that the accused will be prejudiced in the conduct of his defence by the order of transfer made by the lower Court, the High Court will interfere with such order of transfer, 29 Cr.L. J. 373=108 Ind. Cas. 329. It is imperative under sub-section (5) to record reasons for making the order of transfer and when an order is made without giving notice and without giving reasons it is liable to be set aside by the High Court, see 6 M.L.T. 14=1 Ind. Cas. 839; Weir II, 686; 16 Cr. L.J. 626=30 Ind. Cas. 450; 26 Cr. L.J. 221=83 Ind. Cas. 1005; 20 L.W. 394; 26 Cr. L.J. 221=83 Ind. Cas. 1005; but it was held in 34 C. 918 that the omission to state reasons is only an irregularity and is not a material ground for setting aside the order, see also 9 Cr. L.J. 310; 23 A. 421; 12 Cr. L.J. 437=11 Ind. Cas. 621; 11 Cr. L.J. 150=4 Ind. Cas. 1025; 5 Pat. 225.

Sub-section (6).—The power of transfer was limited before to the case of petty thefts which a Village headman was empowered to try under Regulation IV of 1821, 26 M. 394; 15 M. 84, but Regulation XI of 1816 is also included now. Trivial cases relating to abusive language and inconsiderate assaults or affrays before Village-headman can be transferred under this section and the hardship of parties moving the High Court for the transfer of such petty cases is removed now.

CHAPTER XLIV-A.

SUPPLEMENTARY PROVISIONS RELATING TO EUROPEAN AND INDIAN BRITISH SUBJECTS AND OTHERS.

This Chapter is new, and was added by Act XII of 1923 (Racial Distinctions). It contains provisions relating to European and Indian British subjects in cases in which Chapter XXXIII of the Code does not apply. Under this Chapter the accused might claim the status of European British subject with a view to a limited sentence, or with a view to the right conferred by S. 276, *supra*, of claiming a European Majority on the jury. Under this chapter it is for the accused to claim the status of European British subject, but if he fails to do so, his failure will not debar him from urging that the conditions mentioned in clauses (a) or (b) of S. 443 (1), *supra* exist. Those clauses refer not only to the status of the accused person, but to the status of the two persons; one of them cannot be the accused person, and the second clause neither, need be. It seems unreasonable that the omission of the accused person to avail himself of the right to claim the benefit of S. 528A concludes the matter. The right of appeal given to Local Government under S. 449 (1) *supra*, supports this view. What is therefore required is proof of conditions mentioned in S. 443, *supra*, and not evidence that any person concerned has preferred and substantiated a claim to particular status, 52 C. 347. The Chapter deals with cases not falling under Chapter XXXIII *supra*, and it makes it a condition precedent to the determination of the status of an accused person that he must assert his right to be tried as a person belonging to a particular nationality before the Magistrate to whom he is sent up for trial. It is the assertion of that claim which gives jurisdiction to the Magistrate to inquire into the matter and to give a finding thereon which, if adverse to the accused, may be challenged in the subsequent proceedings. If he fails to claim the privilege before the committing Magistrate, and consequently no inquiry and no finding is recorded, the claim cannot be put forward subsequently at the Sessions trial.

and S. 528B expressly debars him from asserting the claim at a later stage, 29 Cr. L.J. 721 = 110 Ind. Cas. 577. A Magistrate is not bound to ask an accused person who is apparently a European British subject whether he claims to be tried as such, so far as cases falling under this new chapter are concerned, 54 C. 1041.

From a consideration of S. 275, *supra*, and this chapter the following propositions may be deduced. (1) An Indian British subject claiming to be dealt with as such must put forward his claim before the Magistrate and this applies to all Magistrates including Presidency Magistrates. (2) If the Magistrate rejects the claim and tries the accused, from the sentence or order an appeal lies. This applies to the Presidency Magistrates also. (3) If the Magistrate rejects the claim and commits the accused, such claim may be repeated at the Court of Session, but not in the High Court exercising Ordinary Original Criminal Jurisdiction, the High Court not being a Court of Session within the Code. (4) If the Court of Session rejects the claim, and tries the accused, the decision, shall form a ground of appeal from the sentence or order passed. (5) If the claim is made before a Presidency Magistrate and rejected, and the accused committed to the High Court, there is no provision of law for putting forward the claim again and under S. 275, *supra*, he cannot claim for being tried by a Jury the majority of whom should be Indians or Europeans as the case may be. (6) When no such claim was put forward before the Magistrate the claim cannot be made before the High Court and S. 528B is a bar to the assertion of the claim in any subsequent stage, 51 C. 930 at 939.

528A. (1) *Where, in any case to which the provisions of Chapter XXXIII do not apply, any person claims to be dealt with as an European or Indian British subject, or where any person claims to be dealt with as an European (other than an European British subject) or an American, he shall state the grounds of such claim to the Magistrate before whom he is brought for the purpose of the inquiry or trial; and such Magistrate shall inquire into the truth of such statement and allow the person making it a reasonable time within which to prove that it is true, and shall then decide whether he is or is not an European British subject or an Indian British subject, or an European, or an American, as the case may be, and shall deal with him accordingly.*

(2) *When any such claim is rejected by the Magistrate and the person by whom it was made is committed by the Magistrate for trial before the Court of Session, and such person repeats the claim before such Court, such Court shall, after such further inquiry, if any, as it thinks fit, decide the claim, and shall deal with such person accordingly.*

(3) *When any Court before which any person is tried rejects any such claim as aforesaid, the decision shall form a ground of appeal from the sentence or order passed in such trial.*

This and S. 528B are new and hitherto have not formed the subject-matter of judicial interpretation. 529A enacts that no Magistrate of the second or third class shall inquire into or try an offence which is punishable otherwise than with a fine not exceeding rupees fifty where the accused is a European British subject who claims to be tried as such. The

question is when that claim is to be made. Reading the sections together it is clear that the Legislature intended that the claim to be tried as a European British subject should be made before the inquiry or trial actually commences. Therefore in a case where the accused did not put forward such a claim when he was produced before the Magistrate for inquiry or trial, it is not open to him to put forward such a claim at any subsequent stage, 54 C. 1031.

This section is expressly limited in its operation to a case to which the provisions of Chapter XXXIII do not apply, and the next S. 528B relates only to such cases as are contemplated by this section and S. 449, *supra*, under which the right of appeal is claimed, in Chapter XXXIII; consequently this and the next section can have no application to S. 449, *supra*, 52 C. 347.

Sub-section (3).—Unlike in S. 443 (2), *supra*, the rejection of the claim to be dealt with as a European or Indian British subject is not open to appeal immediately but is subject to a ground of appeal from the conviction.

528B. *If in any such case an European or Indian British subject or an European (other than an European British subject) or an American does not claim to be dealt with as such by the Magistrate before whom he is tried or by whom he is committed, or if, when such claim has been made before and rejected by the committing Magistrate, it is not repeated before the Court to which such person is committed, he shall be held to have relinquished his right to be dealt with as an European British subject or an Indian British subject, or an European or an American, as the case may be, and shall not assert it in any subsequent stage of the case.*

Failure to plead status a waiver.

This is old section 454 re-enacted with certain modifications.

An European British subject who waived his right to be dealt with as such may re-consider and cancel the waiver before he is called on to enter upon his defence. There is no provision to the effect that a right once waived cannot be re-asserted, 50 C. 689; see also 52 C. 347. When an accused person failed to assert the claim to be tried as an Indian British subject before the committing Magistrate, the Sessions Judge has no jurisdiction to determine his status and the accused is expressly debarred by the provisions of the section from asserting the claim. This section in express terms prevents him from asserting it at any subsequent stage of the case, 29 Cr. L J. 721—110 Ind. Cas. 577. The effect of a waiver is that the trial is to be held under the ordinary law.

528C. *Where a person, not being an European British subject, is dealt with as an European British subject or, not being an Indian British subject, is dealt with as an Indian British subject or, not being an European (other than an European British subject) or American, is dealt with as an European or American, and such person does not object, the inquiry, commitment, trial, or sentence, as the case may be, shall not, by reason of such dealing, be invalid.*

Trial of person as belonging to class to which he does not belong.

This is old section 455 re-enacted with certain modifications.

C.L.J. 432; 21 A.L.J. 86; 46 M. 117; 28 M.L.J. 329; 4 Lah. 376; 5 Ran. 53 (P.C.); 50 A. 457 at 462. The remedying of irregularities is familiar to most systems of jurisprudence but it would be an extraordinary evasion of such a branch of administering criminal law to say that when the Code enacts a certain thing shall not be permitted, that such a contravention comes within the description of error, omission or irregularity, 25 M. 61 (P.C.).

Irregularities which do not vitiate proceedings. **529.** If any Magistrate not empowered by law to do any of the following things, namely:—

(a) to issue a search-warrant under section 98;

(b) to order, under section 155, the police to investigate an offence;

(c) to hold an inquest under section 176;

(d) to issue process, under section 186, for the apprehension of a person within the local limits of his jurisdiction who has committed an offence outside such limits;

(e) to take cognizance of an offence under section 190, sub-section (1), clause (a) or clause (b);

(f) to transfer a case under section 192;

(g) to tender a pardon under section 337 or section 338;

(h) to sell property under section 524 or section 525; or

(i) to withdraw a case and try it himself under section 528;

erroneously in good faith does that thing; his proceedings shall not be set aside merely on the ground of his not being so empowered.

Scope of the Section.—This section deals with irregularities which do not vitiate proceedings. The remedying of irregularities is familiar to most systems of jurisprudence, 25 M. 61 (P.C.). An irregularity may be a non-compliance in a minor matter or it may be a non-compliance in a substantial matter. In the former case the defect in the proceedings will generally be cured, but in the latter they cannot be cured. This section deals with acts done by a Magistrate in no way empowered by law to do those acts. It has no reference to a Magistrate empowered otherwise under the Code to do things but not possessing jurisdiction over the particular offence, 20 A. 40.

Clause (a).—Section 98, *supra*, deals with search of house suspected to contain stolen property, forged documents, false seals or counterfeit stamps or coin or instruments for counterfeiting coins, stamps or for forgery.

Clause (b).—Section 155 (3) refers to investigation in non-cognizable cases by a police-officer receiving an order to do so from a Magistrate. When a police-officer receives information of the commission of a non-cognizable offence he may report the case to the Magistrate for orders and the Magistrate may without taking cognizance order an investigation S 155 (3) read with this clause leaves no doubt in the matter, 6 M L T. 239.

Clause (c).—This sub-section saves only proceedings before a Magistrate taken on a complaint of which cognizance is taken without authority, 29 Cr. L.J. 124=106 Ind. Cas. 716 where 19 A L J. 77=22 Cr. L.J. 122=59 Ind. Cas. 554 is distinguished. But this will not have the effect of making the complainant liable for prosecution for a false complaint by reason of the Magistrate's having taken cognizance of it without power to do so, 5 Pat. 447.

Clause (f).—If a Magistrate not empowered to transfer a case from the file of one Magistrate to another does so this clause will cure such an irregularity, 38 C. 869; 4 C.W.N. 321; 16 C.W.N. 835; Welr II, 152 and 699; where a first-class Magistrate not empowered

by law to transfer cases, makes an order of transfer to a third-class Magistrate of a case erroneously and in good faith, in the absence of anything to the contrary, *bona fides* will be assumed, and the transfer should not be treated as invalid to prevent the third-class Magistrate taking cognizance on such transfer and trying the case, 30 Bom. L.R. 653. Transfer of security proceedings by a Magistrate not empowered to do so was held to be cured by this clause, 35 C. 243. So also proceedings under S. 145, *supra*, 36 C. 370; 2 C.L.J. 614; 5 C.W.N. 866.

Clause (g).—When a pardon was tendered and accepted in good faith, the fact that the Magistrate had no power to tender such a pardon is a defect which could be cured under this clause. Where a Magistrate had no jurisdiction to tender a pardon in respect of offences inquired into in a different District, it was held that his action in that respect was not cured by this clause, 20 A. 40.

Good faith.—Section 3 (20) of the General Clauses Act, X of 1897 defines good faith thus "A thing shall be deemed to be in *good faith* when it is in fact done honestly whether it is done negligently or not." S. 52, I.P.C., defines *good faith*, thus: "Nothing is said to be done or believed in good faith which is done or believed without due care and attention" and S. 4 (2), *supra*, enacts that all words and expressions used herein and defined in the I.P.C., and not hereinbefore defined shall be deemed to have the same meanings respectively, attributed to them by that Code.

530. If any Magistrate, not being empowered by law in this behalf, does any of the following things, namely:—

Irregularities which vitiate proceedings.

- (a) attaches and sells property under section 88;
- (b) issues a search-warrant for a letter, parcel or other thing in the Post Office, or a telegram in the Telegraph Department;
- (c) demands security to keep the peace;
- (d) demands security for good behaviour;
- (e) discharges a person lawfully bound to be of good behaviour;
- (f) cancels a bond to keep the peace;
- (g) makes an order under section 133 as to a local nuisance;
- (h) prohibits, under section 143, the repetition or continuance of a public nuisance;
- (i) issues an order under section 144;
- (j) makes an order under Chapter XII;
- (k) takes cognizance, under section 190, sub-section (1), clause (c), of an offence;
- (l) passes a sentence under section 349, on proceedings recorded by another Magistrate;
- (m) calls, under section 435, for proceedings;
- (n) makes an order for maintenance;
- (o) revises, under section 515, an order passed under section 514;
- (p) tries an offender;
- (q) tries an offender summarily; or
- (r) decides an appeal;

his proceedings shall be void.

Scope of the section.—This section deals with irregularities which vitiate proceedings unlike the last section. It applies only to cases of Magistrate having no legal power to try accused for offences but where they have the power, the trial cannot be vitiated by any irregularity in the trial, 30 Bom. L.R. 653. It is important to notice that in inferior Courts and to proceedings before Magistrate the maxim "*omnia prosequuntur cito esse acta*" does not apply to give jurisdiction but where it appears that the inferior Court has jurisdiction it will be intended that the proceedings are regular but unless it so appears or if it be left to doubt, whether it has jurisdiction or not such intendment will be made, 7 B. & C. 785 at 790 quoted and followed in 28 Cr. L.J. 913 at 924 = 105 Ind. Cas. 433. If any of the acts mentioned in this section is done by a Magistrate not empowered by law so to do, his proceedings are void and the opening words of S. 537, *infra*, subject to the provisions hereinbefore contained, refer to the provisions of this section; see 1 Bom. L.R. 27. It refers only to Magistrates mentioned in the last four classes of Criminal Courts mentioned in S. 6, *supra* and makes no reference to the first class of Criminal Courts, namely, Court of Session. If a Sessions Judge tries an offender or decides an appeal not empowered in this behalf, his proceedings may come under this section, even though this section in terms does not apply to him.

Clause (d).—A defect in the issue of a preliminary notice is not one of mere irregularity but falls under this section being a question of jurisdiction, 41 M. 246; (1913) M.W.N. 751; 31 C. 350; 24 A. 151.

Clause (e).—This clause deals with discharge of a person lawfully bound to be of good behaviour. It is not clear why no similar provision is made dealing with the discharge of a person bound over to keep the peace. Clauses (c) and (d) deal with demands to keep the peace and demands to be of good behaviour. But in the case of a discharge of a person, bound over to keep the peace there is no corresponding provision.

Clause (f).—In S. 125, *supra*, the words "or of good behaviour" were added in the 1898 Code. But perhaps through some over-sight these words were not added in this clause after the words "to keep the peace". Thus we find no provision made in cases where a Magistrate not being empowered by law caucels a bond to be of good behaviour.

Clause (j).—The clause refers only to cases where a Magistrate is not competent by virtue of the position he holds or powers vested in him to try a case of the character referred to in S. 145, *supra*, 5 C.W.N. 695.

Clause (k).—Taking cognizance of an offence *suo motu* would render the proceedings void if the Magistrate is not empowered to do so, 1 C.W.N. 103. See 23 C.W.N. 518; 39 C. 119; 23 C. 412.

Clause (l).—The Magistrate to whom the records are sent up must deal with the case himself. He cannot transfer the case to another Magistrate and if he does so, the proceedings of the latter are void, 2 Cr. L.J. 464.

Clause (n).—Once a Magistrate is empowered to deal with applications for maintenance under S. 488, *supra*, this clause will not apply to vitiate his proceedings even though he had no territorial jurisdiction. Such a case falls under S. 531, *infra*, and not under this section, 49 C.L.J. 205 = 30 Cr. L.J. 525 = 115 Ind. Cas. 652.

Clause (o).—An order for forfeiture of a bond made by a Court other than the Court which took the bond is void under this clause, 16 Bom. L.R. 84.

Clause (p).—Trial by a Court not duly empowered is a nullity, 8 B. 317; a commitment made without jurisdiction is void and need not be set aside, 11 C.L.R. 55; conviction by a Bench of Magistrates, all the members of which did not hear the evidence is void, 39 M. 304. Where the facts disclosed an offence within the jurisdiction of the Magistrate it is a complete fallacy to say he is not empowered by law to try the person charged for the offence

which is within his jurisdiction, because the facts disclosed a more serious offence which is beyond his jurisdiction. He is expressly so empowered; whether in doing so he adopts a proper course, is another question. No doubt it is improper on the part of the Magistrate to intentionally ignore circumstances of aggravation which show that an offence beyond his jurisdiction was in fact committed as well as an offence within his jurisdiction. But in such a case the proceedings would not be void, 2 Ran. 455 at 458 where 13 B. 502; 24 M. 675 are followed and 23 C.W.N. 818 is distinguished. It cannot be contended that an accused has no

qualified Magistrates, 25 L.W. 86=28 Cr. L.J. 165(2)=99 Ind. Cas. 596 (2).

Clause (g).—Where a Magistrate deliberately disregards the offence actually complained of and tries the case summarily there is no question of irregularity but his proceedings are void, 5 C.W.N. 252; 24 M. 675; 26 Cr. L.J. 1539=80 Ind. Cas. 439; 46 A. 446. No tribunal can properly clutch at jurisdiction by intentionally ignoring facts of aggravation which make the offence really cognizable only by a higher tribunal, Weir II 21; 20 L.W. 919=25 Cr. L.J. 1193=82 Ind. Cas. 57; 25 L.W. 86=28 Cr. L.J. 165 (2)=99 Ind. Cas. 596 (2). A summary trial on a charge under S. 147, I.P.C., is illegal and comes within this clause even though the accused is convicted under S. 323, I.P.C., and the provisions of S. 637, *infra* cannot cure such an illegality and the proceedings of the Magistrate must be held to be void 52 B 254 where 27 C.W.N. 143 is followed.

Clause (r).—An accused was sentenced to five years' rigorous imprisonment by a Magistrate specially empowered under S. 80, *supra*, and his petition of appeal was sent from jail, to the Sessions Judge instead of the High Court under S. 403 (b) *supra* and was summarily rejected by the Sessions Judge under S. 421, *supra*. It was held that under the provisions of this clause the proceedings of the Sessions Judge were void and he acted without jurisdiction and the accused had a right of appeal to the High Court, 2 Ran. 386.

531. No finding, sentence or order of any Criminal Court shall

be set aside merely on the ground that the inquiry,

Proceedings in wrong
place.

trial or other proceedings in the course of which it

was arrived at or passed, took place in a wrong

sessions division, district, sub-division or other local area, unless it appears that such error has in fact occasioned a failure of justice.

Scope of the section.—This section applies solely to cases in which there is no jurisdiction by reason of the inquiry, trial or other proceeding being held in wrong local area, 16 B. 200, and refers to districts, divisions, sub-divisions and other local areas, 16 C. 667. The policy of the Code is to uphold in most cases the orders passed by Criminal Court which were lacking in local jurisdiction or which had committed illegalities or irregularities unless a failure of justice has been occasioned or is likely to be occasioned through such want of jurisdiction or such illegalities or irregularities, 52 M. 791 at 792, 793. This section applies to a case where a Magistrate has authority to commit but has no territorial jurisdiction in the place where the offence is alleged to have been committed, 26 M. 640 at 643. The manifest intention of the section is to provide against the contingency of a finding, sentence or order regularly passed by a Court in the case of an offence committed outside its local area, being set aside when no failure of justice has taken place. There is nothing in the language of the section to confine its operation to cases where the offences committed within the jurisdiction of a Court are tried by such Court outside the limits of the local area of its jurisdiction, 30 M. 95. A point of jurisdiction can be raised at any stage, 3 Pat 417 at 421. This section only applies to defects as to local jurisdiction when no failure of justice has been occasioned, 35 C.L.J. 200=22 Cr. L.J. 865=83 Ind. Cas. 458, and does not apply to cases where the order, is passed by a Court not empowered to make such orders unless covered by

S. 529, *supra*, 16 Bom. L.R. 84=15 Cr. L.J. 295=23 Ind. Cas. 503. It is this section and not S. 530 (n) *supra*, that applies to an order passed under S. 489, *supra*, by a Magistrate in a wrong district. Once the Magistrate is empowered to deal with such an application for maintenance S. 530 (n) cannot apply to such a case, 49 C.L.J. 295=30 Cr. L.J. 525=115 Ind. Cas. 602.

Trial in a wrong sessions division, etc.—The policy of the Criminal Procedure Code as shown by Ss. 531—538 is to uphold in most cases the orders passed by the Criminal Court which was lacking in local jurisdiction or which has committed illegalities or irregularities unless failure of justice has been occasioned through such want of jurisdiction. In 36 M. 397 it was held that if a Sessions Court to which a commitment has been made has no local jurisdiction over a place where the offence took place, such commitment should be quashed (though of course after the trial had taken place to its termination), S. 531 might cure the defect, 42 M. 791 at 792-793. The Madras High Court in this case upheld a commitment to the High Court Sessions by the Chief Presidency Magistrate with regard to an offence which took place in the Chingleput District within the cognizance of the Sessions Court of Chingleput. See also 26 M. 640; 17 M. 402; 8 B. 312; 16 B. 200; 10 B. 274 and 18 A. 359. An order of commitment to the Sessions Court is an order under this section and when the Sessions Court had no jurisdiction to try the offence the High Court in revision can set aside such commitment, 3 Pat. 417.

Sessions Division District, etc.—See Ss. 7 and 8, *supra*, at p. 25-27.

Local area—See section 188, *supra*. The expression "other local area" in this section was added in consequence of the decision in 13 B.L.R. Appx. 4=21 W.R. (Cr.) 63.

Trial or other proceeding.—It is a general and well-known rule that all judicial acts exercised by persons whose judicial authority is limited to a particular locality should be done within the locality to which such authority is limited. Where a criminal appeal was presented to a Sessions Judge at the place within his division but was heard and disposed of by him within the limits of his civil but outside the local limits of his criminal jurisdiction, it was held that this section was applicable; as no failure of justice has been occasioned by such irregularity, 17 A. 36 (F.B.). An order passed under S. 107, *supra*, against a person is not invalid merely on the ground that there was no evidence on record to show that the person informed against was residing within the local limits of the Magistrate's jurisdiction when proceedings were initiated. No objection having been raised in the trial Court, irregularity, if any, is cured by this section, 49 A. 228.

Unless the error has occasioned a failure of Justice.—If it appears that the constitution and procedure of the Court in which the trial ought to have taken place are different from the constitution and procedure of the wrong Court in which the trial was held the accused would necessarily be prejudiced, 13 B.L.R. Appx. 4=21 W.R. (Cr.) 65, where no objection as to the jurisdiction of the Court was taken and the accused failed to show that he had been prejudiced in any way the High Court declined to interfere, 21 W.R. (Cr.) 83; 18 M.L.J. 330. The fact that objection was taken as to jurisdiction at a comparatively early stage of the proceeding was not conclusive proof that the accused was prejudiced by the irregularity, 34 C.L.J. 200=22 Cr. L.J. 666=63 Ind. Cas. 438. See the explanation to S. 537, *infra*, on this point.

532. (1) If any Magistrate or other authority purporting to exercise powers duly conferred, which were not so conferred, commits an accused person for trial before a Court of Session or High Court, the Court to which the commitment is made may, after

When irregular commitments may be validated.

perusal of the proceedings, accept the commitment, if it considers that the accused has not been injured thereby, unless, during the inquiry and before the order of commitment, objection was made on behalf

either of the accused or of the prosecution to the jurisdiction of such Magistrate or other authority.

(2) If such Court considers that the accused was injured, or if such objection was so made, it shall quash the commitment and direct a fresh inquiry by a competent Magistrate.

Scope of the Section.—This section applies to a case where a Magistrate or other authority purporting to exercise the powers duly conferred, which are not so conferred, has committed an accused person for trial to a Court of Session and does not apply to a case where the Court of Session considers that a commitment made to it by a competent Magistrate is illegal, 43 B. 147 at 153. This section applies only to a commitment to a Court of Session. It cannot apply to the case of a want of certificate of the Political Agent to try an offence in British India when the trial begins, 12 Bom. L.R. 667=11 Cr. L.J. 543=7 Ind. Cas. 934. It does not deal with cases in which the defect in the committal arises from want of territorial jurisdiction, 20 Cr. L.J. 416=51 Ind. Cas. 176, this section refers to case where the Magistrate is competent to deal with the case within his local jurisdiction but has no power to commit for some reason other than that of local jurisdiction, 16 B. 200; 26 M. 630; 17 M. 402. Where a person has been put on his trial and pleaded to the charge, the commitment cannot be quashed on account of any irregularity in the commitment. The Sessions Judge has jurisdiction to try a case which has been committed to him for trial and if the trial is legally held any irregularity in the commitment would not vitiate the proceedings of the Sessions Judge, 26 Cr. L.J. 1560=90 Ind. Cas. 440 where 12 C.L.R. 120 is followed.

Purporting to exercise powers duly conferred.—These words occurring at the beginning of the section appear to have reference to S. 206 of the Code and to signify "power to commit for trial," 17 M. 402 at 404; the defect contemplated is one personal to the Magistrate, i.e., not being empowered to commit and not to a defect in his proceedings. When a Magistrate is duly empowered to commit, this section has no application whatever. Where a Second-class Magistrate not being empowered to commit the case referred to a superior Magistrate under S. 346, *supra*, and that Magistrate without examining the witnesses *de novo* committed the accused to the Court of Session it was held that the commitment was not illegal and this section had no application, 12 C.W.N. 136=6 Cr. L.J. 429.

Sub-section (2).—Where a trial has been held under an erroneous commitment and no actual failure of justice has been occasioned by such error the judgment will not be reversed, 7 C. 682. The law contemplates that in serious cases of which a Court of Session may take cognizance on commitment made on it, the accused person should have some information of the case he has to answer.

533. (1) If any Court before which a confession or other statement of an accused person recorded or purporting to be recorded under section 164 or section 364 is tendered or has been received in evidence,

Non compliance with provisions of section 164 or 364.

finds that any of the provisions of either of such sections have not been complied with by the Magistrate recording the statement, it shall take evidence that such person duly made the statement recorded; and, notwithstanding anything contained in the Indian Evidence Act, 1872, section 91, such statement shall be admitted, if the error has not injured the accused as to his defence on the merits.

(2) The provisions of this section apply to Courts of Appeal, Reference and Revision.

Scope and object of the section.—This section occurs in the Chapter relating to irregular proceedings and their effect, and it is not intended to override the law of evidence. The object of the section is to prevent justice being defeated by the Magistrate's failure to comply with the provisions of S. 164 or S. 364, *supra*, and to prevent the exclusion of the recorded statement defective in form and to permit oral evidence to be adduced to remedy the defect. It is quite plain that this section can only be invoked when there is some written record but that record is defective through some error in not strictly complying with the provisions of S. 164 or 364. The object apparent from the words of the section is to take such records out of the excluding provisions of S. 91 of the Indian Evidence Act, 45 M. 230 at 235. This section is intended to apply to all cases in which the directions of law have not been fully complied with. It gives legal sanction to the maxim *omnia præsuntur rite esse acta*, 23 B. 221 at 223; 31 Bom. L.R. 565; 26 Cr. L.J. 1459=83 Ind. Cas 1026. This section is intended according to 23 B. 221 to apply to a case in which the directions of law have not been fully complied with, and would apply to omissions to comply with the law as well as to infractions of the law, 31 Bom. L.R. 565 at 568. A defect in form is curable, but a defect in substance is not. If the warning is given under sub-section (2) of S. 164, but the Magistrate failed to embody the fact in his memorandum such a defect is curable. But if the warning had not been in fact given, the defect cannot be cured under this section as such a statement could not be held to have been duly made, 6 Lah 415; 6 Lah. 58 at 64; see also 30 Cr. L.J. 49=113 Ind. Cas. 65 where it was held that a defect in the certificate or memorandum prepared by the Magistrate and attached to the confession is cured if the Magistrate who records the confession goes into the witness-box and states on oath he complied with the requirements of this section. It is more than doubtful whether an omission to prepare a record of the examination of an accused person under S. 361, *supra*, can be cured by this section, 5 Pat. 430 at 448. This section deals only with errors in the recording of a confession and does not apply to a case where no record whatever has been made of a confession, 35 A. 260.

Confession recorded or purporting to be recorded.—Under S. 165, *supra*, it is not obligatory on a Magistrate holding an investigation or preliminary inquiry to record, in writing a confession made to him by an accused person and such confession may be proved by oral testimony of the Magistrate, 45 M. 230; see also 30 Cr. L.J. 49=113 Ind. Cas 65.

Provisions of either of such sections have not been complied with.—Failure to warn an accused before recording a confession is a defect which can be cured by this section, 22 Cr. L.J. 203=60 Ind. Cas 56; 9 C.L.J. 55; 40 C. 873; failure of a Magistrate to append the memorandum at the foot of a confession as to its voluntary character can be cured, 22 M. 15, 8 C.W.N. 22, but where the Magistrate recording a confession certifies that the confession was not voluntary, this section cannot apply, 17 Bom. L.R. 898. Where the confession is recorded in a narrative form without recording every question put and every answer given in the exact language used, the defect can be cured by examining the Magistrate, 9 C.L.J. 55, following 14 C. 532. When the defect in the recording of the confession or other statement of an accused is one not of substance but of form only, this section applies, 2 C.W.N. 702. No distinction can be drawn between omissions to comply with the law and infractions of it. This section is intended to apply to all cases in which the directions of the law have not been fully complied with, 23 B. 221 at 225; 31 Bom. L.R. 563 at 568. This section is not limited to any particular kind of non-compliance with S. 364, *supra*, 21 B. 493; 3 Pat. L.J. 291. This section will not render a confession admissible when no attempt at all had been made to conform to the imperative provisions of S. 164, *supra* 9 M. 224; 23 B. 221; 15 C. 595; 17 C. 862.

Such statement shall be admitted.—The term 'such statement' occurring herein refers to the statement recorded regarding which the Magistrate gives evidence under this section to the effect that such person duly made it. The evidence of the written confession can be given by the Magistrate under this section if the record is proved to be an accurate and true statement made by the accused. It would follow that the statement recorded can be

acted upon as a statement duly made by the accused to the Magistrate, 31 Bom. L.R. 565 at 575, following 21 B. 495; 23 B. 221; 9 M. 224; 3 Pat. 872; 45 A. 166.

If error has not injured the accused in his defence.—This section so far from affording a remedy for a defect expressly excludes from the operation of the section errors which have injured the accused in his defence on the merits. The question whether the accused has been injured has to be determined on the merits of each particular case, 23 B. 221.

534. *An omission to inform under S. 447, any person of his rights under Chapter XXXIII shall not affect the validity of any proceeding.*

Omission to give information under section 447.

The change in the language of the section was due to the Amending Act, XII of 1923. Chapter XXXIII deals with special rights of European and Indian British subjects and S. 447 makes it imperative to inform the accused of his special rights, see 3 Ran. 220.

535. (1) No finding or sentence pronounced or passed shall be deemed invalid merely on the ground that no charge was framed, unless, in the opinion of the Court of appeal or revision, a failure of justice has in fact been occasioned thereby.

Effect of omission to prepare charge.

(2) If the Court of appeal or revision thinks that a failure of justice has been occasioned by an omission to frame a charge, it shall order that a charge be framed, and that the trial be recommenced from the point immediately after the framing of the charge.

This section and S. 232, *supra*, seem to cover the same ground. S. 232, *supra*, deals also with the absence of a charge and applies to Courts of confirmation. The procedure to be followed in cases where prejudice is shown by the accused is not clearly laid down in S. 232 *supra*, as in this section. This section is not limited to trials where no charge at all has been framed but is also applicable to cases in which no charge has been framed for the offence of which a person has been convicted, 41 C.L.J. 474=26 Cr. L.J. 1279=89 Ind. Cas. 1033. This section is intended to legalise convictions had without framing a charge, but a misjoinder of charges will not be cured by this section, 21 O.W.N. 756. When a Court of appeal has before it the question of confirming or setting aside a conviction, an omission to frame a charge or an error in the charge is no ground for interference unless a failure of justice has been occasioned thereby but when a Court of appeal is dealing with an appeal against an acquittal there is no similar provision under which a defect as to a charge can be condoned, 28 Cr. L.J. 170=99 Ind. Cas. 607; see also 55 C. 476. When an accused person did not object at the trial on the ground of omission to draw up a separate charge for each offence but clearly understood what he was being tried for, and was not in any way prejudiced, this section was held applicable, 41 C. 66. When no reasons are given for a conviction as required by S. 263 (h) *supra*, the defect goes to the root of the trial and cannot be regarded as an irregularity, 28 Cr. L.J. 435=101 Ind. Cas. 671, referring to 46 M. 253.

The words "merely on the ground that no charge has been framed" mean a case where the offence being a petty one and the evidence being fairly taken the Court framed no charge at all. But where the Court frames a charge however erroneous, then it cannot be said that the conviction is invalid merely on the ground that no charge was framed bringing the case under this section, 42 C. 188.

Trial by Jury of
offence triable with
Assessors.

536. (1) If an offence triable with the aid of assessors is tried by a jury, the trial shall not on that ground only be invalid.

Trial with Asses-
sors of offence triable
by Jury.

(2) If an offence triable by a jury is tried with the aid of assessors, the trial shall not on that ground only be invalid, unless the objection is taken before the Court records its finding.

Scope of the section.—In enacting this section, the Legislature must be taken to have had in mind cases where the procedure had been wrong throughout. Literally read, sub-section (2) of this section covers only cases where objection is taken, but not to cases where there was no opportunity to take the objection, 45 B. 619.

Sub section (1).—Where an offence triable by Assessors is tried by a Jury the trial is not on that ground only invalid, but the Judge's charge to the Jury is to be treated as his judgment in the case, 24 W.R. (Cr). 30, and an appeal from the conviction will lie on facts, 26 M. 243—*Per Benson, J.*, but the other learned Judge who heard the appeal, *Bhashyam Ayyangar, J.*, took a different view, and held that no appeal lay on facts but only on a point of law under S. 418, *supra*. The two learned Judges however agreed as to the reduction of the sentence passed on the appellant while confirming the conviction, and the case did not go before a third Judge on the question on which the two learned Judges differed. In an earlier case in *Weir II, 709* a Bench of the Madras high Court held that when a case triable with the aid of Assessors was wrongly tried by a Judge with a Jury, the proper course for the appellate Court was to treat the charge to the Jury as the opinion of Assessors or to order a re-trial if there was a possibility of the Jury having gone wrong on the facts. See S. 269 (3) where the Jurors are to sit as Assessors in a case in which the accused is charged in the same trial with several offences some of which are triable by Jury and some with the aid of Assessors. The law makes no difference as to the procedure at the trial, between a trial by a Jury and one with the aid of Assessors except as to summing up in the case of the former, and the manner in which the verdict in the former and the opinion of the Assessors in the latter are respectively taken. It is at this latter point there is a departure of ways and if the accused who is tried does not interfere at that crucial point and get the procedure applicable to trials with the aid of Assessors enforced, he cannot be heard to complain, 33 B. 423.

Sub-section (2).—The words used in the section are "offence triable by a Jury" while in S. 418, *supra*, the words used are "trial was by Jury." Trial by Jury is a privilege carrying with it certain liabilities. If an offence triable by a Jury is tried with the aid of Assessors then provided objection is taken before the Court records its finding, the trial will be invalid. The accused has been deprived of a valuable privilege which is open to him up to the last stage of the case to preserve. But the converse is different. If the accused obtains the privilege to which strictly speaking, he is not entitled, it is not presumed that he will take any objection. He has the chance of a verdict which can only be upset under certain special circumstances. If the verdict is against him he cannot turn round and claim an appeal on matters of fact, 23 B. 680 at 689, see 6 Pat. 208. Assessors can never act as a Jury although the Jurors can act as Assessors. See S. 269 (3), *supra*. So trial with Assessors of an offence triable by Jury will be a valid trial with the aid of Assessors. If a Judge tries a case in which the offence charged is triable by a Jury without a Jury, the defect in the trial can be cured by the sub-section, 28 Cr. L.J. 177=99 Ind. Cas. 849. Where certain accused persons were tried by a Jury of offences triable by a Jury and the Jury when returning a verdict of not guilty on the offences charged find the accused guilty of an offence triable with the aid of Assessors and the Judge did not take the individual opinion of the Jurors as Assessors, it was held that the procedure adopted was a mere irregularity cured by this section. But this section and S. 269, *supra*, will not apply to a case where the accused is not in the first instance charged with the commission of such offence and the conviction come

guide, when a mandatory provision of law is disregarded by a Court, is the well known ruling of the Judicial Committee in 25 M. 61 (P.C.) to the effect that a disobedience of an express provision of law as to a mode of trial is not a mere irregularity cured by this section but an illegality, 51 M.L.J. 687—24 L.W. 649, *dissenting from* 6 Lah. 553. In 49 A. 316, 30 Cr. L.J. 891=118 Ind. Cas. 323, it was held that the decision of the Privy Council in 25 M. 61 (P.C.) applied only to cases of disobedience to an express provision as to the mode of trial and mere disobedience to an express provision of law cannot come within the ruling of the Privy Council and that the provisions of S.256, *supra* are not provisions relating to the mode of trial and it would be wrong to hold that failure to follow strictly the provisions of S. 256 *supra*, amounts to more than an irregularity; see also 1929 M.W.N. 898 and 508 and 57 M.L.J. 763 at 755=30 L.W. 883. This section cannot be availed of, in an appeal against acquittal so as to justify the Court in convicting the accused on the appeal, 39 M. 527 (F.B.) 5 Pat. L.J. 81=21 Cr. L.J. 621. The test to be applied in considering whether a particular infringement of the provisions of the Code is one which does or does not come within the purview of this section appear to be these.....Does the error go to the whole root of the trial? Does it in effect vitiate the proceedings? Has the Court assumed an authority which it does not possess? Has it broken the vital rules of procedure? If the error is of such a nature that the proceedings are vitiated in their very inception, this section has no application. But the mere fact that a certain provision of the Code is imperative does not in itself indicate that a breach of that provision vitiates the whole proceeding. In fact in order to create an error there must be some breach of an imperative rule, for, if the matter were discretionary it would appear that no opportunity for error could arise, 43 A. 124 at 127; 27 Cr. L.J. 669=94 Ind. Cas. 717; 3 Ran. 139 followed in 27 Cr. L.J. 1281=98 Ind. Cas. 177; 4 Pat. 488. This section applies only to mere errors of procedure arising out of mere inadvertence and not to substantive errors of law and does not apply to a case of disregard or disobedience of mandatory provision of the Code, 49 A. 475 following 25 M. 61 (P.C.); 8 Lah. 230 (P.C.); 49 A. 325. See also 28 Cr. L.J. 771=104 Ind. Cas. 99; 1929 M.W.N. 898 and 506. Breach of a statutory provision under Ss. 274 and 326 as to choosing a Jury cannot be cured by this section, 33 C.W.N. 1005. The test to be applied in deciding whether mandatory enactments shall be considered directory only, or obligatory with an implied nullification for disobedience, is this. In each case we must take to the subject-matter, consider the importance of the provision that has been disregarded, and the relation of that provision to the general object intended to be secured by the Act; and upon a review of the case in this aspect decide whether the matter is what is called imperative or only directory, 51 C. I. (F.B.) at 17-18, followed in 52 C. 159. This section was certainly not inserted in the Code for being invoked on any and every occasion as a shield against irregularities perpetrated by the subordinate criminal Courts. The only way to secure the proper observance of the law by the subordinate Courts is for the High Court to interfere whenever any departure from the established procedure, comes to its notice. For example, the observance of the provisions of S. 342 *supra*, is one of paramount importance and non-compliance with it cannot be passed over on the ground of technicality, 29 C.W.N. cxviii. It was held in 60 B. 680, following 53 C. 46 that there is no universal rule that a disobedience of a mandatory provision in a statute, has the consequence of nullification of all proceedings irrespective of any question of prejudice, and the provisions of this section cure the defect unless the omission has in fact occasioned a failure of Justice. In 1929 M.W.N. 505=30 Cr. L.J. 623=116 Ind. Cas. 368 the Madras High Court followed the decisions in 53 C. 46 and 50 B. 680 and held that failure to comply with a mandatory provision of the Code is not necessarily an illegality vitiating the proceedings but the question in each case is whether there has been prejudice to the accused. Again in 1929 M.W.N. 898, it was held that no doubt after 25 M. 61 (P.C.) an idea prevailed that this section did not apply to mandatory provisions of the Code but the ruling in 5 Ran. 53 (P.C.) has dispelled that idea and this section may be taken to cover any irregularity in the wide sense of that term provided that there has been no failure of justice. A failure to comply with a mandatory provision of the Code is not necessarily an illegality. An omission by some of the members of a Bench of Magistrates to sign the judgment is not necessarily illegal vitiating the trial when all the members constituting the Bench have signed the register

in which the sentence was embodied, 57 M.L.J. 763=30 L.W. 883 not following 52 M. 237. See 6 Lab. 554; 27 Cr. L.J. 431=93 Ind. Cas. 159. But see 51 M.L.J. 687=24 L.W. 649 which takes a different view. Consent on the part of an accused will not cure an irregularity, for an accused person can consent to nothing in a criminal trial, 45 M. 117; 1 L.R. (P.C.) 520; 18 M.L.J. 330; 12 W.R. (Cr.) 59; 16 W.R. (Cr.) 69; 23 W.R. (Cr.) 59; 2 Q. 23; 6 C.W.N. 202; 28 M.L.J. 329=(1915) M.W.N. 229; 21 A.L.J. 89; 4 Lab. 376; no consent by Counsel whether for his own convenience or that of his client or for the convenience of the Court, can by itself create jurisdiction in the Court to commit irregularities; nor can the commission of irregularities of a serious nature substantially affecting the conduct of the trial and prejudicing the accused be waived, merely by consent on the part of the accused's representative. As the Privy Council puts it 'no serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of Advocate for the accused,' 60 A. 437 at 462. An accused person's right to have his defence witnesses examined by the Court which disposes of his case, is a right which has been secured to him by the Code and where the action of the Court has deprived him of this right, it must be held that a failure of justice is the natural result of the irregularity. The fact that the accused finding that he could not have his way, and that the Court would not summon his witnesses, made the best of a bad job by putting interrogatories to examine witnesses on commission is immaterial, 18 L.W. 899 at 902.

Subject to the Provisions hereinbefore contained.—"What is the effect of the words "subject to the provisions hereinbefore contained in S. 537?" I do not think it can possibly be taken to be that the section is to have no application if there has been any departure from any of the previous sections of the Code. Such an interpretation would render the words "error, omission or irregularity" in other proceedings absolutely nugatory. The Code is exhaustive as to procedure. I think the opening words of the section must be read as having reference to Ss 529 to 536 *supra*. The Chapter in which these sections are included is headed "of irregular proceedings" and Ss. 529 to 536 deal directly with the effect of various irregularities including some cases of want of jurisdiction. In some cases, the irregularity is fatal, in others not. Then follows S. 537 a general saving section which is, however, limited by the foregoing sections in the same Chapter," 19 C.W.N. 972 at 979. See also 27 C. 839; 6 C.W.N. xlv1; 28 C. 217; 26 B. 50 at 51; 31 M. 80; 29 M. 149; 17 M.L.J. 533 but a contrary view was taken in 22 C. 176 and 23 C. 983. The repeal of sub-section (b) and the illustration supports strongly the view expressed in 19 C.W.N. 972 as the decisions to the contrary relied strongly on the repealed sub-section (b).

No finding sentence or order—This section does not purport to cure any sort of proceedings at any stage. It applies only to finding, sentence or order already arrived at and under consideration by a superior Court. The case should have been finally disposed of, 23 C. 983; this section and the ruling in 25 M. 61 (P.C.) in no way touches on the effect of an error of procedure antecedent to trial or the jurisdiction of the Court, 35 M. 275.

Court of competent jurisdiction.—These words must be taken to mean a Court of competent jurisdiction in respect of the particular offence charged, 10 B. 319. A Magistrate who is disqualified from trying a case though he may be authorised generally to try cases of the same class cannot be said to be a Court of competent jurisdiction, 23 C. 323 and 442. So also a Magistrate who takes cognizance under S 190 (1) (c) and tries the case, 13 A. 345; 28 A. 212; when a Jury is not properly empanelled as required by law but in disregard to Ss. 276, 277, 278, 279 and 326, *supra*, the trial cannot be said to be by a Court of competent jurisdiction, 7 C.W.N. 138; 26 A. 214; 33 C.W.N. 1005. Similarly when the Court is not properly constituted as regards the required number of Assessors, 25 B. 694; 15 B. 514; 21 A. 106; 14 A. 334; 24 M. 523.

Reversed or altered under Chapter XXVII.—Chapter XXVII deals with submission of sentences by lower Court to the High Court for confirmation and the powers of the High Court in dealing with such cases.

Distinction between Irregularity and Illegality.—Irregularity may be defined as a deviation from the established rule of law or procedure 'when a thing is directed to be done

and the thing is in effect done but in the wrong way, the error amounts to an irregularity and not an illegality,' 19 C.W.N. 972. A disobedience to an express provision of law as to the mode of trial is not a mere irregularity but an illegality 25 M. 61 (P.C.) followed in 39 M. 527 (F.B.); 38 M. 1038; 30 M. 44 and 328; 29 M. 569; 28 M. 437; 26 M. 127; 25 M.L.J. 391; 29 B. 449; 26 B. 533; 17 Bom. L.R. 1073 and 892; 46 C. 741; 40 C. 46; 33 C. 1256; 29 C. 335; 17 C. W.N. 479; 11 C.W.N. 472; 10 C.W.N. 520; 6 C.L.J. 757; 1 C.L.J. 475; 26 A. 195; 1901 A.W. N. 520; 19 Cr. L.J. 161; 21 Cr. L.J. 29 and 626; 20 Cr. L.J. 103; 3 L.B.R. 75 (F.B.), etc.

Irregularity in the complaint—This section provides for an error omission or irregularity in the complaint and not to entire absence of complaint say, a complaint of Court under S. 476, *supra*, without which cognizance of the offence cannot be taken under the law and which is a statutory bar to the entertainment of the complaint, 49 C.L.J. 342=30 Cr. L.J. 658=116 Ind. Cas. 638. A complaint is not intended to give information to the accused and failure to set out the speeches or alleged seditious words, the subject-matter of a subsequent charge in a complaint is only an irregularity cured by this section, 32 M. 3 at 11. (1) Failure to examine the complaint on oath under S. 200, *supra*, 9 A. 666; 35 M. 606; 18 A. 221; 20 Bom. L.R. 1081; 46 C. 807; 23 C.W.N. 484; 20 Cr. L.J. 247=49 Ind. Cas. 919, 30 C. 923; 55 M.L.J. 715=23 L.W. 621=30 Cr. L.J. 433=115 Ind. Cas. 242 following the practice in Madras 11 M. 443 and 19 L.W. 461=25 Cr. L.J. 730=81 Ind. Cas. 218 (any irregularity in a complaint under S. 195 (1) which does not occasion a failure of justice will not furnish a ground for revision as it is only an irregularity cured under this section, 10 Lah 231); (2) failure to take the signature of the complainant, 6 C.W.N. 540; (3) failure to reduce a complaint to writing 7 M.H.C.R. Appx 25; (4) failure to record reasons for distrusting a complaint 25 M. 516; 14 C. 141, are curable under this section, but trial without a complaint is illegal and cannot be cured, 4 B.H.C.R. (Cr. Ca) 4; (1904) A.W.N. 266. Irregularity in a complaint of Court, under Ss. 195 and 476 *supra*, is not cured by this section, as it deals with irregularities in complaint and cannot cure the absence of a complaint of Court and proceedings initiated without such a complaint of Court are null and void 26 Cr. L.J. 731=86 Ind. Cas. 287; 1923 M.W.N. 229; 23 Cr. L.J. 840. 1 Luck 323; 28 Cr. L.J. 235=100 Ind. Cas. 1044=101 Ind. Cas. 458; 49 C.L.J. 312=30 Cr. L.J. 658=116 Ind. Cas. 638.

Irregularity in summons, warrant, charge, proclamation, etc.—Omission of particulars in summons or warrant, 8 C. 724; 31 B. 611, is curable. So also a defective search-warrant, 35 C. 1576. Failure to record reasons for issuing a warrant is curable, 33 C. 789, but in 33 M. 1038 it was held that it was a necessary preliminary for the exercise of the powers under S. 90, *supra*, that reasons should be given in writing, and failure to do so vitiates the warrant; omission to serve a preliminary order under S. 145, *supra*, is not fatal, 33 C. 68 (F.B.) and 33; 30 A. 41; and 9 C.W.N. 593; 25 Cr. L.J. 632=81 Ind. Cas. 170; when proceedings are started under S. 145, *supra*, but there was nothing in the police-report or other information upon which the case is started to justify them, this section has no application, 20 C. 520. An irregularity such as omission of actual words used in a charge is curable under this section, 32 M. 384. This section covers only an error or omission in the charge and has no application to a case where there is a total absence of a charge; omission to specify intention in a charge is not fatal, 10 B.H.C.R. 373; 22 C. 391 and 276; 30 Bom. L.R. 633; 15 B. 491; 6 A. 204; 4 C.W.N. 196; but see 39 C. 781; 33 C. 295. A Joinder of charges not permitted by Ss. 233 and 235 *supra* is fatal and cannot be cured 25 M. 61 (P.C.); 41 C. 722 and 662; 30 M. 329; 26 A. 193; 23 B. 449; 39 M. 527 (F.B.); 29 C. 335; 28 C. 7 and 10; 10 C.W.N. 520; 6 Bom. L.R. 725; 4 Bom. L.R. 537. A joint trial of several accused charged with offences not committed in the course of the same transaction is not an irregularity but an illegality and this section cannot cure the defect, 23 Cr. L.J. 357=100 Ind. Cas. 965, see Cr. A.No. 263 of 1927 (M.H.C.) where the conviction was set aside and retrial ordered. Misjoinder of charges and accused is not cured by this section. 23 M.L.J. 397; 33 M. 302; 42 A. 24; 27 B. 135; 29 Cr. L.J. 619=109 Ind. Cas. 811. 6 M.L.T. 266; 43 B. 147; 29 C. 335; 7 M.L.T. 367; 26 M. 434 and 125; 4 Bom. L.R. 449; 32 A. 57; 41 C. 68; 33 C. 161; 43 C. 741; 5 Ran. 53 (P.C.); 50 A. 457 at 462; 51 M.L.J. 672=21 L.W. 343; 27 Cr. L.J. 1351=58 Ind. Cas. 597. See notes under S. 233 at p. 458. A

charge stating that the accused did a particular act to commit a certain offence, or "any other offence punishable with imprisonment", is improper as it does not give the accused knowledge of the specific offence with which he is charged. Where however he does not suffer a prejudice, the defect in the form is cured by this section, 23 Cr. L.J. 1186—82 Ind. Cas. 50; where a charge of criminal conspiracy did not specify who were the parties to it, it is only a defect which can be cured by this section, 28 Cr. L.J. 426—101 Ind. Cas. 458.

Irregularity in Judgments.—(1) Omission to state grounds of decision, 6 B.H.C.R. (Cr. Ca.) 55; 6 G. 579; 13 C. 272; 20 C. 353; 27 Cr. L.J. 153—87 Ind. Cas. 737; (2) pronouncing judgment before writing it, 23 C. 802; 20 C. 333; 21 C. 121; 25 Cr.L.J. 705(1)—81 Ind. Cas. 193 (1) but see 27 M. 237; 14 A. 242; (3) omission to sign and date judgment, 47 A. 294. So also omission to sign a judgment written with his own hand is also cured by this section, 47 A. 284; 7 Ran. 370. Omission by some of the members of a Bench of Magistrates to sign the judgment convicting the accused is not necessarily illegal vitiating the whole trial especially when all the members of the Bench have signed the register embodying the sentence. The omission to sign the judgment is only an omission to comply with the technical requirement of law as to signing and should be treated as an irregularity which occasioning no failure of justice, 57 M.L.J. 763—30 L.W. 833 not following 52 M. 237. See omission to pronounce written judgment before sentencing the accused, 25 M.L.J. 445; Weir II, 711 are cured by this section, but a judgment not in accordance with the imperative provisions of Ss. 867 and 424, *supra*, cannot be cured, 17 Bom. L.R. 1035; 35 C. 138; 21 Cr. L.J. 52—54 Ind. Cas. 405. When in a faction fight, the two factions were tried separately on separate evidence recorded in each case but the appellate Court in appeals from conviction of both factions disposed of both appeals in one judgment, it was held it was only an irregularity as no injustice was done. It might have been better to keep the evidence entirely separate and deliver two judgments separately, 8 Lah. 193 (P.C.). Disposing of two matters by one judgment or recording evidence in two matters together is only an irregularity cured by this section 58 C. 400 at 408. Absence of a judgment cannot be said to be an irregularity cured by this section, 27 Cr. L.J. 1153—97 Ind. Cas. 737.

Irregularity in proceedings before or during trial.—A trial at the High Court sessions commenced before a Judge but continued and concluded by another Judge on account of illness of the first Judge is only an irregularity cured by this section, 29 Bom. L.R. 204. Omission to examine the accused before making an order of commitment under S. 209, *supra* is cured, 23 M. 636. See also 28 A. 421; but omission to call on the accused to enter on his defence occasions a failure of justice and cannot be cured, 23 C. 252; see 25 C. 863 as to significance of the word "trial." The decision of the Privy Council in 25 M. 61 does not compel the Court to hold that in no case a misjoinder of charges or failure to try charges separately can be an irregularity within this section. This section cannot be availed of in an appeal against acquittal so as to justify the conviction of the accused on the appeal, 39 M. 527 (F.B.). This section does not cure the defect in a trial where a case triable with a certain number of Assessors is tried with a less number of Assessors than the required number, the error is such as vitiates the whole trial and this section cannot cure such a defect, 25 Cr. L.J. 459—77 Ind. Cas. 811. Where a case which was made triable by a Court of Session under the new Code was tried by the Magistrate after the new Code came into force instead of committing the accused to the Court of Session which ended in a conviction, it was held the trial was illegal, and the illegality cannot be cured by this section, 26 Cr. L.J. 549—85 Ind. Cas. 643. The recording of evidence by the Magistrate himself when the remand order directed the evidence to be taken on commission is only an irregularity cured by this section, 30 Cr. L.J. 848—118 Ind. Cas. 643.

Irregularity in other Proceedings under the Code.—Failure to draw up a preliminary order under S. 145 (1) *supra* is not a mere irregularity in procedure but an irregularity affecting the jurisdiction of the Court and cannot be cured 49 A. 325. Failure to follow the strict provisions of S. 145, *supra*, when the parties had their case fully heard is curable, 30 A. 41, and omission to state grounds of being satisfied as to likelihood of a breach of the peace in the initial order is an irregularity, 33 C. 63; 36 M. 275; 33 C. 352 but trying together two rival parties in proceedings under S. 107 is illegal, 8 C.W.N. 480; 11 C.W.N.

472; 9 C.W.N. 895; 31 M. 276. Under the amended Code sanction under S. 195 has been abrogated; irregularities in proceedings under S. 476, *supra* are not cured by this section now. So any want of a complaint of a Court or public servant or any irregularity in making the same cannot be cured by this section, 26 Cr. L.J. 751=86 Ind. Cas. 297; 1 Luck. 253; 28 Cr. L.J. 388=100 Ind. Cas. 1044; 49 C.L.J. 342=30 Cr. L.J. 658=116 Ind. Cas. 833. Failure to give the accused an opportunity to adduce evidence to rebut the additional evidence and to hear arguments on such evidence is not cured, 26 Cr. L.J. 1033=87 Ind. Cas. 923; 4 Lah. 376.

Sub-section (b) relating to proceedings under Ss. 195 and 476 has now been omitted. Therefore want of a complaint of Court cannot be cured under this section and such an illegality will vitiate the entire proceedings, 1 Luck. 522. See also 28 Cr. L.J. 780=104 Ind. Cas. 108; 9 B. 27 and 282; 37 C. 457; 18 Cr. L.J. 767=31 Ind. Cas. 643; 49 C. L.J. 342=30 Cr. L.J. 638=116 Ind. Cas. 638.

Sub-section (c).—This sub-section means that the omission referred to herein must be treated as a mere irregularity, but when the provisions of the law as to empanelling of a Jury are violated such a contingency is not provided for in this sub-section. Such a breach of law must be treated as an illegality vitiating the whole trial which must be set aside for that reason alone, e.g., in 26 A 211, a Jury trial was set aside because seven Jurors were not empanelled instead of five as fixed by notification on the ground that the trial was not by a tribunal constituted according to law. Again, where the provisions of Ss. 275 to 279 and S. 283, *supra*, as regards selecting Jurors were not followed, it was held in, 7 C.W.N. 189 that this sub-section did not apply to such an irregularity, 33 C.W.N. 1005, see also 33 A. 385 and 36 A. 481 and 4 Lah. 382. In all the above cases the trial was set aside on account of illegalities committed therein without reference to any misdirection obviously on the ground that there was no valid trial in which a verdict of the jury had been returned. This is how the law must be interpreted, 27 Cr. L.J. 793=95 Ind. Cas. 393.

Sub-section (d).—The provisions of this section require that before a verdict of a jury can be reversed on the ground of misdirection, the High Court must be satisfied that the verdict is erroneous and a failure of justice has been occasioned, 25 C. 230; 21 C.W.N. 33; 12 A.L.J. 149=14 Cr. L.J. 805=21 Ind. Cas. 686. If improper questions have been admitted at a trial by Jury, it is for the Crown to show that their improper effect has been set right by the Court. Either the Jury, should be told at once to disregard the statements or else the charge should contain a similar warning to them expressly telling them not to consider the statement as involving a contradiction or otherwise damaging the evidence of the witness. Under sub-section (2) of s. 423, *supra*, and this sub-section it must be seen whether such improper admission of evidence has in effect led to a miscarriage of justice to entitle the High Court to set aside the verdict of the Jury. If a Judge is of opinion that it will be difficult for the Jury in spite of his express warning to disregard the evidence wrongly admitted, it is preferable that there should be a new trial before another Jury, 28 Bom. L.R. 281=27 Cr. L.J. 431=93 Ind. Cas. 681. A material misdirection or failure to lay down the law by which the Jury is to be guided is not covered by this section, 5 C.W.N. 876; 5 M.L.T. 124; 20 M. 44; 23 C. 22; 188 M.L.J. 250. Total absence of direction by the Judge as to the law cannot be cured by this section, 11 Cr.L.J. 340=5 Ind. Cas. 981; 5 M.L.T. 82=11 Cr. L.J. 432=7 Ind. Cas. 401; 11 Cr. L.J. 322=6 Ind. Cas. 14; 7 M.L.T. 191=11 Cr. L.J. 334=5 Ind. Cas. 935; 5 M.L.T. 345=(1911) 1 M.W.N. 190=12 Cr. L.J. 140=8 Ind. Cas. 789; 40 C. 367. A conviction obtained on a trial by Jury, would not be bad merely because the charge to the Jury was not happily expressed or that there was misdirection in the charge if otherwise there had been no failure of justice and the case will be covered by this section, 12 A.L.J. 149=14 Cr. L.J. 805=21 Ind. Cas. 686. See notes under Ss. 207 and 307, *supra*, at pp. 657 to 664 and 681 to 688.

Unless such error etc, has in fact occasioned a failure of justice.—These words do not qualify clause (d) only but also the other clauses (a) to (c), 5 Ben. 53 (P.C.). Failure to comply with a mandatory provision of law is not necessarily an illegality that vitiates the proceedings. The question is whether the failure has been prejudicial to the

accused, 1929 M.W.N. 506 = 30 Gr. L.J. 623 = 116 Ind. Can. 366 following 53 C. 46 and 50 B. 680; see also 1929 M.W.N. 893. Before proceedings can be set aside it must be shown that by reason of the irregularity the true facts have not come out or that there is a danger that they will not come out, 15 C. 353; 10 A. 414. While no serious defect in the mode of conducting a trial can be justified or cured by the consent of the Counsel for the accused, the fact that a certain course of procedure was in fact consented to by the Counsel for an accused is an important element in considering the equally important question whether there has been any prejudice, 50 A. 437 at 462, following 5 Ran. 53 (P.C.). The onus is on the appellant to show that there has in fact been a failure of justice owing to the irregularity, 24 M. 523. The words "in fact" were introduced in the 1893 Code apparently in order to emphasise the duty of the Court to go into the merits before interfering in consequence of a misdirection or other error, but the duty existed just the same before, 26 M. 1. It is impossible to decide whether there has been a failure of justice in fact without looking to see what the facts are. In order to determine whether the verdict is erroneous and if so which of the powers conferred on the High Court by S. 423 (2) should be exercised, it is absolutely necessary to go into the facts, 26 M. 1. "In fact" is equivalent to "really" or "in reality." The expression "unless it has in fact occasioned a failure of justice" means unless it has unfairly affected the petitioner's defence on the merits, 31 B. 611 at 625; see also 11 B.H.C.R. 237. An error which in no way prejudices a convicted person, and is not fatal to the validity of a decision and is concerned with the proceedings rather than the mode of trial, may be condoned under this section 43 A. 124. In 5 Ran. 53 (P.C.) their Lordships of the Privy Council summed up after review of the several sections of the Code their view that the bare fact of an omission or irregularity has occurred unaccompanied by any probable suggestion of any failure of justice is not enough to warrant the quashing of a conviction; see also 3 Lah. 230 (P.C.).

Explanation.—Effect should be given if the objection is promptly raised and wrongly overruled by the lower Court. The explanation applies only when an objection is raised as to averment of an *irregularity*: an illegality affecting the jurisdiction of the Court can be raised in the appellate Court, 11 C.W.N. 1128, and an accused person cannot waive his rights in a criminal proceeding, or the benefit of legal provisions, 18 M.L.J. 330; 2 C. 23; 6 C. 96; 46 M. 117; 16 W.H. (Cr.) 69; 6 C.W.N. 202; 28 M.L.J. 329 = (1915) M.W.N. 229; 32 A. 633; 21 A.L.J. 89; 4 Lah. 376. See also 5 Ran. 53 (P.C.). No serious defect in the mode of conducting a criminal trial can be justified or cured by the consent of the Advocate for the accused but such consent is an element to be taken into account in considering the equally important question whether there has been any prejudice, 50 A. 437 at 462; see also 31 Bom. L.R. 925 at 928.

538. No *attachment* made under this Code shall be deemed unlawful, nor shall any person making the same be deemed a trespasser, on account of any defect or *want* of form in the summons conviction, writ of *attachment* or other proceedings

Attachment not illegal, person making same not trespasser for defect or want of form in proceedings.

relating thereto.

The word "distress" has been omitted and the word "attachment" has been substituted in its place. This section cures defects in the formal proceedings of Courts.

CHAPTER XLVI.

MISCELLANEOUS.

539. Affidavits and affirmations to be used before any High Court or

Courts and persons before whom affidavits may be sworn.

any officer of such Court may be sworn and affirmed before such Court or the Clerk of the Crown, or any Commissioner or other person appointed by such Court

for that purpose, or any Judge, or any Commissioner for taking affidavits in any Court of Record in British India, or any Commissioner to administer oaths in England or Ireland, or any Magistrate authorised to take affidavits or affirmations in Scotland.

In drawing up affidavits the practical advice of an eminent Judge should be borne in mind by practitioners. "Be most scrupulous in drawing up affidavits for your clients to swear to. I regret to say that the belief has prevailed that in many cases affidavits are drawn without careful instructions as to what the deponent may truthfully state, but rather to support some position beneficial to the cause the practitioner is appearing. You are in a measure the keeper of your client's conscience. Be most careful lest you bring upon yourself condemnation for the guilt of moral, if not legal, subornation of perjury." This becomes all the more important as affidavits are mostly drawn up in this country in English, a language not understood by the deponents in most cases and the affidavits have to be translated to them in the Vernacular.

This section deals with affidavits and affirmation to be used before the High Court or any officer of such Court. It requires that such affidavits should be sworn and affirmed before such Court or Clerk of the Crown or any Commissioner or other person appointed by such Court for that purpose or any Judge, etc. A Magistrate is a Judge within S. 19, I.P.C. read with S. 4 (2), *supra*, only when he is exercising jurisdiction in a case pending in which he is empowered to give a definitive judgment in the matter under dispute and not when he is only empowered to commit; where a Magistrate has not the *seisin* of the case and he could not pronounce any judgment in respect of that case, he is not a Judge within the meaning of the term in this section and a reference to S. 539A will show that a Magistrate may not come within the meaning of the term Judge, in this section. The Magistrate here is differentiated from the officers mentioned in this section and is not empowered to have an affidavit sworn before him, S. Pat. 110. An affidavit sworn before a Presidency Magistrate of Calcutta is not admissible for the purposes of moving the Patna High Court in revision, [1926] Pat. 73=27 Cr. L.J. 313 (2)=92 Ind. Cas. 697 (2). This section applies only to affidavits to be used in the High Court, for instance in support of applications for transfer under S. 526 (4), *supra*. The solitary provision in the Code for the use of an affidavit in any Court subordinate to the High Court is contained in S. 74, *supra*, as to proof of service of summons outside the jurisdiction of the Court issuing it. "The intention of the law is and it cannot be too often repeated, that an affidavit must contain nothing but bare facts known to the person who makes the affidavit, either personally or upon information from a source which he believes to be a correct source and one on which reliance can be placed. Further, as it is possible for human beings to make a mistake in reciting a fact, the law requires that the contents of affidavits should be carefully read over to the deponents in words understood by them and vouched by them to be correct"—*per Knox, J.*, in 36 A. 13 at 16. A person seeking by an application in revision to get rid of a conviction standing against him, is, incapable of tendering his own affidavit in support of such application and cannot consequently be prosecuted for statements made in such an affidavit, 19 A. 200; 12 M. 451; 28 A. 331, but see 6 Lah. 34; 8 Lah. 46; 28 Cr. L.J. 168=99 Ind. Cas. 600, which takes a different view; see notes under the next section. The new section S. 539A now allows the accused to file his own affidavit in proof of conduct of public servant. In a later case in 29 Cr. L.J. 336 at 339=108 Ind. Cas. 124, the Allahabad High Court held that according to the practice of that Court an accused person can legally tender his own affidavit in support of an application for transfer under S. 526, *supra*, whether the affidavit is tendered and the application made in a subordinate or in the High Court and that the accused can be prosecuted for making false statements in such affidavit. The practice has now grown up in Madras of accepting affidavits of accused persons filed in support of transfer application although before the enactment of new S. 539A such affidavits were not accepted, see Weir 11. 691.

539A. (1) *When any application is made to any Court in the course of any inquiry, trial or other proceeding under this Code, and allegations are made therein respecting any public servant, the applicant may give evidence of the facts alleged in the application by affidavit, and the Court may, if it thinks fit, order that evidence relating to such facts be so given.*

Affidavit in proof of
conduct of public ser-
vant.

An affidavit to be used before any Court other than a High Court under this section may be sworn or affirmed in the manner prescribed in section 539, or before any Magistrate.

Affidavits under this section shall be confined to, and shall state separately, such facts as the deponent is able to prove from his own knowledge and such facts as he has reasonable grounds to believe to be true, and, in the latter case, the deponent shall clearly state the grounds of such belief.

(2) *The Court may order any scandalous and irrelevant matter in an affidavit to be struck out or amended.*

This section is newly added and provides for an affidavit in proof of the conduct of Public Servant and gives power to Court also to expunge scandalous or irrelevant matter in an affidavit, and also requires the personal attendance of the deponent of the affidavit for cross-examination before the Court. Sub-section (4) of S. 342, *supra*, says that no oath shall be administered to the accused which means only that an accused person cannot be examined on oath as a witness in the case in which he is an accused person see 3 Lah. 45. A person swearing to an affidavit under this section in support of an application for revision in the Court renders himself liable to a prosecution for any false statement contained in the affidavit. He cannot claim the privileges of an accused person and S. 439 *supra*, nowhere lays down that applications for revision shall be accompanied by affidavits and no affidavits are required under that section, 28 Cr. L.J. 168=99 Ind. Cas. 600. This section prescribes the manner in which an affidavit to be used before any Court other than a High Court can be sworn or affirmed. It may be sworn or affirmed in the manner prescribed by the preceding section or may be sworn before any Magistrate. Neither of these sections authorise the swearing of such an affidavit before the *naizir* of a subordinate Court and therefore the *naizir* had no authority to administer the oath and the deponent cannot be convicted of making any false statement on oath, 31 Bom. L.R. 144=30 Cr. L.J. 593=118 Ind. Cas. 248. The third para of sub-section (1) provides that affidavits shall state separately such facts as the deponent is able to prove from his own knowledge and such facts as he has reasonable grounds to believe to be true and in the latter case the deponent shall clearly state the grounds of such belief. Failure to state separately those facts will not absolve him from his liability to be convicted under S. 199 I.P.O., for making a false statement, 30 Cr. L.J. 645=116 Ind. Cas. 755 where 14 C. 633 is referred to.

539B. (1) *Any Judge or Magistrate may, at any stage of any inquiry, trial or other proceeding, after due notice to the parties, visit and inspect any place in which an offence is alleged to have been committed, or any other place which it is in his opinion necessary to view for the purpose of properly appreciating the evidence given at such inquiry or trial, and shall without*

Local inspection.

unnecessary delay record a memorandum of any relevant facts observed at such inspection.

(2) *Such memorandum shall form part of the record of the case. If the Public Prosecutor, complainant or accused so desires, a copy of the memorandum shall be furnished to him free of cost :*

Provided that, in the case of a trial by jury or with the aid of assessors, the Judge shall not act under this section unless such jury or assessors are also allowed a view under section 293.

Scope of the section.—Prior to 1923 there was no provision in the Code allowing a Magistrate to visit and inspect the scene of the commission of an offence, yet Magistrates did frequently make such visits and they were permitted to do so by a long series of decisions of the various High Courts laying down the procedure to be followed and the safeguards to be applied when making such visits. By the new amendment, the Legislature adopted the general effect of these decisions and incorporated it in the statutory law by enacting this section. The Magistrate should make his visit after due notice to the parties and should incorporate his observations in a memorandum to be placed on the record, 4 Ran. 106 at 109. It is not only not objectionable but in many cases highly desirable, that a Magistrate trying a criminal case should himself inspect the scene of occurrence, in order to understand fully the bearing of the evidence given in Court but if he does so he should be careful not to allow anyone on either side to say anything to him which might prejudice his mind one way or the other. The Magistrate should not go out of the way in making inquiries on the spot in order to satisfy himself how the facts stood without previous notice to the accused and in their absence. It is possible that the magistrate may be able to shake off the impression which that inquiry may have made in his mind, if it was unfavourable to the accused and confine himself during the trial to the evidence that may be recorded in Court but it is not likely that the accused would have the same confidence which he would have had, had no inquiry been made, 21 Cr. L.J. 166-54 Ind. Cas. 774. This section gives power to the Court to make local inspection for the purpose of properly appreciating the evidence given before it. This power rested previously on judicial decisions and on the implied power given in S. 556, *infra*, but there was no express provision. The object of the local inspection is to allow a Magistrate properly to appreciate the evidence given at the inquiry or trial and not for the Magistrate to become the principal witness in the case on a question of fact. It may be the Indian Evidence Act does not prohibit the use of facts observed by a Judge but it is clearly illegal for the Judge to become the principal witness in the case, to keep all knowledge of facts he has observed and noted to himself and keep it out of the knowledge of the accused. He ought to record a memo. of his local inspection immediately after his inspection and give the parties an opportunity of seeing what the facts are and give them an opportunity to rebut his opinion and failure to do these things clearly prejudices the accused, 10 Lah. 138 where 52 C. 138; 53 C. 46 and 37 C. 340, are referred to. A local inquiry by the Magistrate being permitted only for better appreciating the evidence in the case cannot take the place of evidence itself. Such local inspection should be held sparingly as the purpose is only to elucidate and better understand the evidence. The party against whom the result of the local inquiry is used is greatly prejudiced and is put to an irreparable disadvantage in not being able to remove the wrong impression from the mind of the Magistrate by cross-examining him, 47 A. 475, following 22 Cr. L.J. 424-61 Ind. Cas. 712. If a Magistrate receives by a local inspection impression in favour of one party or other, he should give an opportunity to the side against whom he forms an impression to explain it if possible, 54 M.L.J. 442-27 L.W. 654-1928 M.W.N. 69-29 Cr. L.J. 539-109 Ind. Cas. 363. Where a local inquiry was made not for the purpose of better understanding the evidence but for obtaining information which did not appear from the evidence of the witnesses, it was held that in a sense the Magistrate made himself a witness in the case and so went beyond the powers conferred on him by the Code and the trial

was held bad, 29 Cr. L.J. 656=110 Ind. Cas. 112 followed in 30 Cr. L.J. 491=115 Ind. Cas. 556. Similarly where a Magistrate in making a local inspection for better appreciating the evidence himself measured up the plots and came to a certain definite conclusion it was held that he exceeded his jurisdiction as he created fresh evidence himself and introduced it into the case for the purpose of his decision even though he acted, *bona fide*, 30 Cr. L.J. 652=116 Ind. Cas. 767. It is the duty of the Court to make a memorandum of relevant facts observed at such inspection *forthwith* and make such memorandum form part of the record in the case and the parties are entitled to have a copy of the same on application. The amendment is in accordance with the decisions in, 37 C. 340; 15 C.W.N. xclx; 10 C.W.N. 181; 39 C. 476 and other cases. This is a mandatory provision, 52 C. 148. The rule which requires a memorandum to be made does not introduce any new principle, 53 C. 46 at 94. It is open to the Magistrate to use the evidence of his own eyes to test the truth of what the witnesses had deposed to, by making a local inspection and embodying the result of his inspection in the examination of witnesses called under S. 540, *infra*, 35 M.L.J. 279=18 L.W. 113. When in a local inspection a Magistrate merely interrogated a crowd of people without making any memorandum, held the absence of such a memorandum in a local inspection is an illegality vitiating the conviction and not mere irregularity curable under S. 537, 50 B. 680 following 52 C. 148 and dissenting 53 C. 46. See also 3 Ran. 139 followed in 27 Cr. L.J. 1231=98 Ind. Cas. 177; see also 31 Bom. L.R. 955. When notice was actually issued to the parties non-service will not by itself vitiate the matter, 28 Cr. L.J. 180=99 Ind. Cas. 852.

Sub-section (2).—The provisions of this sub-section are mandatory and a failure to comply with the express direction of law is an illegality and not an irregularity which can be cured and a note made by the trying Magistrate after inspection of the place should form part of the record of the case, 52 C. 148, but see 3 Ran. 139, followed in 27 Cr. L.J. 1231=98 Ind. Cas. 177, which took a different view and the decision in 52 C. 148 was distinguished in 53 C. 46, holding that the observations therein are too wide and that unless prejudice is shown the proceedings cannot be set aside as this section introduced no new principle, and there is no universal rule that disobedience of statutory provisions nullifies the proceedings.

540. Any Court may, at any stage of any inquiry, trial or other proceeding under this Code, summon any person

Power to summon material witness, or examine person present.

as a witness, or examine any person in attendance, though not summoned as a witness, or recall and re-examine any person already examined; and the Court shall summon and examine or recall and re-examine any such person if his evidence appears to it essential to the just decision of the case.

Scope of the section.—The first part of this section is an enabling provision whereby a Court in the exercise of its discretion is empowered at any time before it actually pronounces its judgment to take further evidence either for the prosecution or for the defence and for that purpose it may adjourn the hearing to procure the attendance of witnesses. Very often it happens that new light is thrown on the case by examining a defence witness and then it becomes desirable in the interests of the accused himself that fresh evidence should be called for. When such fresh evidence is likely to prove prejudicial to the accused it should proceed with the utmost circumspection and should not exercise its powers under this section merely because the prosecution desires to do so, 1 Ran. 303 at 311. The second part of the section is on the other hand imperative. If the new evidence appears to the Court essential to the just decision of the case and this must depend entirely on the particular circumstances of each case, the Court has no choice but is bound to take evidence, 1 Ran. 308 at 312. The provisions of this section are very wide. But wider the powers the greater the exercise of discretion required; and this section read along with S. 252, *supra*,

was not intended that the Court should exercise its powers at the bidding of any person but that the powers are given to prevent any danger or mis-carriage of justice because some particular witness has not been called, 12 A.L.J. 15=14 Cr. L.J. 682=21 Ind. Cas. 1002, the Court is to exercise its judicial discretion and ought not to allow itself to be guided by any superior Court, 15 Cr. L.J. 375=23 Ind. Cas. 743. The power given to the Court to examine witnesses under this section is unrestricted, 2 C.W.N. 702 but it is not intended to empower the Court to fish for witnesses, 1892 P.R. (Cr. J.) 4. A Court is not bound to call a witness as a Court witness simply because the party wishing to examine him apprehends he will be hostile to him, 29 Cr. L.J. 499=107 Ind. Cas. 774. A Magistrate has no inherent and unlimited power to call witnesses at any time and for any purpose. Though he has a wide discretion under this section to call any witness at any time and for any purpose, still such discretion must be held to be exercised wrongly where he calls a witness as a Court witness at the instance and suggestion of the prosecution to enable the prosecution to cross-examine the witness with regard to a previous statement made by that witness, more especially after the prosecution had closed its case, 1929 M.W.N. 395. This section gives a Judge the fullest discretion to re-call a witness at any stage of a trial and make it imperative on him to do so if he considers further evidence is essential to the just decision of the case. To argue that he should not have carried out that duty when an essential document had been overlooked by the prosecution by having it admitted in evidence, as the result will be fatal to the accused, is to suggest what the words 'just decision' mean a decision in favour of the defence, 57 M.L.J. 681=1929 M.W.N. 901=30 L.W. 640 at 644. But the Court may examine witnesses under this section when those witnesses were summoned originally but not examined by the prosecution, 37 C.L.J. 173=24 Cr. L.J. 193=71 Ind. Cas. 657. A Judge in a criminal trial is not merely a disinterested auditor of the contest between the prosecution and the defence and it is part of his duty to elucidate a point which the prosecution or the defence may have left in obscurity either intentionally or unintentionally. It is the duty of the Judge to remove all such obscurity as far as possible. It is for him to come to a clear understanding, so far as is possible, of the actual events that occurred and he cannot shield himself behind the plea that any point was left obscure by the prosecution or the defence when he had an opportunity of illuminating that obscurity 18 Cr. L.J. 561=39 Ind. Cas. 801. See also the observation in 57 M.L.J. 681=1929 M.W.N. 901=30 L.W. 640, to the same effect as to his duty to bring on record an essential document overlooked by the prosecution.

This section empowers the Court to summon and examine a witness if the evidence appears to the Court essential to the right decision of the case. This section is not controlled by S. 342, *supra*, imposing the duty of questioning the accused generally after the examination of the prosecution witnesses and before the accused is called upon for his defence. Once the accused has been examined as required by S. 342, *supra*, it is nowhere laid down that the Court must examine the accused over again, if the Court examines a witness under this section, 25 Cr. L.J. 1418=89 Ind. Cas. 842. This section enables the Court or in certain circumstances imposes a duty on the Court to summon and examine any material witness not brought before the Court. This section is a very salutary provision calling pointed attention of the Court as to the existence of a most important duty cast on the Presiding Judge in arriving at a correct conclusion. It confers very wide powers upon a Court. But the wider the powers the greater the exercise of discretion required of a Magistrate, and if the Magistrate will, as he ought to read S. 252, *supra*, along with this section, he will find that by this section it is not intended that he should exercise this power at the bidding of any person 1929 M.W.N. 395; but the powers are given to prevent any miscarriage of justice just because some particular witness has not been called, 12 A.L.J. 15=14 Cr. L.J. 682=21 Ind. Cas. 1002; 37 C.L.J. 173; 27 C.W.N. 675=37 C.L.J. 415; 24 C. 167. See also 52 M.L.J. 118=25 L.W. 151=36 M.L.T. 39=28 Cr. L.J. 251=100 Ind. Cas. 123; 46 M.L.J. 326=19 L.W. 272=1924 M.W.N. 303=25 Cr. L.J. 354=77 Ind. Cas. 290, but this section will not enable a Court to examine the accused as a witness in an appeal which is only the continuation of the original case, 12 M. 451; Magistrates should always be chary of taking upon themselves the duties of deciding on behalf of the parties whether witnesses should be examined, 23 M.L.J. 134. The discretion given to the

Magistrate has to be exercised with a great deal of caution 29 Cr. L.J. 740=110 Ind. Cas. 676. following 27 C.W.N. 675=37 C. L.J. 415=24 C.L.J. 957=75 Ind. Cas. 541.

At any stage of the inquiry.—This section gives power to the Court at any stage of the inquiry or trial to examine any witness it may find it to be necessary, to come to a proper conclusion in the matter under inquiry or trial, 8 M.L.T. 418; 57 M.L.J. 681=1929 M.W.N. 501=30 L.W. 640. Examination of certain persons as Court witnesses after the close of the prosecution and discharging the accused, relying on the evidence of the court witnesses is not illegal, Weir II, 714. The power can be exercised even after the close of the case for the prosecution, 46 M.L.J. 325=19 L.W. 272=1924 M.W.N. 303=23 Cr. L.J. 353=77 Ind. Cas. 290, but after the prosecution has closed and the accused had entered on his defence valid reasons are to be recorded for admitting evidence under this section, 10 A.L.J. 383=13 Cr. L.J. 772=17 Ind. Cas. 404, and the accused ought to be given an opportunity to rebut such evidence, 15 C.W.N. 414=12 Cr. L.J. 7=9 Ind. Cas. 46. The recording of evidence on behalf of the prosecution cannot be justified, after the close of the defence evidence; such an irregularity ought to be avoided, 22 Bom. L.R. 1224=22 Cr. L.J. 58=59 Ind. Cas. 202; see also [1927] 2 K.B. 587. This section will not empower a Judge to call and examine the witnesses summoned for the defence before the prosecution case is closed, 14 A. 242. Magistrates should exercise their discretion very cautiously and the power should not be exercised to the prejudice of the accused and when so exercised is liable to be set aside by the High Court, 52 M.L.J. 118=25 L.W. 151=28 Cr. L.J. 251=100 Ind. Cas. 123. Where a case is fully heard and judgment reserved to be pronounced on a certain date, it is improper to examine prosecution witnesses at that stage, 37 C.L.J. 173=24 Cr. L.J. 193=71 Ind. Cas. 657 followed in 29 Cr. L.J. 740=110 Ind. Cas. 676. A Magistrate is strictly within the rights of this section in taking fresh evidence even when a case is adjourned for judgment, 24 C. 167. For the case was still a pending case when fresh evidence was taken, but the practice of examining witnesses after the defence is closed to bolster up the prosecution, if such evidence was prejudicial to the accused is to be condemned, 15 C.W.N. 414 at 416=12 Cr. L.J. 7=9 Ind. Cas. 46; See also 22 Bom. L.R. 1224 at 1227=22 Cr. L.J. 58=59 Ind. Cas. 202.

Summon any person as a witness.—A witness whom the prosecution declines to examine and who is examined by the Court on its own initiative is a witness called by the Court within the meaning of this section 37 C.L.J. 173=24 Cr. L.J. 193=71 Ind. Cas. 657. Where the accused has already exhausted his right of summoning witnesses for the defence by filing his list in Court and if he requires further witnesses to be examined, the only course open to him is to move the Court to summon his additional witnesses as Court witnesses under this section, 36 A. 13.

Examine any person.—There is nothing in law or principle which prevents a person who was charged with an offence but discharged by the Magistrate being examined as a witness under this section, 7 W.R. (Cr) 44, but not an accused or an appellant. The words 'any person' cannot include an accused person who cannot be examined as a witness even at the appeal stage, 12 M. 451, see also 7 Lah. 148. This section merely provides that a Magistrate may summon any witness whose evidence appears to be necessary. It does not specify the manner in which he may acquire his knowledge of the need for the evidence of such a witness. There are in fact many ways in which a Magistrate may come by such knowledge, the most common being through the evidence of other witnesses in the case. There are certain ways in which the Magistrate may acquire such knowledge without himself going out into the high ways and byways and searching for further evidence, and the power to summon witnesses does not by any means imply a power to discover such witness by personal inquiry out of Court. One of the basic principles of British Judicial system is that a cause should be determined on evidence given on oath in Court and in the presence of the parties. If a Magistrate makes personal inquiries out of Court it is practically impossible for him to complete the trial of the case adhering to the above principle. He would necessarily be influenced by what he had seen and heard and in assessing the value of the evidence of the witnesses examined he would be guided by his own recollection and if their evidence should differ from his recollection he would be impelled to reject it not on the intrinsic merits of

the evidence but on his own knowledge, 4 Ran. 106 at 108-109. For the just decision of the case, Courts generally examine medical witnesses when the accused sets up the plea of insanity or where there is no evidence on record as to the nature of the injuries which form the subject-matter of the offence under trial, 5 C.W.N. 98. Where a Magistrate examined certain witnesses under this section and relying on their evidence discredited the prosecution witnesses and discharged the accused, his procedure was held to be legal, Weir II, 714. When a Judge after making a local inspection, in the presence of the parties recalled some of the prosecution witnesses and examined them in such a way as to put on record the important points observed by him at the inspection, and the accused were also allowed to cross-examine the witnesses, it was held that the procedure adopted was legal 43 M.L.J. 279-18 L.W. 113. If the witness is called by the Court under the section and examined both the prosecutor and the accused have a right to cross-examine him freely, 47 A. 147; 5 C. 614; 24 C. 288; 29 C. 387; when a witness is called under this section and examined by the Court, his cross-examination by the parties cannot legally be restricted to the points on which he has been examined by the Court, 35 C. 243; 47 A. 147. Failure to allow the accused an opportunity to rebut the evidence so adduced and to hear further arguments on such further evidence cannot be cured by S. 537, *supra*, 4 Lah. 376; 26 Cr. L.J. 1035=87 Ind. Cas. 923.

Evidence essential for the just decision of the case.—A Judge in a criminal trial is entitled to call a witness not called by either the prosecution or the defence, without the consent of either side if in his opinion that course is necessary in the interests of justice but in order that injustice should not be done to an accused person, a Judge should not call a witness after the case for the defence is closed except in a case where a matter arises *ex improviso* which no human ingenuity can foresee on the part of the prisoner (1927), 2 K.B. 587; see also 22 Bom. L.R. 1224=22 Cr. L.J. 58=59 Ind. Cas. 202. When an essential document was overlooked by the prosecution it is the Judge's duty to have it admitted in evidence. To say that he should not have carried out that duty as the result was fatal to the accused is to suggest that the words 'just decision' mean a decision in favour of the accused and such a construction is unwarranted, 87 M.L.J. 681 at 683=30 L.W. 642 at 644.

540A. (1) *At any stage of an inquiry or trial under this Code,*

where two or more accused are before the Court, if the Judge or Magistrate is satisfied, for reasons to be recorded, that any one or more of such accused is or are incapable of remaining before the Court, he may, if such accused is represented

Provision for inquiries and trial being held in the absence of accused in certain cases

by a pleader, dispense with his attendance and proceed with such inquiry or trial in his absence, and may, at any subsequent stage of the proceedings, direct personal attendance of such accused.

(2) *If the accused in any such case is not represented by a pleader, or if the Judge or Magistrate considers his personal attendance necessary, he may, if he thinks fit, and for reasons to be recorded by him, either adjourn such inquiry or trial, or order that the case of such accused be taken up or tried separately.*

This section has been newly added and provides for inquiries and trials being held when one or more of the accused become incapable of remaining at the bar. Where accused is represented by a pleader under sub-section (1) his personal attendance being dispensed with there is no difficulty. In case where the accused is not represented or whose personal attendance is thought necessary, the Court may adjourn the trial of all the accused or order the trial of the particular accused to be tried separately.

Sub-section (2).—The amendment is intended to meet a practical difficulty. This sub-section which is new deals with the case of an accused person who is unrepresented and

whose personal attendance is necessary. In such a case the Court is empowered either to adjourn the trial or order the accused to be tried separately.

[Proposed new section by way of amendment of the Code introduced in the Legislative Assembly on September 9th 1929 as a very emergent measure and popularly called "the Hunger strike Bill," and directed to be circulated ultimately runs as follows:—

"540 B. (1). At any stage of an inquiry or trial under this Code, if the Judge or the Magistrate is satisfied for reasons to be recorded, that any accused in consequence of a single act or a series of acts or a course of conduct pursued by him after his arrest has voluntarily rendered himself incapable of remaining before the Court, such Judge or Magistrate, may, whether such accused is represented by a pleader or not, dispense with his attendance and proceed with the inquiry or trial in his absence. (2) In any such inquiry or trial, where a plea is required in answer to a charge from an absent accused whose attendance has been dispensed with under sub-section (1), such accused shall be deemed not to 'plead guilty'; (3) notwithstanding anything contained in this Code no finding, sentence or order passed in such inquiry or trial shall be held to be illegal by any Court by reason of any commission or irregularity whatsoever, arising from the absence of any or all the accused whose attendance has been dispensed with under sub-section (1). (4) No order under sub-section (1) dispensing with the attendance of an accused shall affect his right to attend or to be represented by a pleader at any subsequent stage of the proceedings. (5) Where an inquiry or trial has begun before the commencement of this Act, S. 540B of the said Code, as hereby enacted, shall have effect, provided that where the accused's incapacity of remaining before the Court arises from a series of acts or course of conduct begun before the commencement of this Act, the said section shall have effect only where such series of acts or course of conduct is continued after the commencement of this Act."

The statement of objects and reasons for this Bill runs thus: "The Code of Criminal Procedure, 1898, contains no provision by which an inquiry or trial can continue in the absence of an accused person, if he is not represented by Counsel. The High Court of Judicature, Lahore, has recently held that there was no provision in the law by which Counsel could be appointed to represent an accused person without the latter's consent. It is therefore possible for an accused person to bring the administration of justice to a stand still by a voluntary act by which he renders himself incapable of attending Court. The provisions of the Bill are intended to prevent delay and the defeat of justice by empowering Judges or Magistrates to proceed with the inquiry or trial in the absence of the accused even if he is not represented by Counsel, if the Judge or Magistrate is satisfied that his incapacity to attend the Court was due to a voluntary act done or to a course of conduct pursued by him after arrest."]

541. (1) Unless when otherwise provided by any law for the time being in force, the Local Government may direct in what place any person liable to be imprisoned or committed to custody under this Code shall be confined.

Power to appoint place of imprisonment.

Removal to criminal jail of accused or convicted persons who are in confinement in civil jail, and their return to the civil jail.

(2) If any person liable to be imprisoned or committed to custody under this Code is in confinement in a civil jail, the Court or Magistrate ordering the imprisonment or committal may direct that the person be removed to a criminal jail.

(3) When a person is removed to a criminal jail under sub-section (2),* he shall, on being released therefrom, be sent back to the civil jail, unless either—

* amended by Act VII of 1924.

(a) three years have elapsed since he was removed to the criminal jail, in which case he shall be deemed to have been discharged from the civil jail under section 342 of the Code of Civil Procedure; or

(b) the Court which ordered his imprisonment in the civil jail has certified to the officer in-charge of the criminal jail that he is entitled to be discharged under section 341 of the Code of Civil Procedure.

There is no provision of law empowering a Sessions Judge to decide the imprisonment passed on an accused person between different jails and such a power belongs to the Local Government, Ratanlal 827; the words 'prison' and 'jail' will not include a 'police lock-up' unless there is a notification by Local Government declaring a 'police lock-up' as a place of confinement, 15 Cr. L.J. 10=22 Ind. Cas. 154.

See Ss. 57 and 58 of the Civil Procedure Code, 1908. The term of imprisonment in execution of a decree of a Civil Court is limited to six months, and in some cases to six weeks.

542. (1) Notwithstanding anything contained in the Prisoner's Testimony Act, 1869, any Presidency Magistrate desirous of examining as a witness or an accused person, in any case pending before him, any person confined in any jail, within the local limits of his jurisdiction, may issue an order to the officer in-charge of the said jail requiring him to bring such prisoner in proper custody, at a time to be therein named, to the Magistrate for examination.

Power of Presidency Magistrate to order prisoner in jail to be brought up for examination.

(2) The officer so in charge, on receipt of such order, shall act in accordance therewith, and shall provide for the safe custody of the prisoner during his absence from the jail for the purpose aforesaid.

The Prisoner's Testimony Act now in force is Act, III of 1900. See in this connection sections 34 to 43 of the Act, provisions for requiring the attendance of prisoners and obtaining their evidence. S. 39 of Act III of 1900 lays down the procedure to be adopted. The application for removal of the prisoner to give evidence is to be made to the High Court and the High Court is to give the necessary direction, if it thinks fit. So practically this section is repealed by enacting the above S. 39 in the Prisoners Act, S. 44 of that Act deals with commissions to examine prisoners, see also Ss. 45 and 46 of the said Act.

543. When the services of an interpreter are required by any Criminal Court for the interpretation of any evidence or statement, he shall be bound to state the true interpretation of such evidence or statement.

Interpreter to be bound to interpret truthfully.

A deposition taken without administering an oath to the interpreter will not make it inadmissible in evidence, the prosecution will have to prove that the interpretation was made accurately, 26 C. 808. See S. 361, *supra*, which provides for interpretation of evidence to an accused or his pleader. When an interpreter is employed, the language in which the statement of the accused is interpreted is the language in which it is to be recorded, notwithstanding the provisions of S. 361, *supra*, 5 C. 826; 21 C. 642.

544. Subject to any rules made by the Local Government, any Criminal Court may, if it thinks fit, order payment, on the part of Government, of the reasonable expenses of any complainant or witness attending for the purposes of any inquiry, trial or other proceeding before such Court under this Code.

The words "with the previous sanction of the Governor General in Council" have now been omitted by the Devolution Act, XXXVII of 1920.

This section is subject to the rules framed by the Local Government, 25 Cr. L.J. 912= 81 Ind. Cas. 413 and provides that when the Local Government makes rules on the subject, a Criminal Court may, if it thinks fit order payment, on the part of Government, all reasonable expenses of any complainant or witness attending for the purpose of any inquiry, trial, or other proceedings before such Court under the Code. This clearly means that the general rule is that in a private prosecution, the complainant must pay the reasonable expenses of the witnesses, although it is open to make rules which would permit, in certain cases, the liability to be transferred to the Crown, 3 Luck. 363 at 363.

If it thinks fit.—These words were added in the Code of 1898. The discretion must be exercised according to sound judicial principles and reason, 9 Bom. L.R. 353=5 Cr. L.J. 329. It is not legal to call upon the accused to pay the expenses of a witness who was recalled for examination under the provisions of S. 350, *supra*, 15 Cr. L.J. 687=26 Ind. Cas. 135.

For rules by various Local Governments, see, *Madras*, G. O. No. 304 Jnd. dated 24-2-1910. *Mad. Cr. Rules of Pr. Rules* 68, 83A & 95A. *Calcutta*, Cal. Gaz. 1895 Pt. I, p. 648. *N.W. Provinces*: N. W. P. Gaz. 1875, p. 106. *Bombay* Bom. Gaz 1884, Pt I, p. 204. *Central Provinces*: Cen. Pro. Gaz. Not, 1917, dated, 5-5-1884. *Burma*. Bur. Gaz., Pt. IV, p. 456, dated 12-5-1894.

545. (1) Whenever under any law in force for the time being a Criminal Court imposes a fine or confirms in appeal, revision or otherwise a sentence of fine, or a sentence of which fine forms a part, the Court may, when passing judgment, order the whole or any part of the fine recovered to be applied—

- (a) in defraying expenses properly incurred in the prosecution ;
- (b) in the payment to any person of compensation for any loss or injury caused by the offence, when substantial compensation is, in the opinion of the Court, recoverable by such person in a Civil Court ;
- (c) when any person is convicted of any offence which includes theft, criminal misappropriation, criminal breach of trust, or cheating, or of having dishonestly received or retained, or of having voluntarily assisted in disposing of, stolen property knowing or having reason to believe the same to be stolen, in compensating any bona fide purchaser of such property for the loss of the same if such property is restored to the possession of the person entitled thereto.

(2) If the fine is imposed in a case which is subject to appeal, no such payment shall be made before the period allowed for presenting

the appeal has elapsed, or, if an appeal be presented, before the decision of the appeal.

Amendment.—The italicised words in sub-sections (1) (b) and (c) are new. The rulings in 6 M. 286; 6 M.L.T. 231; 46 B. 893; Weir II, 715 and 717 are no longer law.

Scope of the section.—This section is applicable where there is a conviction of the accused and fine forms a part of the sentence. A Magistrate cannot without imposing a fine, order payment of compensation to the complainant by the accused, 22 B. 717; 3 O.L.R. 404; 23 Cr. L.J. 1116=81 Ind. Cas. 940. Where a Court orders that out of the fine, if recovered a certain amount be paid as compensation, it does not mean that the amount should be paid only if the full amount of fine were recovered and nothing was payable till the recovery of the full amount, 2 L.W. 22=6 Cr. L. Rev. 440=16 Cr. L.J. 58=26 Ind. Cas. 650. Where the accused is discharged, and no fine is imposed this section cannot apply, 22 B. 717. Nor can this section apply to a case under B. 107, *supra*, as no fine could be imposed in such a case. An order directing the accused to pay the costs of the complainant in such a case is illegal, 23 Cr. L.J. 476=77 Ind. Cas. 828. It deals only with the expenses properly incurred in the prosecution and for compensation for the injury caused by the offence when substantial compensation is recoverable in a Civil Court; compensation for loss caused to the complainant on account of his inability to attend to his work, his time being fully taken up in the prosecution of the accused cannot be granted, 22 B. 438. The injury must be the direct result of the offence and compensation can be ordered only out of the fine recovered and it is not competent to the Magistrate to award compensation in addition to the fine imposed on the accused, 5 Bom. L.R. 976; 24 M. 305. See also 5 Bom. L.R. 126. An order for compensation to the nearest heirs without specifying who those heirs may be is bad, 1913 P.R. (Cr. J.) 18=14 Cr. L.J. 522=20 Ind. Cas. 1002; see also 1898 P.R. (Cr.J.) 17 (F.B.) The fine should be calculated according to the nature of the offence and means of the accused and not according to the expenses which the complainant might have incurred. There is no provision of law which empowers a Court to order payment of money as indemnity in a case of theft, 26 Cr. L.J. 1395=50 Ind. Cas. 151.

Court confirms in appeal, revision or otherwise, a sentence of fine.—There must be an imposition of a sentence of fine by the first Court. An appellate Court or the High Court imposing a sentence of fine in lieu of a term of imprisonment is not competent to award compensation under this section; fine must form part of the sentence originally imposed on the accused when passing judgment or order for offences specified herein and cannot be made after judgment had been pronounced and fine credited to Government, 11 W.R. (Cr.) 53. The High Court when hearing a reference made by the District Magistrate under B. 438, *supra*, recommending a retrial of an accused convicted under the rules framed under the Motor Vehicles Act for an offence under the I.P.C., has power while holding that the accused was substantially punished for his act to award compensation to be given to the complainant out of the fine imposed on the accused when such order had not been passed by the trial Court, 28 Cr. L.J. 757=103 Ind. Cas. 837.

In defraying expenses properly incurred in the prosecution.—This section does not apply to such expenses as are incurred in bringing the person of the offender before the Magistrate, Ratanlal 603. Where N was convicted of the offence of accepting an illegal gratification as a public servant and sentenced to imprisonment and a fine and the Magistrate directed that out of the fine if paid Rs. 95, the amount of the bribe paid be given as compensation for the trouble and expenses of the prosecution. It was held that the order was illegal, Ratanlal 873. All legitimate expenses such as medical officer's fee can be awarded, 24 M. 305; 4 Bom. L.R. 877. Provisions of Civil Procedure Code as to costs cannot be imported ordinarily, 23 C.W.N. 661=23 Cr. L.J. 438=57 Ind. Cas. 730.

For injury caused by the offence.—Compensation paid for injury caused is different from what is paid to defray the expenses of the prosecution. Compensation can be awarded only to the person actually injured by the offence. It was held that it cannot be given to the heirs of persons who have been killed, 10 W.R. (Cr.) 39 or to the widow of the

deceased when death is caused by rash and negligent act, 12 M. 352 followed in Ratanlal 763; 21 M. 74; 7 B.H.C.R. 73. But in 36 C. 302 a different view was taken and it was held that this section provided for compensation in case when it is recoverable under Act, XIII of 1855 by the persons therein indicated, viz., wife, husband, parent and child, if any, of the deceased. The new amendment in cl. (1) (b) that compensation may be paid to any person by whom it will be recoverable in a Civil Court adopts the view taken in, 36 C. 302 and the view of *Benson, J.*, the referring Judge, in 21 M. 74 (F.B.). The decisions in 21 M. 74 (F.B.) and 6 Cr. L. Rev. 148 which followed it, are no longer law.

Sub-section (1) (b).—Compensation cannot be ordered to be awarded to a Municipal Council out of the fine recovered from an accused who was convicted under S. 183, I.P.C., for disobeying the Plague Rules framed by Local Government in having brought a patient suffering from plague into a town without informing the authorities about it, on account of the expenditure incurred in disinfecting the house where the patient was brought by the accused, assuming that the offence caused injury by polluting the house, and the Municipality could by civil suit have recovered from the accused the cost of disinfecting the house, Ratanlal 959. In a prosecution instituted without a complaint on the report of an official of illegally receiving money from certain persons and the accused is convicted and fined three times the amount of the illegal receipts, the order to pay the whole of such amount of fine to the person from whom money was illegally taken was held bad as the payment by way of compensation of an amount considerably in excess of the amount which could be awarded under this sub-section to a person who did not incur any expense in connection with the prosecution and did not suffer any loss beyond the loss of the sum they had paid to the accused, 10 Cr. L.J. 78—2 Ind. Cas. 552.

Sub-section (1) (c).—This sub-section is new and makes provision for the payment of compensation to the innocent purchaser of *stolen property* when the property is restored to the owner. The following decisions are therefore no longer law, 6 M. 286; Weir II. 715, 717; 6 M.L.T. 241—10 Cr. L.J. 290—3 Ind. Cas. 437; 46 B. 893; 3 Bom. L.R. 449. Neither this section nor S. 519, *supra*, applies to the case of an innocent mortgagee who has advanced money on stolen property, 46 B. 893.

Sub-section (2).—This sub-section is specially enacted as there is no provision in the Code for a refund of the money paid as compensation under this section. The only remedy open to the person who paid the money and who is entitled to a refund of the same was by a civil suit. The Madras High Court in Weir II, 717 held that when the order for compensation was reversed in revision and the money having been paid over to the complainant before the result of the revision application, if the complainant refuses to refund the amount, the only remedy open to the person who paid the money was to institute a civil suit to recover the amount; in 19 A. 112, it was held that when the High Court in revision set aside a sentence of fine, compensation paid out of it to the complainant under this section may be recovered under S. 547, *infra*. Refund under such circumstances may be considered to be an incidental or consequential order coming under S. 423 (1) (d), *supra*. Where a person is dealt with under S. 562, *infra*, and no fine is imposed upon him, the Court has no power to direct him to pay compensation, 23 Cr. L.J. 1116 (1)—81 Ind. Cas. 840 (1).

Notice to complainant.—There is no express provision of law in case of an order under this section or S. 250, *supra*, with regard to notice upon the opposite party. When compensation is granted to a complainant under this section it would be the exercise of proper discretion by the appellate Court if notice is given to the complainant of the hearing of the appeal. It is a fundamental principle of law that no order should be passed to the detriment or prejudice of a party without giving him an opportunity of being heard and it is the settled practice of the Calcutta High Court that where compensation has been awarded to the complainant to serve notice upon him as well in issuing a Rule, 53 C. 969. The Madras High Court also follows this practice and gives notice to the complainant. Where in a case in which compensation to the complainant was ordered to be paid out of the fine realised from the accused and at the time of admission of the appeal no notice was issued

to the complainant leave was granted to him to appear on his application to support the judgment of the lower Court under which he was awarded compensation. *Cr. M.P. No. 655 of 1929 (M.H.C.)*.

546. At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under section 545.

Payments to be taken into account in subsequent suit.

Shall take into account.—This section enacts a direction to the Civil Court which has to assess damages in the civil suit. The expression means that the Civil Court may take into consideration the compensation awarded by the Magistrate and not that the compensation awarded shall be deducted from the damages to be awarded, 22 W.R. (Civ.) 336.

546A. (1) Whenever any complaint of a non-cognizable offence is made to a Court, the Court, if it convicts the accused, may, in addition to the penalty imposed upon him order him to pay to the complainant—

Order of payment of certain fees paid by complainant in non-cognizable cases.

(a) the fee (if any) paid on the petition of complaint, or for the examination of the complainant, and

(b) any fees paid by the complainant for serving processes on his witnesses or on the accused,

and may further order that, in default of payment, the accused shall suffer simple imprisonment for a period not exceeding thirty days.

(2) An order under this section may also be made by an Appellate Court, or by the High Court, when exercising its powers of revision.

Scope of the section.—This section is new and provides for the payment of certain fees, such as stamp-fee on petition of complaint, process-fee, etc., paid by the complainant in non-cognizable cases to be recovered from the convicted person in addition to the penalty imposed upon him by the Court. It merely provides for the refund of process-fees, in non-cognizable cases, when paid, but does not authorise their payment, 27 Cr. L.J. 419-93 Ind. Cas. 78. Costs cannot be awarded when the offence is not a non-cognizable one, 25 Cr. L.J. 1161 (1)-81 Ind. Cas. 985 (1).

Sub-section (2).—This sub-section empowers the High Court in revision to make the necessary order for payment to complainant when by an oversight the first Court failed to pass such order.

547. Any money (other than a fine) payable by virtue of any order made under this Code, and the method of recovery of which is not otherwise expressly provided for shall be recovered as if it were a fine.

Moneys ordered to be paid recoverable as fines.

Amendment.—The words "not otherwise expressly provided for" were added as the Code already contains various provisions for the recovery of, costs, S. 148 (3); compensation, S. 250 (2); maintenance, S. 435 (3), etc., as if they were fines.

Scope of the section.—This section provides that any money (other than a fine) payable by virtue of any order under this Code, the method of recovery of which is not specifically provided for, shall be recovered as if it were a fine. The section therefore confers authority to realise compensation paid to an accused person under S. 250, *supra*, when such order is set aside by the appellate Court or a Court of revision, 1904 P.L.R. (Cr.J.) 2 p. 5, following 1885 P.R. (Cr.J.) 12 and 19 A. 112.

There is no express provision in the Code for refund of any money once paid over to any person by a criminal Court. The word payable occurring in this section is construed as also including re-payable, 19 A. 112; 25 A. 315; 28 C. 258. This section is applicable only to money and not to goods, 23 Cr. L.J. 157=65 Ind. Cas. 621.

548. If any person affected by a judgment or order passed by a Criminal Court desires to have a copy of the Judge's charge to the jury or of any order or deposition or other part of the record, he shall, on applying for such copy, be furnished therewith :

Copies of proceed-
ings.

Provided that he pays for the same, unless the Court, for some special reason, thinks fit to furnish it free of cost.

Any person affected—Every one making a complaint of an offence by which he has been injured is affected by the disposal of his complaint whether the case has been sent up by a police-officer or not. Such a person is entitled to ask for a copy of the Magistrate's order of a discharge, Ratanlal 305. Every prosecutor whose charge has been dismissed is a person affected, 8 C. 166. An Advocate against whom remarks have been made imputing to him misconduct is entitled to have a copy of the judgment containing such remarks, 6 Bom. L.R. 540. A prisoner is entitled to have copies of all documents which he thinks necessary for his defence and the Court is not entitled to refuse such copies, 4 M.H.C.R. (Appx.) 57; 14 W.R. (Cr.) 77.

Judge's charge to the jury.—See S. 371, *supra*, as to heads of charge to the Jury.

Other part of the record.—e.g. Statements under S. 161 *supra*, police charge sheet under S. 179, *supra*, reports under Ss. 157, 167, 168, and 174, *supra*.

Revision—The High Court is entitled to revise the order of a Magistrate refusing to grant copies, 8 C. 166.

549. (1) The Governor General in Council may make rules, consistent with this Code and the Army Act and * *the Air Force Act* and any similar law for the time being in force, as to the cases in which persons subject to military or *air force* * law shall be tried by a Court to which this Code applies, or by Court-martial, and when any person is brought before a Magistrate and charged with an offence for which he is liable, under the Army Act, section 41 or under the *Air Force Act*, Section 41 * to be tried by a Court-martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the regiment, corps or detachment to which he belongs, or to the commanding officer of the nearest military station or * *air force station*, as the case may be, for the purpose of being tried by Court-martial.

Delivery to military authorities of persons liable to be tried by Court-martial

* Added by Act X of 1927.

to the complainant leave was granted to him to appear on his application to support the judgment of the lower Court under which he was awarded compensation. *Cr. M.P. No. 655 of 1929 (M.H.O.)*.

546. At the time of awarding compensation in any subsequent civil suit relating to the same matter, the Court shall take into account any sum paid or recovered as compensation under section 545.

Payments to be taken into account in subsequent suit.

Shall take into account.—This section enacts a direction to the Civil Court which has to assess damages in the civil suit. The expression means that the Civil Court may take into consideration the compensation awarded by the Magistrate and not that the compensation awarded shall be deducted from the damages to be awarded, 22 W.R. (Civ.) 336.

546A. (1) Whenever any complaint of a non-cognizable offence is made to a Court, the Court, if it convicts the accused, may, in addition to the penalty imposed upon him order him to pay to the complainant—

Order of payment of certain fees paid by complainant in non-cognizable cases.

(a) the fee (if any) paid on the petition of complaint, or for the examination of the complainant, and

(b) any fees paid by the complainant for serving processes on his witnesses or on the accused,

and may further order that, in default of payment, the accused shall suffer simple imprisonment for a period not exceeding thirty days.

(2) An order under this section may also be made by an Appellate Court, or by the High Court, when exercising its powers of revision.

Scope of the section.—This section is new and provides for the payment of certain fees, such as stamp-fee on petition of complaint, process-fee, etc., paid by the complainant in non-cognizable cases to be recovered from the convicted person in addition to the penalty imposed upon him by the Court. It merely provides for the refund of process-fee, in non-cognizable cases, when paid, but does not authorise their payment, 27 Cr. L.J. 415=93 Ind. Cas. 79. Costs cannot be awarded when the offence is not a non-cognizable one, 25 Cr. L.J. 1161 (1)=51 Ind. Cas. 283 (1).

Sub-section (2)—This sub-section empowers the High Court in revision to make the necessary order for payment to complainant when by an oversight the first Court failed to pass such order.

547. Any money (other than a fine) payable by virtue of any order made under this Code, and the method of recovery of which is not otherwise expressly provided for shall be recovered as if it were a fine.

Moneys ordered to be paid recoverable as fines.

Amendment.—The words "not otherwise expressly provided for" were added as the Code already contains various provisions for the recovery, of, costs, S. 148 (3); compensation, S. 250 (2); maintenance, S. 453 (3), etc., as if they were fines.

Scope of the section.—This section provides that any money (other than a fine) payable by virtue of any order under this Code, the method of recovery of which is not specifically provided for, shall be recovered as if it were a fine. The section therefore confers authority to realise compensation paid to an accused person under S. 250, *supra*, when such order is set aside by the appellate Court or a Court of revision, 1904 P.L.R. (Cr.J.) 2 p. 5, following 1885 P.R. (Cr.J.) 12 and 19 A. 112.

There is no express provision in the Code for refund of any money once paid over to any person by a criminal Court. The word payable occurring in this section is construed as also including re-payable, 19 A. 112; 25 A. 315; 28 C. 258. This section is applicable only to money and not to goods, 23 Cr. L.J. 157—65 Ind. Cas. 621.

548. If any person affected by a judgment or order passed by a Criminal Court desires to have a copy of the Judge's charge to the jury or of any order or deposition or other part of the record, he shall, on applying for such copy, be furnished therewith:

Copies of proceedings.

Provided that he pays for the same, unless the Court, for some special reason, thinks fit to furnish it free of cost.

Any person affected—Every one making a complaint of an offence by which he has been injured is affected by the disposal of his complaint whether the case has been sent up by a police-officer or not. Such a person is entitled to ask for a copy of the Magistrate's order of a discharge, Ratanlal 305. Every prosecutor whose charge has been dismissed is a person affected, 8 C. 166. An Advocate against whom remarks have been made imputing to him misconduct is entitled to have a copy of the judgment containing such remarks, 6 Bom. L.R. 540. A prisoner is entitled to have copies of all documents which he thinks necessary for his defence and the Court is not entitled to refuse such copies, 4 M.H.C.R. (Appx.) 57; 14 W.R. (Cr.) 77.

Judge's charge to the jury.—See S. 371, *supra*, as to heads of charge to the Jury.

Other part of the record.—*e.g.* Statements under S. 161 *supra*, police charge sheet under S. 179, *supra*, reports under Ss. 157, 167, 168, and 174, *supra*.

Revision—The High Court is entitled to revise the order of a Magistrate refusing to grant copies, 8 C. 166.

549. (1) The Governor General in Council may make rules, consistent with this Code and the Army Act and * *the Air Force Act* and any similar law for the time being in force, as to the cases in which persons subject to military or *air force* * law shall be tried by a Court to which this Code applies, or by Court-

Delivery to military authorities of persons liable to be tried by Court-martial.

martial, and when any person is brought before a Magistrate and charged with an offence for which he is liable, under the Army Act, section 41 or under the *Air Force Act*, Section 41 * to be tried by a Court-martial, such Magistrate shall have regard to such rules, and shall in proper cases deliver him, together with a statement of the offence of which he is accused, to the commanding officer of the regiment, corps or detachment to which he belongs, or to the commanding officer of the nearest military station or * *air force station*, as the case may be, for the purpose of being tried by Court-martial.

* Added by Act X of 1927.

(2) Every Magistrate shall, on receiving a written application for that purpose by the commanding officer of any body of troops stationed or employed at any such place, use his utmost endeavours to apprehend and secure any person accused of such offence.

Apprehension of such persons.
Scope of the section.—This section is based on the old Bengal Regulation, XX of 1825, under which the military authorities would require a Magistrate to hand over any prisoner who may be apprehended and brought before him for an offence committed at any place more than 120 miles from the Presidency Town, but the proceedings before the Magistrate, when taken at the request of, and assented to by the military authorities are not absolutely void, and a commitment so made is not invalid, 22 W.R. (Cr.) 20; 5 C. 125.

Army Act.—See 44 and 45 Vict., C. 58.

Rule 129. Mad. Cr. Rules of Pr. says that the provisions of the section should be complied with unless (1) the Magistrate is of opinion for reasons to be recorded that he should proceed without the person accused being removed or unless the Magistrate is moved by the military authorities (2) Before proceeding under rule (1) the Magistrate is to give notice to the Commanding Officer and to the accused and until the expiry of fifteen days from date of service of notice, he shall not acquit or convict the accused under Ss. 243, 245, 247 or 248, Cr. P.C., or hear him on his defence under S. 244 or frame a charge in writing under S. 254 or make an order committing him to the High Court or Court of Session under S. 213 or S. 214 or issue orders for his trial by Jury. The Magistrate should stay proceedings on notice by the Commanding Officer and deliver the accused to the military authorities and when the accused after delivery is not tried by the Court-martial, the Magistrate shall report the fact to the Local Government in Madras and Bombay and in other cases through the Local Government to the Governor-General in Council. Not. No. 817, dated 23rd May, 1902, Gazette of India, Pt. I, p. 383.

See the new Rules published in the Gazette of India dated 30th June 28 Notification, No. F. 465 of 1928 (Home Depart.).

550. Any police-officer may seize any property which may be alleged or suspected to have been stolen, or which may be found under circumstances which create suspicion of the commission of any offence. Such police-officer, if subordinate to the officer in charge of a police-station, shall forthwith report the seizure to that officer.

Powers to police to seize property suspected to be stolen.
 This section expressly empowers police-officers to seize properties which they may suspect to have been stolen or which they find under circumstances which create suspicion of the commission of an offence. S. 523, *supra* describes the procedure to be followed with reference to such property when seized. See also Ss. 51 and 54 (1), cl. (iv) *supra*, but without seizing, a police officer cannot issue an order to detain certain logs suspected to be stolen property lying in a truck at the Railway Station yard, to the Station Master, 15 Cr. L.J. 177=22 Ind. Cas. 753. This section gives very wide powers of seizure of property, say cattle, suspected to have been stolen, but it does not extend to the taking away other cattle, simply because they are mixed up with the suspected stolen cattle, See 11 Cr. L.J. 93=4 Ind. Cas. 980.

551. Police-officers superior in rank to an officer in charge of a police-station may exercise the same powers throughout the local area to which they are appointed, as may be exercised by such officer within the limits of his station.

Powers of superior officers of police

Where a superior-Officer, *vis.*, the District Superintendent of Police, reported at a Police Station that a police-officer and another constable had prepared false records, wrongfully confined certain persons and caused hurt to them to extort a confession, it was held that although he had power to investigate the case under S. 156, *supra*, by virtue of this section still it was rather startling that the complainant himself should have made investigation under S. 157, 25 M.L.T. 379; 45 M.L.J. 279=18 L.W. 113=1923 M.W.N. 860=25 Cr. L.J. 7=75 Ind. Cas. 695. Order for dispersing of an unlawful assembly by a Deputy Commissioner of Police is lawful, 7 B. 42.

Officer in charge of Police-Station.—For definition of the expression See S. 4 (p) *supra*.

552. Upon complaint made to a Presidency Magistrate or District Magistrate on oath of the abduction or unlawful detention of woman, or of a female child under the age of *sixteen** years, for any unlawful purpose, he may make an order for the immediate restoration of such woman to her liberty, or of such female child to her husband, parent, guardian or other person having the lawful charge of such child and may compel compliance with such order, using such force as may be necessary.

Power to compel
restoration of abducted
females

Scope of the section.—This section applies to women and female children only who are alleged on oath to have been abducted or unlawfully detained for any unlawful purpose. The section is not intended for the protection of children only or children generally, but of women and female children only. This combination and exclusion of male children go to show not only that some definite purpose unlawful in itself was contemplated but that the purpose has some reference to the sex of the person against whom it was entertained. Therefore it should not be so construed as to make it include purposes which though not unlawful in themselves might only become so when entertained towards a child in opposition to the wishes of its guardian, say for the purpose of being brought up in a religion which such parent or guardian disapproves, 16 C. 487; 4 Bom. L.R. 609; 9 C.W.N. 1030. This section confers on Magistrates specified herein, *vis.*, a Presidency Magistrate or a District Magistrate and not on other Magistrates specific powers to pass certain orders of a very special nature and directs that these powers shall not be exercised except on a complaint made on oath, for the exercise of the power to administer oath being already possessed by the Magistrate is made compulsory as a condition precedent to the exercise of the special power 17 Cr. L.J. 491=36 Ind. Cas. 171. The purpose contemplated by this section must in itself be unlawful, 4 Bom. L.R. 609, *e.g.*, detention for the purpose of forcing a woman or a girl under sixteen years, even with her consent, the girl's consent being immaterial for sexual intercourse, would certainly be unlawful. There must be an express finding by the Magistrate that the woman is unlawfully detained before passing an order under the section. If a woman resides with the relations who are aiding her in her endeavour to procure a divorce from her husband such a detention cannot be held to be an unlawful detention. Weir II, 724.

—Make an order for immediate restoration.—For making an order for restoration the Magistrate must find that she was unlawfully detained by some one and direct that person to restore her to liberty. When he is unable to find who the person is that is detaining the woman and what his purpose is, the only proper order to issue is to have the woman brought up before the Court and have her examined.

Female child under sixteen years.—By Act XVIII of 1924, S. 5 the word "*sixteen*" was substituted for the original word "*fifteen*." A girl of sixteen years has a right to choose her own residence and, living away from her mother with a missionary lady cannot be said to be an unlawful detention by the missionary lady, 16 B. 307.

Unlawful detention.—It is immaterial whether the girl did or did not consent. When she was kept against the will of the lawful guardian such keeping and refusal to give her up, amounted to an unlawful detention, 16 C. 487 at 501. But when a husband complained to a District Magistrate of his wife being unlawfully detained by his father-in-law and refusing to send her to his house without alleging that she has been so detained contrary to her own wish, it was held that the proper remedy for the husband lay in the Civil Court if he had any grievance, 15 Gr. L. J. 712=26 Ind. Cas. 160.

553. (1) Whenever any person causes a police-officer to arrest another person in a presidency-town, if it appears to the Magistrate by whom the case is heard that there was no sufficient ground for causing such arrest, the Magistrate may award such compensation, not exceeding fifty rupees, to be paid by the person so causing the arrest, to the person so arrested, for his loss of time and expenses in the matter, as the Magistrate thinks fit.

(2) In such cases, if more persons than one are arrested, the Magistrate may, in like manner, award to each of them such compensation, not exceeding fifty rupees, as such Magistrate thinks fit.

(3) All compensation awarded under this section may be recovered as if it were a fine, and, if it cannot be so recovered, the person by whom it is payable shall be sentenced to simple imprisonment for such term not exceeding thirty days as the Magistrate directs, unless such sum is sooner paid.

See S. 250, *supra*, which deals with false and frivolous or vexatious complaints.

The Magistrate by whom the case is heard.—Obviously the Magistrate herein referred to is a Presidency Magistrate. The section is taken from Presidency Magistrates Act, IV of 1877.

554. (1) With the previous sanction of the Governor General in Council, the High Court at Fort William, and, with the previous sanction of the Local Government any other High Court established by Royal Charter, may, from time to time, make rules for the inspection of the records of subordinate Courts.

Power of chartered High Courts to make rules for inspection of records of subordinate Courts.

Power of other High Courts to make rules for other purposes.

(2) Every High Court not established by Royal Charter may, from time to time, and with the previous sanction of the Local Government,—

(a) make rules for keeping all books, entries and accounts to be kept in all Criminal Courts subordinate to it, and for the preparation and transmission of any returns or statements to be prepared and submitted by such Courts;

(b) frame forms for every proceeding in the said Courts for which it thinks that a form should be provided;

(c) make rules for regulating its own practice and proceedings and the practice and proceedings of all Criminal Courts subordinate to it; and

(d) make rules for regulating the execution of warrants issued under this Code for the levy of fines:

Provided that the rules and forms made and framed under this section shall not be inconsistent with this Code or any other law in force for the time being.

(3) All rules made under this section shall be published in the local official Gazette.

This section on the authority of which the forms in the schedules are framed expressly states that the forms given in the Schedule to the Code are liable to be varied according to the requirements of each particular case. It would certainly be extremely difficult to carry on police administration of the country if every warrant had to be directed by name to a police-officer and upon his transfer it were to become incapable of execution till the name of some other officer had been substituted in his place, [1918] Pat. 269=3 Pat. L.J. 493.

555. Subject to the power conferred by section 554, and by section 107 of the *Government of India Act*, the forms set forth in the fifth schedule, with such variation as the circumstances of each case require, may be used for the respective purposes therein mentioned, and if used shall be sufficient.

Forms.

May be used.—This section provides that the forms in the schedule are not obligatory; they may be used with such variations as they may require, and if used with such variations shall be sufficient compliance with law, 22 C.W.N. 342 at 345. See also 34 C. 697; 26 M. 55; 7 A. 44 (F.B.) as to significance of the words "*if used shall be sufficient.*" Where a search-warrant under S. 100 *supra* was drawn up in a printed form used under S. 93 with necessary alterations, it was held to be a valid warrant, 39 C. 403; 6 Cr. L.J. 127; see 45 C. 905 following 16 C.W.N. 336. This section deals with the form of warrant itself and nothing more and the words of the section are not intended to supersede the provisions of S. 93, *supra*, 51 C. 1. The Madras High Court in its Proceedings No. 1297, dated 23-7-1873, has observed that Sessions Judges should frame the charge in the first person and not in the third person, and if the charge sent up by a Committing Magistrate is defective, it should be corrected by the Sessions Court.

556. No Judge or Magistrate shall, except with the permission of the Court to which an appeal lies from his Court, try or commit for trial any case to or in which he is a party, or personally interested, and no Judge or Magistrate shall hear an appeal from any judgment or order passed or made by himself.

Case in which Judge or Magistrate is personally interested.

Explanation.—A Judge or Magistrate shall not be deemed a party, or personally interested, within the meaning of this section, to or in any case by reason only that he is a Municipal Commissioner or otherwise concerned therein in a public capacity, or by reason only that he has viewed the place in which an offence is alleged to have been committed,

or any other place in which any other transaction material to the case is alleged to have occurred, and made an inquiry in connection with the case.

Illustration.

A, as Collector, upon consideration of information furnished to him, directs the prosecution of B for a breach of the Excise Laws. A is disqualified from trying this case as a Magistrate.

Scope and object of the section.—The object of this section is to enact the well known maxim that "no man can be his own judge or give judgment concerning his own rights." It is one of the oldest and plainest rules of justice and common sense that no man shall sit as Judge in a case in which he has a substantial interest. That is the law of this country as much as it is the law of England, 2 C. 23 at 27. This section is based on the maxim '*nemo debet esse iudex in propria causa*'. As an abstract proposition a Judge or Magistrate is not disqualified from trying a case based on a private complaint and which has not been filed under his direction or sanction merely and solely on the ground that the validity of certain orders passed by him in his capacity, as an Executive or Revenue Officer is directly in issue in the case, 27 Cr. L.J. 1333=58 Ind. Cas. 405. The object is to clear everything which might engender suspicion and distrust and to promote the feeling of confidence in the administration of justice which is so essential to social order and security, 20 C. 857. It is essential to preserve the administration of justice not merely from any taint of bias or impartiality but also as far as possible from any suspicion of such taint, 28 Bom. L.R. 1302=28 Cr. L.J. 53=99 Ind. Cas. 85. "The principle of this section rests not upon any suspicion as to the honesty of the Judge or his capacity to adjudicate but upon a thing higher than the technicalities of law, namely, upon the conception that human beings are after all human beings and with all honour due to the honesty and integrity of Judges, they are not to hear cases in which they are themselves concerned." Where a Judge is a sole judge of law and fact in a case tried before himself, he cannot give evidence before himself or import matters in his judgment not stated on oath before the Court in the presence of the accused. If he does so he makes himself a witness in the case and renders himself incompetent to try the case, 20 Cr. L.J. 45=48 Ind. Cas. 685 where 19 M. 263. is referred. A Judge cannot try a case in which he is the complainant. The presiding officer of a Court before whom an offence against public justice was committed has to make a complaint of Court under S. 476, *supra*, if he wishes to take action. Such a complaint comes within the definition given in S. 4 (1)(h) *supra*, but the complainant need not be examined on oath before cognizance is taken (See S. 200 (aa) *supra*) and the Judge who makes such a complaint of Court cannot try the case himself, 8 Lah. 496; See also 32 C.W.N. VI. When a sessions Judge made a complaint of Court against a person under S. 191, I.P.O., and the Magistrate who took cognizance discharged the accused, the Sessions Judge who made the complaint of Court is not competent to hear a revision against the order of discharge, he having been a party to the complaint, 28 Bom. L.R. 1302=28 Cr. L.J. 53=99 Ind. Cas. 85. It is highly undesirable, that a Magistrate should act judicially in a case in which he has himself extra-judicially investigated and has formed conclusions of fact adverse to the party against whom he subsequently initiates criminal proceeding, 10 C.L.J. 484=11 Cr. L.J. 2=4 Ind. Cas. 437 where 5 A.L.J. 337, is referred to; 1903 A.W.N. 95. See also 13 Cr. L.J. 236=14 Ind. Cas. 428, what the section contemplates is that if the Magistrate or Judge is merely connected with a case by reason of his discharging some other public function or is connected with it in some public capacity outside his magisterial or judicial functions and orders or directs a prosecution or is concerned with it in some public capacity, he is not on that ground alone to be deemed personally interested in the case. And if in addition to a connection of that sort he is in some capacity outside his magisterial or judicial functions and orders or directs the prosecution of a person for an offence then he is to be deemed personally interested in the case and he cannot try it. The distinction is between having some public or official connection with the case and ordering or directing a prosecution in some extra-judicial or extra-magisterial capacity, 1899 A.W.N. 74. A disqualifying

Interest must be one attaching to a Magistrate or Judge as an individual and not one which he derives solely from his official position, 1893 A.W.N. 79. Interest creating a real ground for transfer must be distinguished from the disqualifying interest contemplated by this section. The latter comes within the purview of S. 526, *supra*, and may not come within the scope of this section. Consent of parties to a cause cannot remove the disqualification imposed by this section, 23 Cr. L.J. 446=67 Ind. Cas. 622; 4 Lah. 376; 32 A.635; 31 Bom. L.R. 925 nor the absence of *bona fides* of the party raising the objection affects the question 31 Bom. L.R. 925. Whether a given case falls within the provisions of this section is a question of fact to be determined by the circumstances of each case and it is not safe to draw any analogy from the decisions in other cases, 14 Cr. L.J. 385=20 Ind. Cas. 209, *following* 24 M. 238;

Try any case.—These words are wide enough to include any stage of a judicial proceeding in which the guilt or innocence of the accused is finally adjudicated upon. Consequently the provisions of this section apply to proceedings taken under S. 437, *supra*, which will have the effect of setting aside an order of discharge. This construction does not force to the words of the section and is in accord with the intention of the Legislature which was to enact the rule that no man could be judge in his own cause, 13 Cr. L.J. 30=13 Ind. Cas. 222 where 27 A. 25 is distinguished. The words "try any case" are comprehensive enough to include the hearing of an appeal, 23 Cr. L.J. 446=67 Ind. Cas. 622; 14 Cr. L.J. 385=20 Ind. Cas. 209. The fact that the Magistrate had issued a search-warrant prior to the institution of the case or the fact that the accused may possibly object to the propriety of the issuing of search-warrant will not disqualify the Magistrate from trying the case, 24 A.L.J. 568=27 Cr. L.J. 783=93 Ind. Cas. 319, but a Magistrate who as a member of a District Board, took part in a resolution that the police should inquire into the conduct of certain officials of the Board and prosecute them after due inquiry is incompetent to try the case instituted on such resolution, 29 Cr. L.J. 371=108 Ind. Cas. 271. A Sub-divisional Magistrate who did not take cognizance of a complaint or hold a local investigation, but acting as the officer in charge of the division directed the issue of summons holding that the investigating Magistrate had not given satisfactory reasons for recommending a dismissal of the complaint without, however, expressing any clear opinion hostile to the accused is not disqualified under this section to hear an appeal from a conviction especially where no objection whatever was raised to the Magistrate hearing the appeal. Nor can a Judge try an offence nor hear an appeal from a conviction where he directs a prosecution, as by doing so he had merely directed further inquiry into the matter, 23 Cr. L.J. 1481=89 Ind. Cas. 1049; the expression "try a case" is wide enough to include any stage of judicial proceeding in which the question of the guilt or innocence of the accused is finally adjudicated and includes a proceeding under S. 436, *supra*, for further inquiry into a discharge, See 32 A. 635.

Commit for trial.—Unless the Magistrate obtains permission from the appellate Court, he is disqualified from committing the case for trial, if he had taken more than a formal part in the police investigation of the case under inquiry, 2 L.B.R. 209.

Except with the permission of the Court to which appeals lie.—Properly speaking the permission should be given before the proceedings are begun, 31 Bom. L.R. 925 at 531; 53 B. 716. There is nothing in this section to suggest that the interest which might disqualify a Judge or Magistrate from trying or committing for trial would prevent an appellate Court granting the permission contemplated by this section. The fact that both the Magistrate and the Judge are members of a club and the accused was a servant of that club will not preclude the Judge as the appellate authority from granting the necessary permission, 20 A. 181. The expression "permission of the Court refers to the words "try or commit for trial" and cannot be extended to include the hearing of an appeal. A Judge who directed a prosecution should not hear an appeal from the conviction even with regard to the severity of the sentence passed, 14 C.W.N. LXIII; 17 C.W.N. XII; 1893 P.R. (Cr. J.) 39. The examination of a trying Magistrate as a witness will not disqualify him from trying the case, 2 Luck. 533. It was held in 23 C.46 at 47, that the words "try any case" are words

comprehensive enough to include even an appeal. The prohibition in the case of an appellate Court hearing an appeal from its own judgment is absolute. No such permission can ever be granted. The word "trial" may not apply to proceedings under Ss. 437 and 438, *supra*. "I have grave doubt whether the word 'try' used in S. 556 can in any case be applied to proceedings taken under S. 435 or any other section of the Code in which he is not empowered to pass any orders, but merely to report the case for the orders of this Court. It seems to me doing violence to the word 'try' that it should cover any such proceedings"—*Per Knox, J.*, in 27 A. 23 at 27. Consent of the accused cannot confer jurisdiction upon a Magistrate who is disqualified from trying the case, 7 A.L.J. 739. Criminal Proceedings substantially bad cannot be cured by any amount of waiver or consent on the part of the accused person, 2 C. 23; 46 M. 117 at 120; 18 M.L.J. 330; 6 C.W.N. 202; 21 A.L.J. 89; 2 Pat. 93; 1 L.R.P.C. 520; 23 M.L.J. 329=1915 M.W.N. 229; 4 Lah. 376; 29 Cr. L.J. 521=109 Ind. Cas. 345; 50 A. 457 at 462.

Personally Interested—This section is based on the maxim '*nemo debet esse judex in propria causa*,' 8 Lah. 497. The words '*party or personally interested*' have been the subject of several English decisions which well established that a direct personal pecuniary interest, however small, in the result of a case, disqualified a Judge from trying a case but where such interest is not pecuniary, the disqualifying interest should have substantially the same effect so as to create a reasonable suspicion of bias, but a mere possibility of bias is not enough. The same consideration should apply in interpreting this expression occurring in this section. Where the only interest in the result of a case tried by a Magistrate is that he is concerned in it in his public capacity, it may fairly be presumed that his interest is not so substantial as to warrant the inference that he is likely to have a real bias in the matter, 27 Cr. L.J. 1333=98 Ind. Cas. 405; 53 B. 716 at 723-74 '*interest*' which disqualifies a Justice may be two fold: pecuniary interest and interest other than pecuniary interest such as personal feeling or bias. The rule as to pecuniary interest is stated thus: 'It is a leading principle of English law that no one is allowed to be a Judge in his own case, that means that the least pecuniary interest in the subject-matter of the litigation is sufficient to disqualify any person from acting as a Judge.' 'Law is no respecter of persons' and Lord Chancellor Cottenham's judgment in a case was reversed by the House of Lords solely on the ground that the Lord Chancellor owned some shares in the defendant company which fact the Lord Chancellor had apparently forgotten when he heard the appeal, see 3 H.L. Ca. 759. The prohibition herein contained is based on the principle that no man is allowed to be a Judge in his own cause and rests on the decisions in 20 Q.B.D. 58 at 60; [1894] 1 Q.B. 750; 43 Ch. D. 366; 2 Q.B.D. 558, see also 31 Bom. L.R. 925; 53 B. 716. The word "interest" in this section does not merely imply intellectual interest, but something of the nature of an expectation of an advantage to be gained or for a loss or of some disadvantage to be avoided by the person who is said to be interested in the case, 8 Bom. L.R. 947=5 Cr. L.J. 2; 15 Cr. L.J. 649=25 Ind. Cas. 977. The words "personally interested" cannot mean that a public officer, whose duty it is to see that the law is obeyed, is merely by reason of that duty, a person personally interested in the prosecution. They cannot refer to any very remote interest in the matter and must refer to some particular and immediate personal interest in the case and its result. 15 A. 193 (F.B.); 22 A. 340; 27 A. 33; see also 20 C. 857; 23 C. 328; 7 C.W.N. 708, 24 M. 238; 1 Lah. 33. The words do not exclude pecuniary interest as distinguished from personal interest, 20 B. 502. Where the accused was a servant of the Magistrate who tried him and was charged with rash and negligent driving of a carriage driven by the Magistrate's wife it was held that the Magistrate was personally interested, and the conviction was set aside, 14 B. 572; 9 B. 172. Where the trying Magistrate is himself the complainant, he having arrested the accused who was found smoking in a railway train and who refused contemptuously to do so when asked by the Magistrate, cannot try the accused for an offence under the Railway Act, as he is disqualified Ratanlal 339, but where the trying Magistrate is the master of the complainant there is no disqualification but it is expedient that the complaint should be tried by some other Magistrate, 9 B. 172. A Magistrate who is a share-holder in a company is disqualified from trying an employee of the company charged with criminal breach of trust as a servant of the company

20 B. 502 ; 8 Bom. L.R. 947 ; 31 Bom. L.R. 925; 53 B. 716. It is highly desirable that the President of a Municipal Council who is also a Magistrate should not try Municipal cases and a conviction had is illegal on account of his personal disqualification, 18 Cr. L.J. 1017=42 Ind. Cas. 761. It has been held over and over again that if a prosecution has been directed in pursuance of orders passed by a local body in a meeting presided over or attended by a Magistrate in his capacity as an office-bearer or member thereof such Magistrate is "legally interested" in the matter and is disqualified from trying the matter in his judicial capacity, 10 Lah. 718, following 18 B. 442 ; 10 C. 1030; 18 Cr. L.J. 1017=42 Ind. Cas. 761 and 32 A. 635. But the objection, that because the trying Judge was, once while at the bar held briefs for a certain company, and therefore could not decide a case of the company impartially, was overruled, holding that a man is quite capable of disassociating himself from such influence while acting in a judicial position, 4 C.W.N. cxxliii.

Explanation.—The explanation was added to meet the objections raised in, 23 C. 328 ; 37 C. 340 ; 19 M. 253 and follows the view expressed in, 10 C. 194 and 19 A. 302 ; see also the decision in 15 A. 192 (F.B.), where it was held that Magistrate being in charge of the excise and opium administration of the District was held not to be personally interested merely because of his duty as a Government officer to see that the law relating to sale of opium is enforced and maintained. "A gentleman who without remuneration is merely discharging a public and honorary office and who has no personal interest in the proceedings of the municipality may well be supposed to be free from the bias which the jealousy of the law presumes in other persons immediately interested. Such immediate and disqualifying interest does, we think, exist in the case of a gentleman whose time and services are in consideration of a salary given to carry on the work of a Municipal Corporation. The jealousy of law must presume that such a person, however upright and honourable his character, is disqualified from taking part in judicial proceedings in which the municipality is *ipso facto* the prosecutor"—per Field, J., in 10 C. 194 at 193. As a general rule it is undesirable that a Magistrate, who, by local investigation while on tour, having himself discovered the existence of a crime, and collected or ascertained evidence in support of it, thereafter directs, recommends or invites the institution of judicial proceedings should try the supposed criminal, 13 Cr. L.J. 236 ; 1 Lah. 25; 23 Cr. L.J. 446 ; 24 Cr. L.J. 128. But it was held in 5 Bom. L.R. 542, that a Magistrate who held a departmental inquiry and sent the records to the Collector with his opinion that the evidence justified a prosecution was not disqualified. Where there is a disqualification under this section the judicial officer before whom the case is, is not a Court of competent jurisdiction and S. 537, *infra* would not apply. A case so tried must be regarded as one tried by a Court without jurisdiction, 23 C. 328. The explanation covers only those cases in which the Magistrate, though a member, has not taken part in directing or sanctioning the prosecution, 10 Lah. 718 where 1 Ran. 517 is distinguished on the ground that the prosecution had not been directed by the Magistrate but if he has done so he would have been disqualified. The explanation does not apply to any case in which a Magistrate may have been personally concerned as a Municipal Commissioner in the matter which forms the subject of a trial before him. It was rather intended to prevent an objection being raised that from the mere fact that the Magistrate happened to be a Municipal Commissioner, he was necessarily disqualified from holding a trial in which some Municipal matter was involved. A Magistrate who merely authorises a prosecution as President of a Town Committee is not disqualified under this section from trying the case. But it is extremely undesirable that a Magistrate who has given formal sanction for a prosecution in his official capacity should try the case himself when other Magistrates are available, 1 Ran. 517. The question whether a given case falls within the provisions of this section is a question of fact to be determined by the circumstances of each particular case. The word used in the illustration is 'directs' which means institutes, or gives orders for the institution of the prosecution. An authorisation is not a direction which will disqualify a Magistrate under this section, 23 M. 233 at 240. But where a Deputy Tahsildar who is also a Magistrate on receipt of a report from a Revenue Inspector as to an encroachment directed the village headman to file a complaint against the person alleged to have encroached on public land and himself received the complaint, he is disqualified under this section from trying the case, (M.H.C.), Cr.R.C. No. 237 of

1929, following 24 M. 233. It is a very different matter when the Magistrate is practically one of the prosecutors and the Judge 10 C. 1030 at 1031 or otherwise concerned therein in a public capacity. A Magistrate holding a preliminary inquiry under S. 202, *supra* is not disqualified from trying the case himself, 4 C.W.N. 604; 24 C. 167. A Magistrate is not debarred from trying the case under the opium Act by reason only of his being in charge of the opium and exercise administration of the District, 15 A. 192 (F.B.) or where he merely lays certain information before the police to make an inquiry on the basis of that information and the prosecution is initiated in the ordinary course by the investigating officer, 11 A.L.J. 832=15 Cr. L.J. 17=22 Ind. Cas. 161. But where a District Magistrate took an active part in the investigation of a case, he was held to be disqualified, 24 M. 233; 20 C. 837; 6 C.W.N. 864. In *Weir*, II, 723; a Municipal Commissioner reported to the Council an offence against conservancy provision which came to his notice, the Council of which he was a member directed the prosecution and the Commissioner also sat on the same Bench of Magistrates who convicted him, it was held that the proceedings were not illegal. Again a Municipal Commissioner who brought to the notice of the Executive Officer of the Committee of an infringement of a bye-law by the accused and on the strength of which the health officer instituted a prosecution of the accused before a Bench of Honorary Magistrates of which the said Municipal Commissioner was a member, and the accused was tried and convicted, it was held, that the conviction was not bad on the ground that the Municipal Commissioner was personally interested in the prosecution or was a part to the prosecution in the sense that because it to be instituted, 21 Cr. L.J. 135=71 Ind. Cas. 359.

Viewed the place in which an offence is alleged to have been committed.—Local inspection is not a necessary disqualification. See also 21 Cr. L.J. 135=71 Ind. Cas. 359.—See 16 C.W.N. 423; 12 C.W.N. 743; 9 C. 333; 37 C. 349; 39 C. 475; *Weir* II, 723 and a conviction had, will not be set aside if the local inspection is used to confirm the evidence on record. 25 Cr. L.J. 703=81 Ind. Cas. 193. But a Magistrate exceeds his jurisdiction if in making a local inspection he himself measures the plots and comes to a definite conclusion on such measurement inasmuch as he creates fresh evidence himself and introduces it into the case for the purposes of his decision, 30 Cr. L.J. 652=116 Ind. Cas. 767. S. 539B which has been newly added regulates local inspection, see 52 C. 148 and 53 C. 45 in this connection.

Or making an inquiry into the case.—Where a District Magistrate took an active part in the investigation of a case he was held not to be competent to have it tried by himself, 24 M. 233; 6 C.W.N. 864; 1 Lah. 31. But a Magistrate holding a preliminary inquiry under S. 202, *supra* is not disqualified from trying the case himself. A District Magistrate who directed the accused to be prosecuted before a Magistrate subordinate to him will be disqualified from hearing an appeal preferred to him against the conviction. But a Magistrate who is the head of the police in the District is not debarred by this section from trying a person accused under the Police Act for any breach of any order, 21 A. 343. Where a Magistrate merely laid information before the police, and directed the police to make an inquiry, and the police after investigation instituted proceedings, held that the Magistrate was not disqualified from trying the case, 1933 A.W.N. 93; 32 A. 633, where 27 A. 25, is distinguished. A Sessions Judge is not prohibited in law from hearing an appeal from a conviction by a Magistrate in which he as an Insolvency Judge allowed the prosecution to proceed. 21 A.L.J. 90=24 Cr. L.J. 144=71 Ind. Cas. 368.

Illustration.—The illustration cannot be read as merely meaning that the officer concerned may not try as a Magistrate a complaint instituted by him as Collector; its evident intention is to debar him when he himself originates the prosecution, 1 Sind L.R. 99. In the illustration the word used is 'directs' which means institutes or gives orders for institution of the prosecution. An authorisation is not a direction which will disqualify a Magistrate, 24 M. 233 at 240. The illustration makes it clear that the interest need not be pecuniary. 18 Cr. L.J. 355=29 Ind. Cas. 203 but it may be official. This is opposed to the decision in 15 A. 192 (F.B.) and is in accordance with the decision in 33 A. 635.

557. No pleader who practises in the Court of any Magistrate in a presidency-town or district shall sit as a Magistrate in such Court, or in any Court within the jurisdiction of such Court.

Practising pleader
not to sit as Magistrate
in certain Courts.

Pleader.—For definition, see S. 4 (1) (r), *supra*. The section does not deal with appointments. All it says is that no Pleader who *practises* in the Court of any Magistrate shall sit as Magistrate in such Court or as a Presidency Magistrate. A Pleader when appointed to act as a Magistrate ceases to practise in that Court, and this section cannot apply to him. The appointment of a Pleader as a Magistrate is not forbidden by any section of the Code, 23 B. 450. This section only provides that pleaders shall not sit as Presidency Magistrates while in actual practice in that Court. A pleader appointed as a Magistrate in any Court cannot under this section be prohibited from practising in that Court. But he cannot sit as a Magistrate in the Court if he continues to practise therein, 23 Cr. L.J. 311=76 Ind. Cas. 1031.

558. The Local Government may determine what, for the purposes of this Code, shall be deemed to be the language of each Court within the territories administered by such Government, other than the High Courts established by Royal Charter.

Power to decide
language of Courts.

Provision for powers
of Judges and Magis-
trates being exercised
by their successors in
office.

559. (1) *Subject to the other provisions of this Code, the powers and duties of a Judge or Magistrate may be exercised or performed by his successor in office.*

(2) *When there is any doubt as to who is the successor in office of any Magistrate, the Chief Presidency Magistrate in a presidency-town, and the District Magistrate outside such towns, shall determine by order in writing the Magistrate who shall, for the purposes of this Code or of any proceedings or order thereunder, be deemed to be the successor in office of such Magistrate.*

(3) *When there is any doubt as to who is the successor in office of any Additional or Assistant Sessions Judge, the Sessions Judge shall determine by order in writing the Judge who shall, for the purposes of this Code or of any proceedings or order thereunder, be deemed to be the successor in office of such Additional or Assistant Sessions Judge.*

This section is new and enables powers of Judges and Magistrates to be exercised by their successors and when a doubt arises as to who is the successor, the District Magistrate, Chief Presidency Magistrate in the case of Magistrates and the Sessions Judge in the case of Additional and Assistant Sessions Judges are to decide the question. So the proper person to file a complaint of Court where there is a change with personnel of the Court is the successor in office of the officer before whom an offence specified in S. 195 (1) *supra*, has been committed, 23 Cr. L.J. 643=103 Ind. Cas. 99.

Officers concerned in sales not to purchase or bid for property.

560. A public servant having any duty to perform in connection with the sale of any property under this Code shall not purchase or bid for the property.

Compare S. 169, I.P.C., which prohibits a public servant from purchasing or bidding for property which he is legally bound not to purchase.

Special provisions with respect to offence of rape by a husband.

561. (1) Notwithstanding anything in this Code, no Magistrate except a Chief Presidency Magistrate or District Magistrate shall—

(a) take cognizance of the offence of rape where the sexual intercourse was by a man with his wife, or

(b) commit the man for trial for the offence.

(2) And, notwithstanding anything in this Code, if a Chief Presidency Magistrate or District Magistrate deems it necessary to direct an investigation by a police-officer, with respect to such an offence as is referred to in sub-section (1), no police-officer of a rank below that of police-inspector shall be employed either to make or to take part in the investigation.

When the offence of rape has been taken cognizance of by a District Magistrate as required by law, the fact that the investigation into the offence was made by an officer below the rank of Police Inspector was held not to be such a material irregularity as would vitiate the subsequent proceedings, 1893 A.W.N. 9.

561A. *Nothing in this Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code, or to prevent abuse of the process of any Court or otherwise to secure the ends of justice.*

Saving of inherent power of High Court.

Scope of the section—This section corresponds to S. 151, C.P.C., but the power is to be exercised only by the High Court and not by the lower Courts. In 1923 the Legislature has introduced a section in the Code the necessity of which really follows as a corollary from the proposition that the Code is not exhaustive. "The old rule for jurisdiction is, that nothing shall be intended to be out of the jurisdiction of the superior Court but that which specially appears to be so; nothing is intended to be within the jurisdiction of an inferior Court but that which is expressly alleged, 28 Cr. L.J. 913 at 924-103 Ind. Cas 433. It is S. 561A which saves the inherent power of the High Court, which after all is the custodian of the rights of the subjects. Under this provision nothing in the Code of Criminal Procedure shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to give effect to any order under this Code or to prevent abuse of the process of any Court or otherwise to secure the ends of justice. This power was always supposed to exist and it was never denied that the arms of the High Court were not long enough to reach any kind of wrong but still in the absence of any express provision of law recognising the existence this power, the exercise of it could not be relied upon as an effective remedy for all cases of failure of justice. The Legislature very properly has put in this section in 1923, and it may be called the saving section of the Code, a counter to the ousting section 537, *supra* 30 C.W.N. cl. This

section is new and it recognises the inherent powers of the High Court. It confers no new power on the High Court. All that this new section does is to declare that such inherent powers as the High Court may possess have not been taken away or abridged by the provisions of the Code and it does not confer any new powers. It merely says that such of the inherent powers as the Court may possess shall not be deemed to be limited or affected by anything contained in the Code, 10 Lah. 1. The limits of the jurisdiction are very wide as the language employed in enacting S. 439, *supra*, and this section shows, but though the jurisdiction exists and is very wide in its scope, it is a rule of practice that it will only be exercised only in very exceptional cases, 3 Luck. 287 at 291. The Court cannot by invoking its inherent powers extend the powers given to it by statute, 49 M.L.J. 533, following 48 M. 262 (F.B.); 45 M. 913 (F.B.). This new section has been enacted to authorise the High Court to make any order as may be necessary to secure the ends of justice or to prevent the abuse of the process of the Court or to give effect to any order under the Code and this power has been conferred on the High Courts in India notwithstanding the limitation contained in S. 369, *supra*. Where owing to carelessness of Counsel in not appearing in Court at the time of the original hearing a client's case went unrepresented and an *ex parte* order was passed, the High Court has jurisdiction under this section to entertain a fresh application to rehear the matter to secure the ends of justice, 3 Luck. 680; 10 Lah. 1 following 34 C. 960 and 1 Q.B.D. 677. Criminal Courts no less than Civil Courts exist for the administration of justice and Courts of both descriptions have inherent power to mould the procedure subject to the statutory provisions applicable to the matter in hand to enable them to discharge their functions as Courts of justice, 15 C.L.J. 51. Jurisdiction to take cognizance of offences must be expressly conferred on the High Court in order to enable it to punish offenders and the inherent powers of the High Court cannot be invoked for that purpose. So the High Court has no jurisdiction to take cognizance of an offence under S. 120 of the Government of India Act, oppression by one holding office of any British subject in the exercise of his authority. 30 Cr. L. J. 460—115 Ind. Cas. 428.

To prevent abuse of process of Court.—The language of the section is wide and comprehensive. There can be no doubt that criminal proceedings before a subordinate Court constitute a process of the Court and if the High Court comes to the conclusion that the process is being abused, this new section vests in the High Court jurisdiction to quash those proceedings so as to prevent an abuse of the process of the Court, 3 Luck. 287; 39 C.L.J. 236—25 Cr. L.J. 1258=82 Ind. Cas. 266; 1 Luck 133; 50 B. 741.

Or otherwise to secure ends of justice.—The words 'or otherwise to secure the ends of justice' can only mean that such other inherent power as the Court possesses is likewise preserved. The High Court is not given, nor did it ever possess, an unrestricted and undefined power to make any order which it might please to consider, was in the interest of justice. Its inherent powers are much controlled by principle and precedent as are its express powers by statute, 10 Lah. 1 at 6. The terms of the section are from their nature very wide; "Inherent power", "to prevent abuse of process," "to secure ends of justice" are terms incapable of definition or enumeration and capable at the most of test, according to well-established principles of criminal jurisprudence. The results of such tests might in certain cases be doubtful or indecisive. What then are the "ends of justice?" To the particular result in any particular case, justice is indifferent. The end of justice is no more conviction than acquittal. It is justice by the ascertainment of truth as to the facts on a balance of evidence on each side. If so, do the ends of justice require, or do they not that the accused person from the moment of his arrest, should have reasonable access to his legal advisers; or does it suffice that this access should commence under the Prisons Act IX of 1894, from the time exclusive police custody has ceased. If the end of justice is justice and the spirit of justice is fairness, then each side should have equal opportunity to prepare its own case and to lay its evidence fully, freely and fairly before the Court. This necessarily involves preparation, which is more effective from the point of view of justice, if it is made with the aid of skilled legal advice. Ss. 497 and 498, *supra*, give ample authority to release the prisoner on bail from exclusive police custody. If access to legal adviser is refused, under this section

the High Court has ample powers to see that such access is not prevented, where the ends of justice so require, 50 B. 741 at 749, 750. Unlike S. 151 of the Civil Procedure Code which saves the inherent powers of all Courts, this section recognizes the inherent powers of the High Court alone and it is not as wide as S. 151, C.P.C., which empowers the Court to make any order as may be necessary for the ends of justice. See 32 C.L.J. 270 (Sp. B) where *Hookerjee, J.*, has discussed at great length the inherent power of the Court and comes to the conclusion that there was no doubt whatever that the doctrine of inherent power as enunciated in 44 C. 816 and 15 C.L.J. 517 is well established in principle and cannot be successfully questioned. It is clearly just that under this section, the High Court has power to order restitution of property when the lower Court has made over property under S. 517, *supra* to a person who is not entitled to its possession and the High Court should remedy the error by restoring it to the person lawfully entitled to the same, 5 Ran. 553 where 21 Cr. L.J. 561 = 57 Ind. Cas. 81 is followed and 6 Cr. L.J. 126 is dissented from. See also 50 A. 414 following 3 L.W. 498 = 1916 M.W.N. 89 = 17 Cr. L.J. 190 = 33 Ind. Cas. 830 and 23 C.W.N. 143 = 28 C.L.J. 83 = 19 Cr. L.J. 931 = 47 Ind. Cas. 803. The High Court has under this section inherent power to stay execution of its own order when the ends of justice require it. In cases where an appeal against its decision has been admitted by their Lordships of the Privy Council and there is a fear that the sentence would expire before the appeal is heard and disposed of it would be within its power to release the accused on bail. Such inherent power must be deemed to exist as in this section it is expressly provided that nothing in the Code shall be deemed to limit or affect the inherent power of the High Court to make such orders as may be necessary to secure the ends of justice, 49 A. 257. The High Court is similarly empowered to require a criminal Court trying an accused person on a complaint of Court under S. 476, *supra*, to stay pronouncing its judgment when an appeal from the decree in the civil suit out of which the criminal proceedings were instituted was pending in the High Court and the question of the genuineness of a will was the issue to be decided in the High Court and was also the subject of the charge in the criminal Court, 28 Cr. L.J. 778 = 104 Ind. Cas. 106. Where the High Court enhanced the sentence passed on an accused person without notice to the accused and hearing his objections, the order is null and void and without jurisdiction and in such a case the High Court has inherent power to proceed with the case afresh after due notice to the accused, 47 M. 428. See also 47 C.L.J. 353 = 28 Cr. L.J. 831 = 104 Ind. Cas. 447 ; 27 Cr. L.J. 1114 = 97 Ind. Cas. 426. The High Court has also inherent power to call for records of inferior Criminal Courts and pass the necessary incidental orders such as *interim* stay of proceedings before the lower Court pending final orders by it, 1927 M.W.N. 716. The High Court can also interfere where a charge had been framed by the Magistrate against an accused person where none should have been framed on the evidence on record, 23 A.L.J. 21 = 26 Cr. L.J. 743 = 85 Ind. Cas. 281. But as observed in 43 M. 913, the Court cannot by invoking its inherent powers extend the powers given to it by statute, see 48 M. 262 (F.B.) 49 M.L.J. 593 = 22 L.W. 723 = 1925 M.W.N. 772 = 27 Cr. L.J. 126 = 91 Ind. Cas. 702. For example the High Court has no power under the section to order restoration of property attached under S. 83 *supra*, when no application was made under S. 81 *supra*, within the two years as prescribed by that section ; such an order by the High Court will be in direct conflict with the express provision contained in S. 89 *supra*. The proper remedy is to make an application to Government, 26 Bom. L.R. 719 = 25 Cr. L.J. 1293 = 82 Ind. Cas. 353. This section recognises the inherent power of the High Court to make such orders as may be necessary to prevent abuse of the process of any Court, or otherwise to secure the ends of justice. But the power to expunge a portion of a judgment delivered by a competent Court is intended for cases of exceptional circumstances and should be exercised very sparingly. It is true there have been a few instances in which remarks calculated to expose a witness or an accused person to a criminal prosecution have been deleted. It is not desirable that a subordinate Magistrate should apply to the High Court to expunge remarks made by the lower appellate Court with regard to the conduct of the judicial proceedings had before the subordinate Magistrate. A Subordinate Magistrate should not be too sensitive and any attempt on his part to criticise a judgment of the lower appellate Court must be deprecated. The High Court burdened as it is with a large volume of judicial work cannot afford to waste time on applications made

by subordinate Magistrates against their official superiors and there is no precedent for entertaining such an application, 27 Cr. L.J. 310=23 Ind. Cas. 973; 27 Cr. L.J. 1113=97 Ind. Cas. 426. The High Court's inherent power to expunge passages from judgments delivered by itself or by subordinate Court has been put beyond controversy now, 9 Lah. 269 following 5 Lah. 476 at 479; 6 Lah. 166; 30 Cr. L.J. 578=118 Ind. Cas. 747; 29 Cr. L.J. 620=109 Ind. Cas. 812; but this jurisdiction is of an extraordinary nature and must be exercised with caution, 9 Lah. 269. It is of the utmost importance to the administration of justice that Courts should be allowed to perform their functions freely and fearlessly and without interference by the High Court but it is equally desirable that the right of the lower Courts to make disparaging remarks on persons who appear or are named in the course of the trial is a right which should be exercised with moderation especially when the person disparaged had no opportunity of explaining or defending himself, 9 Lah. 269, followed in 29 Cr. L.J. 1102=112 Ind. Cas. 686; 30 Cr. L.J. 970=118 Ind. Cas. 747; 49 A. 254. There is no reason why the inherent power under this section should not comprise a power to order deletion of passages in judgments which are either irrelevant or inadmissible and which adversely affects the character of the party or a witness or of Counsel before it. The High Court as the Supreme Court of Revision must be deemed to have the power to see that Courts below do not unjustly and without any lawful excuse take away the character of persons before it. Such jurisdiction can be exercised only when there is no foundation whatever for the remark objected to and not where it is a matter of inference from evidence, 49 A. 247. In 29 Cr. L.J. 313=107 Ind. Cas. 912 the Court *suo motu* expunged objectionable remark in the lower Court's judgment. See also 29 Cr. L.J. 336 at 340=103 Ind. Cas. 124. The High Court has power under this section to order the expunging of passages in the order of a Sessions Judge granting bail, if such passages are likely to prejudice the Magistrate in the impartial trial of the case, 25 Cr. L.J. 1363=82 Ind. Cas. 759; 44 A. 401 and 67 Ind. Cas. 195. Even though the High Court has power to expunge remarks in judgments of the lower Courts' the passages should be deleted only if they are irrelevant and do not form integral part of the judgment in which they appear, 30 Cr. L.J. 970 at 971=118 Ind. Cas. 747. See notes under S. 439 at p. 824.

First Offenders.

- 562.** (1) *When any person not under twenty-one years of age is convicted of an offence punishable with imprisonment for not more than seven years, or when any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or transportation for life, and no previous conviction is proved against the offender, if it*

Power of Court to release certain convicted offenders, on probation of good conduct instead of sentencing to punishment.

appears to the Court before which he is convicted, regard being had to the age, character or antecedents of the offender, and to the circumstances in which the offence was committed, that it is expedient that the offender should be released on probation of good conduct, the Court may, instead of sentencing him at once to any punishment, direct that he be released on his entering into a bond, with or without sureties, to appear and receive sentence when called upon during such period (*not exceeding three years*) as the Court may direct, and in the meantime to keep the peace and be of good behaviour :

Provided that, where any first offender is convicted by a Magistrate of the third class, or a Magistrate of the second class not specially empowered by the Local Government in this behalf, and the Magistrate

is of opinion that the powers conferred by this section should be exercised, he shall record his opinion to that effect, and submit the proceedings to a Magistrate of the first class or Sub-Divisional Magistrate, forwarding the accused to, or taking bail for his appearance before, such Magistrate, who shall dispose of the case in manner provided by section 380.

(1A) In any case in which a person is convicted of theft, theft in a building, dishonest misappropriation, cheating or any offence under the Indian Penal Code punishable with not more than two years' imprisonment and no previous conviction is proved against him, the Court before which he is so convicted may, if it thinks fit, having regard to the age, character, antecedents or physical or mental condition of the offender and to the trivial nature of the offence or any extenuating circumstances under which the offence was committed, instead of sentencing him to any punishment, release him after due admonition.

(2) An order under this section may be made by any Appellate Court or by the High Court when exercising its power of revision.

(3) When an order has been made under this section in respect of any offender, the High Court may, on appeal when there is a right of appeal to such Court, or when exercising its powers of revision, set aside such order, and in lieu thereof pass sentence on such offender according to law :

Provided that the High Court shall not under this sub-section inflict a greater punishment than might have been inflicted by the Court by which the offender was convicted.

(4) The provisions of sections 122, 126A and 406A shall, so far as may be, apply in the case of sureties offered in pursuance of the provisions of this section.

History of the section.—Under the English Common Law a convicted person instead of being sentenced and sent to prison may be released on probation of good conduct and the judgment and sentence of the Court is deferred until a future date. The accused is required to enter into his recognisance with or without sureties and to come up for judgment when called upon and meanwhile to be of good behaviour. The old Supreme Courts inherited this Common Law jurisdiction and the Charter Act of the High Courts confirmed all their inherent powers. This section was introduced in the Code of 1828. 'This section is a tardy recognition of a principle well established in England and it is one of the wisest features of the Code of 1828, but being a provision hitherto entirely unknown to Indian law may not be properly understood by the lower ranks of the Magistracy. S M.L.J. 157 (Jour).'

Amendment.—In sub-section (1) three years has been altered to seven years and 1 Lah. 512 is no longer law. See also 3 Pat. L.J. 257; the words "any person under twenty-one years of age or any woman is convicted of an offence not punishable with death or transportation for life" have been added now S. 380 (theft in a building), S. 381 (theft by clerk or servant), S. 423 (cheating and dishonestly inducing delivery of property) and S. 411

(receiving stolen property) come within this section. It is also expressly enacted that an Appellate Court or the High Court may make an order under this section. The High Court when hearing an appeal in respect of any offender or when no appeal lies, in revision, is now empowered to set aside an order made under this section and in lieu thereof pass sentence on him according to law. Sub-section (1A) has been newly added by Act XXXVII of 1923. In sub-section (4) Ss. 125A, 406A have been added along with S. 122, *supra*.

Scope and object of the section.—The idea of the Legislature in framing this section was that sometimes offenders (and in special, youthful offenders) without being persons of depraved character, may on occasion, succumb to sudden temptation, for example, a poor boy without a pie in his pocket sees suddenly displayed before him some property which is worth his stealing. He having never previously committed any crime whatever, succumbs to temptation and steals the property and he is caught. The Legislature very humanely and very properly allows the Magistrate in such a case as that to give to the youthful offender another chance and to deal with him under this section, 1916 P.R. (Cr. J.) 19=17 Cr. L.J. 310=33 Ind. Cas. 436. This benevolent provision affords a guilty person an opportunity of reforming himself instead of turning into a hardened criminal by associating himself with convicts in Jail. The principle of the section is that instead of imposing a punishment authorised by law, the Court requires the convicted person to enter into recognizance with or without sureties to come up for judgment when called upon and in the meanwhile to keep the peace and be of good behaviour. The scope of the section has been greatly enlarged now. The principle embodied in the section applies not only to persons who are convicted of an offence punishable under the I.P.C., but also to those who are found guilty of an offence punishable under a special or local law but its provisions should not ordinarily apply to a person convicted under the Excise Act, 7 Lah 32; 27 Cr. L.J. 478=93 Ind. Cas. 702. This section refers to a far wider range of offences than are included in S 75, I.P.C., and distinctly contemplates the use of previous convictions (not necessarily convictions for the same offence of which the person has just been convicted) to affect the question of sentence. It is legal to prove a previous conviction in order to show that a convicted person cannot avoid being sentenced, 56 M.L.J. 593=1929 M.W.N. 393=29 L.W. 194=30 Cr. L.J. 471=115 Ind. Cas. 483. This section does not apply to the case of an offender who is insane and when such a person is convicted under S. 304A, I.P.C., he cannot be released on probation of good conduct under this section but the proper procedure is to report the case to the High Court under S. 311, *supra*, 11 M.L.T. 404=13 Cr. L.J. 248=14 Ind. Cas. 600. This section is not intended for the benefit of juvenile offenders only for which in fact the Reformatory Schools Act makes ample provision. Before applying this section to any particular case the Court must consider whether the case is a fit one for applying the provisions of this section or not and must guard against danger to the public and danger to the accused himself by applying the section. Where the offender has shown a criminal propensity rather than mere thoughtlessness and a general character of craft and deceit, the provisions of the section should not be applied 23 Cr. L.J. 1224=82 Ind. Cas. 152. Where in a case of cheating the accused is literate well able to appreciate his action and its consequences and the crime appears to have been carefully planned, the use of the provisions of this section is not appropriate, 27 Cr. L.J. 835=93 Ind. Cas. 756. It is not desirable to apply the provisions of this section to an accused person found guilty of deliberate perjury to screen an offender from punishment. Perjury is far too ripe for any such leniency, 29 Cr. L.J. 219=107 Ind. Cas. 107. Where the offence is a hideous and reprehensible one the mere youth of the offender is no ground to act under this section and release him on his executing a bond for good behaviour, 23 Cr. L.J. 1033=112 Ind. Cas. 680. Powers are conferred upon the Magistrates not for the purpose of showing favour to any particular class of persons, the sole intention of the section being that the convict should be given a chance of reformation which he would lose by being incarcerated in prison. The exercise of this discretion does need a considerable sense of responsibility in the Magistrate. Should he make a bad use of this discretion, far from reforming an offender, he will be a cause of corruption to many; punishment is not awarded to a criminal, only for vindictive purposes. It is awarded so that the fate of the convict

punished, may be a deterrent to others. If the Magistrate, by misuse of this section, causes to spring up in the minds of young people, an impression that they could with impunity commit serious offences, because they can get off with no punishment, then it is obvious that this misuse of beneficial power is a means on the contrary, of increasing crime. It may well be that many a young man who would have lived a virtuous life, had he been certain that his first offence, if serious, would meet with due punishment, may be led by the expectation that he will, even if detected, escape with no punishment, into a criminal course of life. He has already the chance, that his first efforts may be undetected. It is therefore at least necessary in dealing with the first offender to see that the crime he has committed does not indicate that he is rather a fortunate habitual than a real first offender. Magistrates should be very careful to consider the wording of the section and should not allow themselves to be misled into the use of the section by misplaced leniency and sympathy, 27 Cr. L.J. 309=92 Ind. Cas. 693. In order to give the Magistrate jurisdiction to act under this section, there must co-exist two conditions precedent (1) there must not be any previous conviction, i.e., the accused must be a first offender (2) the offence for which he is convicted must be one of these offences specified in the section, 28 Cr. L.J. 235=100 Ind. Cas. 127. If these conditions are fulfilled the Court has jurisdiction to act under this section in the exercise of its discretion but in exercising its discretion the Court must have regard to the points specified in the section, viz., the youth, character and antecedents of the offender, to the trivial character of the offence and to any extenuating circumstances under which the offence was committed. The intention of the Legislature is not to make it essential that the offender must be young, that the offence must be trivial and there must be extenuating circumstances but merely to indicate the lines on which the Court's discretion should be exercised, 2 L.B.R. 65 (F.B.)=1 Cr. L.J. 538. See also 6 C.W.N. ccliv. In 15 C.W.N. cii, the *Kulna Gang Case* the Special Tribunal acted under this section and released the accused who pleaded guilty. The first essential for the application of this section is that the offender is to be a first offender and if he is one, the extenuating considerations which entitle him to indulgence are his age, character and antecedents, 2 Bom. L.R. 817. See also 30 C.W.N. 373=43 C.L.J. 79=27 Cr. L.J. 409=93 Ind. Cas. 73, where the accused, a widow of 45 years old, and a mere puppet in the hands of the other accused in the case who was convicted for an offence under S. 82 of the Registration Act was held entitled to the benefit of this section and was released on her entering into a bond with one surety for rupees one hundred. The section is headed "first offenders" and is intended primarily for first offenders but the words of the section "and no previous conviction is proved against him" seem to include the idea an inquisition into the past of the accused. Where as a matter of fact an accused person had a conviction 20 years ago which was not proved at the trial, the order passed under this section cannot be said to be unwarranted, 26 Cr. L.J. 1278=88 Ind. Cas. 1034; if the person is not under 21 years, the conviction is to be for an offence punishable with imprisonment for not more than seven years and if the person is under 21 years or a woman the conviction is to be for an offence not punishable with death or transportation for life. On a proper construction of this section a first offender, provided the other provisions of the section apply, is entitled to the benefit of the section even when without such provision the Magistrate would be obliged to pass a sentence of imprisonment. Any other construction would entirely nullify in a great number of cases the provisions of this section, 27 Bom. L.R. 111=26 Cr. L.J. 694=86 Ind. Cas. 70. An order under this section directing release upon probation of good conduct cannot be said to be a punishment coming within S. 53, I.P.C., which specifies different kinds of punishments known to law. What is done in such a case is that the sentence of punishment is postponed and something which is not a punishment is substituted for it, i.e., the convicted person is required to enter into a recognizance with or without sureties and in the meanwhile to keep the peace and be of good behaviour, 24 Cr. L.J. 738=74 Ind. Cas. 66. Before passing an order under this section the Magistrate must satisfy himself that the accused is in a position to furnish security having regard to the provisions of S. 564, *infra*; S. 123, *supra*, applies to Ss. 106 and 118 and not to this section, 2 Ran. 380. The sending of first youthful offenders whose antecedents are not shown to be bad, to ordinary jails has the effects of making them hardened criminals after they are discharged from such jails. Their association with all classes of offenders has a very unhealthy influence on them. The

scope of the section has recently been widened. The provisions of this section and those of the Reformatory Schools Act should be resorted to by Magistrates when sentencing first youthful offenders, 27 Cr. L.J. 934=96 Ind. Cas. 390. This section does not apply to an offence under S. 457 (2) I.P.O. 28 Cr. L.J. 759=103 Ind. Cas. 839. When an Act gives special power that power must be limited to the purpose for which it is confined, (12 M. 297 at 300) and it is a well known established principle that jurisdiction must be exercised strictly in accordance with the provisions of the statute which create it, (7 C. 157 at 160). Moreover Courts in this country have repeatedly laid down that it is an evasion of the law to treat an aggravated offence as an ordinary one and thus introduce a different jurisdiction or a lower scale of punishment. It may well be that the list of offences in this section might have been longer with advantage to the best interests of the society but the Courts must stop where the Legislature has stopped, 7 Cr. L.J. 319 at 320. This section cannot apply to a case falling under S. 411, I.P.O., even when the accused was 19 years old and the offence was his first offence, 1923 Pat. 237 ; 25 Cr. L.J. 419=83 Ind. Cas. 35. This section will not apply when an accused person has not only been convicted, but also been sentenced by the Court 17 A.L.J. 426=20 Cr. L.J. 332=50 Ind. Cas. 1030. The provisions of this section should not be applied to an accused who was convicted of conspiracy to possess firearms and ammunition though the accused was a law student belonging to a respectable family and a first offender, 31 C.W.N. 239=23 Cr. L.J. 241 (2)=100 Ind. Cas. 113 (2). This section applies only to offences under the I.P.O. and not to other offences under special or local laws, 52 B. 252 not does it apply to an offence under the Indian Stamp Act, 25 A.L.J. 401=23 Cr. L.J. 166=99 Ind. Cas. 593 or to an offence under S. 407 I.P.O. breach of trust by a public servant punishable with transportation for life, 28 Cr. L.J. 257=100 Ind. Cas. 225. Before passing an order under this section the Magistrate should satisfy himself that the accused is in a position to furnish the required security. Where however an order under this section has been passed but the accused fails to furnish the security, the proper course is to pass a sentence on him according to law, 2 Ran. 360. A person released on probation of good conduct cannot be ordered to pay compensation to the complainant and such an order is obviously illegal 29 Cr. L.J. 38=106 Ind. Cas. 454.

Offence punishable with imprisonment.—The Legislature in using these words must be taken to contemplate an offence primarily punishable with imprisonment. Had it been intended, that an offence punishable with fine only should also be within the scope of this sub-section, they would have added some such words as "or of an offence punishable with fine only," which is an expression constantly used (see for instance S. 67, I.P.C.). Further the use of the word "released" in this sub-section points to the object of the section being to prevent an offenders' committal to jail, in the circumstances mentioned in the sub-section, and that it was not intended to cover cases where the offender is merely ordered to pay a fine. Therefore in the absence of words which clearly show that an offence punishable with fine only, even though there is imprisonment in default of payment of fine, comes within this sub-section, such an order is illegal, 28 Bom. L.R. 1031=27 Cr. L.J. 1158=97 Ind. Cas. 752.

Not punishable with death or transportation for life.—When a person is convicted of an offence punishable with death or transportation for life he cannot be dealt with under this section. Even in a case where one of the alternative punishments for the offence, say, under S. 307 I.P.C., is transportation for life it is obvious that this section is inapplicable and the accused must be sentenced to rigorous imprisonment, 30 Cr. L.J. 789=117 Ind. Cas. 239.

No previous conviction is proved against the offender.—This section contemplates the use of previous convictions (not necessarily convictions for the same offence of which the person has just been convicted) to affect the question of sentence. It is legal to prove a previous conviction in order to show that the convicted person cannot avoid being sentenced, 58 M.L.J. 595 at 587=1929 M.W.N. 393=29 L.W. 191=30 Cr. L.J. 471=115 Ind. Cas. 483. S. 511 *infra* as to the mode of proving previous convictions.

Court before which he is convicted.—The intention of the Legislature in using these words is not to limit the power of making orders under this section to the Court of first

instance. The proviso to the section appears to be inconsistent with the view that this was the intention of the Legislature. The appellate Court therefore when disposing of an appeal has jurisdiction to pass an order under this section. 29 H. 567 following; 24 A. 326. A formal conviction must be recorded by the Court before invoking the provisions of this section. See 1 Bom. L.R. 557; when an accused person is not only convicted but also sentenced this section becomes inapplicable. 17 A.L.J. 425=20 Cr. L.J. 352=50 Ind. Cas. 1200.

Instead of sentencing him.—In view of the wording of this section, it is illegal to impose a fine on the accused when an order under this section is passed releasing him on probation of good conduct on his entering into a bond with or without sureties, 5 Lab. 722.

To appear and receive sentence when called upon.—It is not necessary or proper to fix a date under this section on which the accused should come up for receiving sentence. He is merely required to appear and receive sentence when called upon. S. 563, *infra*, explains how and when he is eventually to be brought up before the Court for receiving sentence. It is only when an accused person who has been ordered to keep the peace and be of good behaviour for a specified period, does not observe the conditions of his recognizance within the period, that the provisions of S. 563, *infra*, will have to be followed calling upon the accused to appear before the Court for receiving sentence, 2 Bom. L.R. 702.

Release on his entering into a bond with or without sureties.—The third proviso to S. 112, *supra*, which enacts that a minor's bond for keeping the peace or good behaviour shall be executed only by his sureties, is not applicable to bonds taken under this section enacted for the benefit of youthful offenders. To introduce proviso (7) of S. 112, *supra*, into this section is to give a forced and unnatural construction to the words of the section. It must be presumed that the omission was intentional. Under this section a minor may himself execute a bond, as the language used is "on his entering into a bond with or without sureties, 6 Cr. L.J. 125=1 L.B.R. 12; 2 L.B.R. 185.

When called upon.—An accused person cannot be put merely on personal recognizance by the Magistrate. All that a Magistrate is authorised to do under this section is to require the accused to appear before him and receive the sentence when called upon to do so on the happening of the event contemplated by the next section, *viz.*, when the offender fails to observe any of the conditions of his recognizance and, in the meanwhile to keep the peace and be of good behaviour. 2 Bom. L.R. 112. A Magistrate cannot direct the accused to appear on a day certain to receive sentence when taking a bond from him under this section. All that he can do is to release him on probation of good conduct for a fixed period and direct his appearance to receive sentence when called upon, 2 Bom. L.R. 702.

Proviso to Sub-section (11).—This proviso governs sub-section (1A) also 30 Cr. L.J. 270 (11=113 Ind. Cas. 311 where 27 Bom. L.R. 1115=25 Cr. L.J. 1431=63 Ind. Cas. 1123 is followed and 47 A. 353 is not followed. The procedure to be followed in cases submitted to superior Magistrates by Magistrates not empowered to act under this section is laid down in S. 380, *supra*; see notes under S. 380 at pages 697-698. The superior Magistrate is empowered to pass such sentence or make such order as he might have passed or made if the case had originally been heard by him and he is also empowered to direct further inquiry or to direct additional evidence being taken or he may himself make such further inquiry or take such additional evidence if he thinks fit. The words "make such order as he might have made if the case had originally been heard by him" clearly suggest that the Magistrate is entitled to accept an accused who having been convicted by a Magistrate not empowered to take action under this section submit the case for order to a superior Magistrate. 15 Cr. L.J. 233=25 Ind. Cas. 653. See the similar provision in S. 340, *supra*, where it was held that a Magistrate cannot return the records to the inferior Magistrate, but must himself pass such judgment, order or sentence as he thinks fit according to law. See notes at pp. 653-654. The superior Magistrate may also have power when sentencing an accused to demand security to keep the peace under S. 306, *supra*. But there are no decided cases on this point. It is incompetent for a second class Magistrate to pass an order under this section himself. He should submit the case to a Magistrate of the first class or a Sub-Divisional Magistrate for order with his report that he is of opinion that the case is a fit case for the

exercise of powers under this section, 5 Lah. 36, but this decision was *dissented* from in 8 Lah. 33, where it was pointed out that all second class Magistrates in the Punjab are specially empowered by *Gout. Not., No. 431 of 1910*. The terms of the sub-section are wide and the Court is to take into account the character and antecedents of the accused 25 Cr. L.J. 1278=88 Ind. Cas. 1054; 28 Cr. L.J. 235=100 Ind. Cas. 127.

Sub-section (1A).—This was newly added by Act XXXVII of 1923 in accordance with the recommendations of the Indian Jails Committee and permits a first offender to be released after due admonition, a provision which did not exist before. This sub-section only applies to certain limited class of cases such as theft, etc., under the Indian Penal Code. Consequently it does not apply to offences under as totally different act such as the Motor Vehicles Act. The words of the sub-section are plain and effect must be given to them. Whether the sub-section should not be extended so as to cover less serious offences than those mentioned in the sub-section is a matter for the Legislature. If a Magistrate wishes to pass a nominal sentence there are other means of doing so than the one adopted, *viz.*, release after due admonition. The High Court in the exercise of revisional powers set aside the order passed under this sub-section and sentenced each of the taxi-drivers found guilty under the Motor Vehicles Act to a fine of rupees five, 23 Bom. L.R. 297=27 Cr. L.J. 528=93 Ind. Cas. 992. The provisions of this section do not apply to offences under the Stamp Act and no order can be passed warning the accused not to do so in the future, 25 A.L.J. 401=2 Cr. L.J. 166=99 Ind. Cas. 593, nor does it apply to cases under the City Municipal Act but is confined to offences under the I.P.C., and the Magistrate when convicting the accused has no power to warn and discharge him analogous to admonition under this section but must pass sentence according to law, 52 B. 230 where 28 Bom. L.R. 297 is *referred to*. The case will not fall under sub-section (1) as the offence is punishable with fine only and not imprisonment. Admonition is a judicial reprimand, a censure of the Judge and a warning that in case of repetition he will be punished severely in accordance with law. It is unfortunate that when this sub-section was added to the section by the new amendment the Legislature did not place it before the proviso. Ordinarily speaking when a proviso governs the whole of the provision of the section it ought to come in the end. The proviso says that where any first offender is convicted by any Magistrate of the third or second class not specially empowered by the Local Government, the Magistrate shall record his opinion that the power conferred by this section should be exercised and submit his proceedings to a superior Magistrate forwarding the accused or taking bail for his appearance before such Magistrate who shall dispose of the case as provided by S. 380, *supra*. Before this sub-section was enacted there was no power to release the offender after due admonition. That power undoubtedly is one under this section and although the proviso comes now in the middle of the section that fact does not affect the competency of third class Magistrates to exercise the powers granted under this sub-section. A third class Magistrate when he finds an accused guilty and discharges the accused after giving admonition under this sub-section, on account of his tender age acts without jurisdiction and must submit the proceedings to the superior Magistrate and the High Court is competent to review a third class Magistrate's order discharging the accused on admonition, 27 Bom. L.R. 1019=26 Cr. L.J. 1461=89 Ind. Cas. 1029, but see 47 A. 353, where it is held that the power under sub-section (1A) is exercisable by a second class Magistrate. Where a case could not by any stretch of language of this sub-section be brought within the four corners thereof, the High Court in revision set aside the order and imposed on the accused a substantive term of rigorous imprisonment for one year, 53 C. 417.

Sub-section (2).—This sub-section is new and is in accordance with the decisions in 24 A. 306 followed in 29 M. 567. The effect of the order of the High Court when releasing an offender on probation of good conduct is to set aside the sentence passed on the accused and when the accused fails to furnish the security as directed by the Court, the Code is silent as to what the consequence is. The proper view to take in such a case is to consider the accused to be convicted by the Magistrate but not sentenced to punishment and produced before the Court for suitable punishment, 21 L.W. 49=25 Cr. L.J. 633=86 Ind. Cas. 59.

Sub-section (3).—The rulings in 20 Cr. L.J. 99=48 Ind. Cas. 979; 37 A. 31 and which hold that the High Court cannot substitute a sentence of imprisonment or whipping in

revision are no longer law by reason of this new sub-section which empowers the High Court when exercising its powers as an Appellate or Revisional Court to set aside an order made under this section and in lieu thereof pass sentence of imprisonment on such offender according to law, 24 A.L.J. 228=27 Cr. L.J. 303=92 Ind. Cas. 591. But unlike its powers under S. 439, *supra*, the High Court cannot inflict a greater punishment than might have been inflicted by the original Court.

Appeal and revision.—An appeal lies against an order under this section in a summary trial notwithstanding the provisions of S. 414, *supra*. The order passed is not sentence within S. 414, 46 A. 828, see also 4 Cr. L. Rev. 480; 37 A. 31 at 33; 52 G. 483 followed in 28 Bom L.R. 671 27 Cr. L.J. 873=96 Ind. Cas. 121, but the order is not a punishment as punishment is only postponed, 24 Cr. L.J. 738=74 Ind. Cas. 66. There is authority for holding that even where a judgment of conviction has not been actually given, there is a conviction. *Archbold, Cr. Pl. Ev. & Pr.* pp. 250 and 223. The High Court is not bound to interfere in revision even where the order passed is illegal, 27 Cr. L.J. 624=94 Ind. Cas. 368 where 11 Cr. L.J. 389=6 Ind. Cas. 639 and 4 Cr. L.J. 75 is followed. See also 29 Cr. L.J. 822=111 Ind. Cas. 326, following 4 Cr. L.J. 75. Where the Magistrate in the exercise of his discretion and taking into consideration all the circumstances of the case releases an offender under this section the High Court will be slow to interfere. 28 Cr. L.J. 255=99 Ind. Cas. 127. Although the circumstances of a case were such that a term of imprisonment might well have been awarded by the trying Magistrate, still where the Magistrate in the exercise of his discretion has given the benefit to the accused under this section, the High Court in revision will not lightly interfere with the order especially after the lapse of a long time, 29 Cr. L.J. 291=107 Ind. Cas. 775. The High Court can interfere with an order and set it aside even in a case where the accused had not moved it, 13 Cr. L.J. 476=15 Ind. Cas. 316. See also 29 Cr. L.J. 259=107 Ind. Cas. 529, where the High Court interfered with the order admonishing certain boys when in revision preferred by others who had been sentenced to fine found that no offence had been committed and then acquitted them. In 55 G. 417 the High Court set aside the order of the trial Court and sentenced the accused to one year's rigorous imprisonment.

563. (1) If the Court which convicted the offender, or a Court which could have dealt with the offender in respect of his original offence, is satisfied that the offender has failed to observe any of the conditions of his recognizance, it may issue a warrant for his apprehension.

Provision in case of offender failing to observe conditions of his recognizances.

(2) An offender, when apprehended on any such warrant, shall be brought forthwith before the Court issuing the warrant, and such Court may either remand him in custody until the case is heard, or admit him to bail with a sufficient surety conditioned on his appearing for sentence. Such Court may, after hearing the case, pass sentence.

Power to issue a warrant of arrest for the apprehension of a first offender under this section is not given to Magistrates generally but is confined to the Court which convicted the offender or to the Court which could have dealt with the offender in respect of his original offences. See Probation of Offenders Act 1907 (7 Edw. 7 Ch. 17, S. 6) which provides for cases where the offender fails to observe the conditions of release.

564. (1) The Court, before directing the release of an offender under section 562, sub-section* (1) shall be satisfied that the offender or his surety (if any) has a fixed place of abode or regular occupation in the place

Conditions as to abode of offender.

* Amended by Act VII of 1924.

for which the Court acts, or in which the offender is likely to live during the period named for the observance of the conditions.

(2) Nothing in this section or in sections 562 and 563 shall affect the provisions of section 31 of the Reformatory Schools Act, 1897.

An order under sub-section (1) passed by a Sub-divisional Magistrate under the provisions of S. 390, *supra*, would be clearly appealable under S. 407, *supra*, S. 408, *supra*, gives a right of appeal to a person convicted on a trial by an Assistant Sessions Judge, a District Magistrate, a Magistrate of the first class and from a sentence passed under S. 349, *supra*, by a Magistrate of the first class or an order (which is not a sentence), passed by a Magistrate of the first class under S. 390, *supra*. Such an order may exclude an order under this sub-section. Section 408, *supra*, is controlled by two sub-sections (b) and (c), sub-section (a) having now been deleted. These two sub-sections contained in the proviso do not curtail the right of appeal given by the section itself, but makes exceptions as to the venue of appeal which ordinarily lies to the Court of Session in cases specifically mentioned in provisos (b) and (c). The rights conferred by Ss. 407 and 408 are only restricted by Ss. 412, 413 and 414 and subject to the provisions of S. 415 which is a proviso to Ss. 413 and 414. This interpretation may lead to certain anomalies but a contrary view leads to absurdities of not less serious nature. A person against whom an order under S. 562 (1) has been passed will have one appeal in the first instance and possibly a second one when an order is passed sentencing him under S. 563 (2). The general tendency of the Amending Act of 1923 has been to enlarge rather than to curtail the right of appeal in favour of the accused person. Several orders not appealable before have been made so now. An appeal lies on behalf of convicted persons against whom an order under this section was made, 52 C. 463 where 37 A. 31; 18 Cr. L.J. 401=38 Ind. Cas. 561; 1 Cr. L.J. 543 and 1028 are referred to.

Section 31 of the Reformatory Schools Act, refers to the power of Court to deal with youthful offenders including girls by discharging them after due admonition or deliver them to their parent or guardian or near relative taking a bond to be responsible for the good behaviour of the offenders.

Previously Convicted Offenders.

Order for notifying
address of previously
convicted offender.

565. (1) When any person having been convicted—

(a) by a Court in British India of an offence punishable under section 215, section 489A, section 489B, section 489C, or section 489D of the Indian Penal Code, or of any offence punishable under Chapter XII or Chapter XVII of that Code, with imprisonment of either description for a term of three years or upwards, or

(b) by a Court or Tribunal in the territories of any Prince or State in India acting under the general or special authority of the Governor General in Council, or of any Local Government, of any offence which would, if committed in British India, have been punishable under any of the aforesaid Sections or Chapters of the Indian Penal Code with like imprisonment for a like term, is again convicted of any offence punishable under any of those Sections or Chapters with imprisonment for a term of three years or upwards by a High Court, Court of Session, Presidency Magistrate, District Magistrate, Sub-divisional Magistrate or of first class, such

Court or Magistrate may, if it or he thinks fit, at the time of passing sentence of transportation or imprisonment on such person, also order that his residence and any change of or absence from such residence after release be notified as hereinafter provided for a term not exceeding five years from the date of the expiration of such sentence.

(2) If such conviction is set aside on appeal or otherwise, such order shall become void.

(3) The Local Government may make rules to carry out the provisions of this section relating to the notification of residence or change or absence from residence by released convicts.

(4) *An order under this section may also be made by an Appellate Court or by the High Court when exercising its powers of revision.*

(5) *Any person against whom an order has been made under this section and who refuses or neglects to comply with any rule so made shall be deemed within the meaning of section 176 of the Indian Penal Code to have omitted to give a notice required for the purpose of preventing the commission of an offence.*

(6) *Any person charged with a breach of any such rule may be tried by a Magistrate of competent jurisdiction in the district in which the place last notified by him as his place of residence is situated.*

Amendment.—This section has been re drafted. In sub-section (1), S. 215 and Ss. 489A to 489D have been added. Sub-section (4) empowers the appellate Court and the High Court in revision to pass orders under this section. By the addition in sub-section (5) failure to notify will be deemed to be omission to give information for the prevention of the commission of an offence. Sub-section (6) provides the place for trial for breach of rules.

Object of the section.—This section imposes a duty on a habitual offender when released from jail to give notice of his residence to the police in order that they may know his movements with certainty. This section must be construed strictly and it must be taken that the Court's power is limited to cases specifically described therein and does not specifically extend to cases where the Court instead of passing sentence of transportation or imprisonment passes a sentence of whipping, 35 B. 137. The object is that the person may be kept under police surveillance with a view to preventing him from committing further offences, 31 M. 548 at 550. This section presupposes the previous convictions of the accused, 8 M.L.T. 352—(1910) M.W.N. 567=11 Cr. L.J. 636=8 Ind. Cas. 300, but not to a conviction for attempt. The law apparently assumes that a person convicted twice is likely to commit further crimes. The notice to the police is therefore introduced as a deterrent and in the majority of cases it undoubtedly acts as such. The residence of such men are frequently visited by the police and if he happens to have been away from home at the time of the occurrence of the crime in the locality they stand a fair chance of being suspected of being concerned in the crime. The conviction need not be for an offence of the same kind as before, because the expression "of the same kind" has been omitted. The sentence must be one of transportation or imprisonment and cannot be one of whipping, 35 B. 137. An order under this section to notify address after release from jail though a punishment in the general sense is not such a punishment as is meant by the words of S. 221 (7) *supra*, the provisions of which section do not apply to an order under the section which can legally be passed without previous convictions having been specifically set out in the charge, 14 Cr. L.J. 390=20 Ind. Cas. 214.

Sub-section (1).—The order must be passed at the time of passing the sentence. The previous conviction must be by a Court in British India or by a Court in the territories of any Prince or State in India acting under the authority of Government which if committed in British India would be punishable under the Penal Code.

Sub-section (3).—For rules relating to notifications of residence by released convicts, see for *Madras* G.O. No. 940, dated 15-6-1904, *Fort St. George Gazette*, 1904, Part I, P. 576. See also *Mad. Cr. Rules of Pr. Rule 130* (1). The convict is to state before his release to the Jailor the place, naming the town or village and street at which he intends to reside after release and within 24 hours after his arrival at his residence to notify at the nearest police station that he has taken up his residence accordingly. (2) Intention to change residence should be notified at the nearest police station not less than 2 days before making the change, giving the name of the village or town and street in which he intends to reside and notify within 24 hours his arrival at the changed residence. (3) The convict shall notify his intention to absent himself from his residence between sunset and sunrise stating the time and purpose of his absence and his exact address where he can be found then. (4) Notice as required above is to be given in person unless prevented by illness or other sufficient cause in which case notice may be sent by letter duly signed by him or by an authorised agent and whenever such notice is given the convict shall be furnished with a certificate of having given notice by the officer to whom the notice is given (5) Before release, a copy of the rules in English and in the Vernacular shall be given to the convict and substance thereof fully explained to him in his own language. He shall also be informed that he is bound to observe the rules and any neglect or failure will render himself liable to be punished under S. 176, I.P.C.

Bombay.—Bombay Gov. Gazette, 1900, Part I, P. 374, Notn. No. 1040.

Bengal.—Bengal, Gov. Notn. No. 313, J. dated 14-1-1902.

Assam.—Assam Gazette, 1900, Part II, P. 540.

Punjab.—Punjab Gazette, 1901, Part I, P. 182.

Burma.—Burma Gazette, 1902, Part I, P. 63.

Sub-section (4).—This sub-section is new. The appellate Court or a Court of revision is now empowered to pass an order under this section.

Sub-section (5).—It was held in 31 M. 543 that non-compliance was punishable under first part of S. 176, I.P.C. See also 2 Cr.L.J. 745 but by the new amendment, cases under this sub-section fall under the second part of S. 176 I.P.C., viz., omission to give notice required for the purpose of preventing the commission of an offence which is a more serious offence. It was held before, that information required to be given under sub-section (4) of this section cannot be said to be required for the purpose of preventing the commission of any particular offence, though it may be required for the purpose of preventing the commission of offences generally and allowed to be dealt with under the first part of S. 176, I.P.C., 31 M 543 where 15 C. 385 is referred to, but this is no longer law. A person is bound under this section merely to notify his residence or change of residence after his release. As long as he retains his residence in the same place, his temporary absence from his home for a day or two does not require notification. Whether he retains his residence or not must always be a question of fact. But provided a man leaves his family and household effects in the house in which he was residing he would ordinarily be considered to retain his residence. From an absence for a single night it cannot be said that he changed his residence and made himself liable to be dealt with under S. 176, I.P.C., 43 M. 783 at 790.

SCHEDULE I.

ENACTMENTS REPEALED.

[Repealed by Act X of 1914.]

SCHEDULE II.

TABULAR STATEMENT OF OFFENCES.

EXPLANATORY NOTE.—The entries in the second and seventh columns of this schedule, headed respectively "Offence" and "Punishment under the Indian Penal Code," are not intended as definitions of the offences and punishments described in the several corresponding sections of the Indian Penal Code, or even as abstracts of those sections, but merely as references to the subject of the section, the numbers of which is given in the first column.

The third column of this schedule applies also to the police in the towns of Calcutta and Bombay.

CHAPTER V.—ABETMENT.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant of a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
109	Abetment of any offence, if the act abetted is committed in consequence, and where no express provision is made for its punishment.	May arrest without warrant if arrest for the offence abetted may be made without warrant, but not otherwise.	According as a warrant or summons may issue for the offence abetted.	According as the offence abetted is bailable or not.	According as the offence abetted is compoundable or not.	The same punishment as for the offence abetted.	The Court by which the offence abetted is triable.
110	Abetment of any offence, if the person abetted does the act with a different intention from that of the abettor.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
111	Abetment of any offence, when one act is abetted and a different act is done; subject to the proviso.	Ditto	Ditto	Ditto	Ditto	The same punishment as for the offence intended to be abetted.	Ditto
113	Abetment of any offence, when an effect is caused by the act abetted different from that intended by the abettor.	Ditto	Ditto	Ditto	Ditto	The same punishment as for the offence committed.	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
114	Abetment of any offence, if abettor is present when offence is committed.	May arrest without warrant if arrest for the offence abetted may be made without warrant, but not otherwise.	According as a warrant or summons may issue for the offence abetted.	According as the offence abetted is bailable or not.	According as the offence abetted is compoundable or not.	The same punishment as for the offence committed.	The Court by which the offence abetted is triable.
115	Abetment of an offence, punishable with death or transportation for life, if the offence be not committed in consequence of the abetments.	Ditto	Ditto	Not bailable.	Ditto	Imprisonment of either description for 7 years and fine.	Ditto
	If an act which causes harm be done in consequence of the abetment.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 14 years and fine.	Ditto
116	Abetment of an offence, punishable with imprisonment, if the offence be not committed in consequence of the abetment.	Ditto	Ditto	According as the offence abetted is bailable or not.	Ditto	Imprisonment extending to a quarter part of the longest term, and of any description, provided for the offence, or fine or both.	Ditto
	If the abettor or the person abetted be a public servant whose duty it is to prevent the offence.	Ditto	Ditto	Ditto	Ditto	Imprisonment extending to half of the longest term, and of any description, provided for the offence or fine, or both.	Ditto
117	Abetting the commission of an offence by the public, or by more than ten persons.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
118	Concealing a design to commit an offence punishable with death or transportation for life if the offence be committed.	May arrest without warrant if arrested for the offence abetted may be made without warrant but not otherwise.	According as a warrant or summons may issue for the offence abetted.	Not bailable.	According as the offence abetted is compoundable or not.	Imprisonment of either description for 7 years and fine.	The Court by which the offence abetted is triable.
	If the offence be not committed.	Ditto	Ditto	Bailable.	Ditto	Imprisonment of either description for 3 years and fine.	Ditto
119	A public servant concealing a design to commit an offence which it is, his duty to prevent, if the offence be committed.	Ditto	Ditto	According as the offence abetted is bailable or not.	Ditto	Imprisonment extending to half of the longest term and of any description, provided for the offence, or fine, or both.	Ditto
	If the offence be punishable with death or transportation for life.	Ditto	Ditto	Not bailable.	Ditto	Imprisonment of either description for 10 years.	Ditto
	If the offence be not committed.	Ditto	Ditto	Bailable.	Ditto	Imprisonment extending to a quarter part of the longest term, and of any description, provided for the offence, or fine, or both.	Ditto
120	Concealing a design to commit an offence punishable with imprisonment, if the offence be committed.	Ditto	Ditto	According as the offence concealed is bailable or not.	Ditto	Ditto	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
120	If the offence be not committed.	May arrest without warrant if arrest for the offence abetted may be made without warrant, but not otherwise.	According as a warrant or summons may issue for the offence abetted.	Bailable.	According as the offence abetted is compoundable or not.	Imprisonment both.	The Court

CHAPTER VA.—CRIMINAL CONSPIRACY.

120 B	Criminal conspiracy to commit an offence punishable with death, transportation or rigorous imprisonment for a term of two years or upwards.	May arrest without warrant if arrest for the offence which is the object of the conspiracy may be made without warrant, but not otherwise.	According as a warrant or summons may issue for the offence which is the object of the conspiracy.	According as the offence which is the object of the conspiracy is bailable or not.	Not compoundable.	The same punishment as that provided for the abetment of the offence which is the object of the conspiracy.	Court of Session when offence which is the object of the conspiracy is abetted by such Court of Session, Presidency Magistrate or Magistrate of the first class.
	Any other criminal conspiracy.	Shall not arrest without warrant.	Summons.	Bailable.	Ditto	Imprisonment of either description for six months and fine or both.	Presidency Magistrate or Magistrate of the first class.

CHAPTER VI.—OFFENCES AGAINST THE STATE.

121	Waging or attempting to wage war, or abetting the waging of war, against the Queen.	Shall not arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Death, or transportation for life and fine.	Court of Session
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1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
121 A	Conspiring to commit certain offences against the State.	Shall not arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Transportation for life or any shorter term, or imprisonment of either description for 10 years and fine.	Court of Session.
122	Collecting arms, etc., with the intention of waging war against the Queen.	Ditto	Ditto	Ditto	Ditto	Transportation for life or imprisonment of either description for 10 years and fine.	Ditto
123	Concealing, with intent to facilitate a design to wage war.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years, and fine.	Ditto
124	Assaulting Governor General, Governor, etc., with intent to compel or restrain the exercise of any lawful power.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Ditto
124 A	Sedition.	Ditto	Ditto	Ditto	Ditto		Court of Session.
125	Waging war against any Asiatic Power in alliance or at peace with the Queen, or abetting the waging of such war.	Ditto	Ditto	Ditto	Ditto	Transportation for life and fine, or imprisonment of either description for 7 years and fine, or fine.	Court of Session.
126	Committing depredation on the territories of any Power in alliance or at peace with the Queen.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine, and forfeiture of certain property.	Ditto

	2	3	4	5	6	7	8
	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
7	Receiving property taken by war or depredation, mentioned in sections 125 and 126.	Shall not arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 7 years and fine, and forfeiture of certain property.	Court of Session.
8	Public servant voluntarily allowing prisoner of State or war in his custody to escape.	Ditto	Ditto	Ditto	Ditto	Transportation for life or imprisonment of either description for 10 years, and fine.	Ditto
9	Public servant negligently suffering prisoner of State or war in his custody to escape.	Ditto	Ditto	Bailable.	Ditto	Simple imprisonment for 3 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
0	Aiding escape of, rescuing or harbouring, such prisoner, or offering any resistance to the recapture of such prisoner.	Ditto	Ditto	Not bailable.	Ditto	Transportation for life, or imprisonment of either description for 10 years, and fine.	Court of Session.

CHAPTER VII.—OFFENCES RELATING TO THE ARMY AND NAVY.

1	Abetting mutiny, or attempting to seduce an officer, soldier, sailor or airman from his allegiance or duty.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Transportation for life, or imprisonment of either description for 10 years, and fine.	Court of Session.
2	A betment of mutiny, if mutiny is committed in consequence thereof.	Ditto	Ditto	Ditto	Ditto	Death or transportation for life, or imprisonment of either description for 10 years, and fine.	Ditto
3	Abetment of an assault by an officer, soldier, sailor or airman on his superior officer, when in the execution of his office.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
4	Abetment of such assault, if the assault is committed.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Court of Session.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant of not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
135	Abetment of the desertion of an officer, soldier, sailor or airman.	May arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 3 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
136	Harbouring such an officer, soldier sailor or airman who has deserted.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
137	Deserter concealed on board merchant vessel, through negligence of master or person in charge thereof.	Shall not arrest without warrant.	Summons.	Ditto	Ditto	Fine of 500 rupees.	Ditto
138	Abetment of act of insubordination by an officer, soldier sailor or airman, if the offence be committed in consequence.	May arrest without warrant.	Warrant.	Ditto	Ditto	Imprisonment of either description for 6 months, or fine, or both.	Ditto
140	Wearing the dress or carrying any token used by a soldier, sailor or airman with intent that it may be believed that he is such a soldier, sailor or airman.	Ditto	Summons.	Ditto	Ditto	Imprisonment of either description for 3 months, or fine of 500 rupees, or both.	Any Magistrate.

CHAPTER VIII.—OFFENCES AGAINST THE PUBLIC TRANQUILLITY.

143	Being member of an unlawful assembly.	May arrest without warrant.	Summons.	Bailable.	Not compoundable.	Imprisonment of either description for 6 months, or fine, or both.	Any Magistrate.
144	Joining an unlawful assembly armed with any deadly weapon	Ditto	Warrant.	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto
145	Joining or continuing in an unlawful assembly, knowing that it has been commanded to disperse.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
147	Rioting ...	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
148	Rioting, armed with a deadly weapon.	May arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of	Court of Ses-
149	If an offence be committed by any member of an unlawful assembly, every other member of such assembly shall be guilty of the offence.	According as arrest may be made without warrant for the offence or not.	According as a warrant or summons may issue for the offence.	According as the offence is bailable or not.	Ditto	The same as for the offence.	The Court by which the offence is triable.
150	Hiring, engaging or employing persons to take part in an unlawful assembly.	May arrest without warrant.	According to the offence committed by the person hired, engaged or employed	Ditto	Ditto	The same as for a member of such assembly, and for any offence committed by any member of such assembly.	Ditto
151	Knowingly joining or continuing in any assembly of five or more persons after it has been commanded to disperse.	Ditto	Summons	Bailable.	Ditto	Imprisonment of either description for 6 months, or fine, or both.	Any Magistrate.
152	Assaulting or obstructing public servant when suppressing riot, etc.	Ditto	Warrant.	Ditto	Ditto		
153	Wantonly giving provocation with intent to cause riot, if rioting be committed.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 1 year, or fine, or both.	Any Magistrate.
	If not committed	Ditto	Summons.	Ditto	Ditto	Imprisonment of either description for 6 months, or fine, or both.	Ditto.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant of not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
135	Abetment of the desertion of an officer, soldier, sailor or airman.	May arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
136	Harbouring such an officer, soldier sailor or airman who has deserted.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
137	Deserter concealed on board merchant vessel, through negligence of master or person in charge thereof.	Shall not arrest without warrant.	Summons.	Ditto	Ditto	Fine of 500 rupees.	Ditto
138	Abetment of act of insubordination by an officer, soldier sailor or airman, if the offence be committed in consequence.	May arrest without warrant.	Warrant.	Ditto	Ditto	Imprisonment of either description for 6 months, or fine, or both.	Ditto
140	Wearing the dress or carrying any token used by a soldier, sailor or airman with intent that it may be believed that he is such a soldier, sailor or airman.	Ditto	Summons.	Ditto	Ditto	Imprisonment of either description for 3 months, or fine of 500 rupees, or both.	Any Magistrate.

CHAPTER VIII.—OFFENCES AGAINST THE PUBLIC TRANQUILLITY.

143	Being member of an unlawful assembly.	May arrest without warrant.	Summons.	Bailable.	Not compoundable.	Imprisonment of either description for 6 months, or fine, or both.	Any Magistrate
144	Joining an unlawful assembly armed with any deadly weapon	Ditto	Warrant.	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto
145	Joining or continuing in an unlawful assembly, knowing that it has been commanded to disperse.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
147	Rioting ...	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether com-poundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
48	Rioting, armed with a deadly weapon.	May arrest without warrant.	Warrant.	Bailable.	Not com-poundable.	Imprisonment of either description for 3 years, or fine, or both.	Court of Ses-sion, Presidency Magistrate or Magistrate of the first class.
49	If an offence be committed by any member of an un-lawful assembly, every other member of such assembly shall be guilty of the offence.	Accord-ing as arrest may be made without warrant for the offence or not.	Accord-ing as a warrant or sum-mons may issue for the offence.	Accord-ing as the offence is bail-able or not.	Ditto	The same as for the offence.	The Court by which the offence is triable.
50	Hiring, engaging or employing per-sons to take part in an unlawful assem-bly.	May arrest without warrant.	Accord-ing to the of-fence com-mitted by the per-son hired, engaged or em-ployed	Ditto	Ditto	The same as for a member of such assembly, and for any offence com-mitted by any member of such assembly.	Ditto
151	Knowingly join-ing or continuing in any assembly of five or more persons after it has been commanded to dis-pers.	Ditto	Sum-mons.	Bailable.	Ditto	Imprisonment of either description for 6 months, or fine, or both.	Any Magistrate.
152	Assaulting or ob-structing public ser-vant when suppres-sing riot, etc.	Ditto	Warrant.	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both,	Court of Session, Presidency Magistrate or Magistrate of the first class.
153	Wantonly giving provocation with in-tent to cause riot, if rioting be commit-ted.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 1 year, or fine, or both.	Any Magistrate.
	If not committed	Ditto	Sum-mons.	Ditto	Ditto	Imprisonment of either description for 6 months, or fine, or both.	Ditto.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
153 A	Promoting enmity between classes.	Shall not arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first class.
154	Owner or occupier of land not giving information of riot, etc.	Ditto	Summons.	Bailable	Ditto	Fine of 1,000 rupees.	Presidency Magistrate or Magistrate of the first or second class.
155	Person for whose benefit or on whose behalf a riot takes place not using all lawful means to prevent it.	Ditto	Ditto	Ditto	Ditto	Fine ...	Ditto
156	Agent of owner or occupier for whose benefit a riot is committed not using all lawful means to prevent it	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
157	Harbouring persons hired for an unlawful assembly.	May arrest without warrant.	Ditto	Ditto	Ditto	Imprisonment of either description for 6 months, or fine, or both.	Ditto
158	Being hired to take part in an unlawful assembly or riot.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
"	Or to go armed.	Ditto	Warrant.	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto
160	Committing affray.	Shall not arrest without warrant.	Summons	Ditto	Ditto	Imprisonment of either description for 1 month, or fine of 100 rupees, or both.	Any Magistrate.
CHAPTER IX.—OFFENCES BY, OR RELATING TO, PUBLIC SERVANTS.							
161	Being or expecting to be a public servant, and taking a gratification other than legal remuneration in respect of an official act.	Shall not arrest without warrant.	Summons.	Bailable	Not compoundable.	or fine, or both.	Magistrate of the first class.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
162	Taking a gratification, in order by corrupt or illegal means to influence a public servant.	Shall not arrest without warrant.	Summons.	Bailable.	Not compoundable.	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
163	Taking a gratification for the exercise of personal influence with a public servant.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first class.
164	Abetment by public servant of the offences defined in the last two preceding clauses with reference to himself.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
165	Public servant obtaining any valuable thing, without consideration, from a person concerned in any proceeding or business transacted by such public servant.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
166	Public servant disobeying a direction of the law with intent to cause injury to any person.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 year, or fine, or both.	Ditto
167	Public servant framing an incorrect document with intent to cause injury.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
168	Public servant unlawfully engaging in trade.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first class.
169	Public servant unlawfully buying or bidding for property.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 2 years, or fine, or both, and confiscation of property, if purchased.	Ditto
170	Personating a public servant.	May arrest without warrant.	Warrant.	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Any Magistrate.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
171	Wearing garb or carrying token used by public servant with fraudulent intent.	May arrest without warrant.	Summons.	Bailable.	Not compoundable.	Imprisonment of either description for 3 months, or fine of 200 rupees, or both.	Any Magistrate.

CHAPTER IXA.—OFFENCES RELATING TO ELECTIONS.*

171 E	Bribery ...	Shall not arrest without warrant.	Summons.	Bailable.	Not compoundable.	Imprisonment of either description for 1 year, or fine, or both, or if treating only, fine only.	Presidency Magistrate or Magistrate of the first class.
171 F	Undue influence and personation at an election.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 1 year, or fine, or both.	Ditto
171 G	False statement in connection with an election.	Ditto	Ditto	Ditto	Ditto	Fine ...	Ditto
171 H	Illegal payments in connection with elections.	Ditto	Ditto	Ditto	Ditto	Fine of 500 rupees.	Ditto
171 I	Failure to keep election accounts.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto

CHAPTER X.—CONTEMPTS OF THE LAWFUL AUTHORITY OF PUBLIC SERVANTS.

172	Abandoning to avoid service of summons or other proceedings from a public servant.	Shall not arrest without warrant.	Summons.	Bailable.	Not compoundable.	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Any Magistrate.
	If summons of notice requires attendance in person, etc., in a Court of Justice.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto
173	Preventing the service or the affixing of any summons or notice, or the removal of it when it has been affixed, or preventing a proclamation.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
	If summons, etc., require attendance in person, etc., in a Court of Justice.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto

* Added by Act XXXIX of 1920, S. 3.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether com-poundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
174	Not obeying a legal order to attend at a certain place in person or by agent, or departing therefrom without authority. If the order requires personal attendance, etc., in a Court of Justice.	Shall not arrest without warrant	Summons.	Bailable.	Not com-poundable.	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Any Magistrate.
		Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto
175	Intentionally omitting to produce a document to a public servant by a person legally bound to produce or deliver such document. If the document is required to be produced in or delivered to a Court of Justice.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	The Court in which the offence is committed, subject to the provisions of Ch. XXXV; or, if not committed in a Court, a Presidency Magistrate or Magistrate of the first or second class.
		Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto
176	Intentionally omitting to give notice or information to a public servant by a person legally bound to give such notice or information. If the notice or information required respects the commission of an offence, etc.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 month, or fine of 500 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
		Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	Ditto
177	Knowingly furnishing false information to a public servant. If the information required respects the commission of an offence, etc.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
		Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable
178	Refusing oath when duly required to take oath by a public servant.	Shall not arrest without warrant.	Summons.	Bailable.	Not-compoundable.	Simple imprisonment for 6 months, or fine of 1,000 rupees or both.	The Court in which the offence is committed, subject to the provisions of Ch. XXV; or, if not committed in a Court, a Presidency Magistrate or Magistrate of the first or second class.
179	Being legally bound to state truth and refusing to answer questions.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
180	Refusing to sign a statement made to a public servant when legally required to do so.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 3 months, or fine of 500 rupees, or both.	Ditto
181	Knowingly stating to a public servant on oath as true that which is false.	Ditto	Warrant	Ditto	Ditto	Imprisonment of either description for 3 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
182	Giving false information to a public servant in order to cause him to use his lawful power to the injury or annoyance of any person.	Ditto	Summons.	Ditto	Ditto	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
183	Resistance to the taking of property by the lawful authority of a public servant.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
184	Obstructing sale of property offered for sale by authority of a public servant.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 1 month, or fine of 500 rupees, or both.	Ditto
185	Bidding by a person under a legal incapacity to purchase it, for property at a lawfully authorised sale, or bidding without intending to perform the obligations incurred thereby.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for one month, or fine of 200 rupees, or both.	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether ballable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
186	Obstructing public servant in discharge of his public functions.	Shall not arrest without warrant.	Summons.	Ballable	Not compoundable.	Imprisonment of either description for 3 months, or fine of 500 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
187	Omission to assist public servant when bound by law to give such assistance.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 month, or fine of 200 rupees, or both.	Ditto
	Willfully neglecting to aid a public servant who demands aid in the execution of process, the prevention of offences, etc.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 6 months, or fine of 500 Rupees, or both.	Ditto
188	Disobedience to an order lawfully promulgated by a public servant, if such disobedience causes obstruction, annoyance or injury to persons lawfully employed.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 month, or fine of 200 rupees, or both.	Ditto
	If such disobedience causes danger to human life, health or safety, etc.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Ditto
189	Threatening a public servant with injury to him, or one in whom he is interested, to induce him to do or forbear to do any official act.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto
190	Threatening any person to induce him to refrain from making a legal application for protection from injury.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 1 year, or fine, or both.	Ditto

CHAPTER XI.—FALSE EVIDENCE AND OFFENCES AGAINST PUBLIC JUSTICE.

193	Giving or fabricating false evidence in a judicial proceeding.	Shall not arrest without warrant.	Warrant	Ballable	Not compoundable.	Imprisonment of either description for 7 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
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1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether Compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
	Giving or fabricating false evidence in any other case.	Shall not arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 3 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
194	Giving or fabricating false evidence with intent to cause any person to be convicted of a capital offence.	Ditto	Ditto	Not bailable.	Ditto	Transportation for life, or rigorous imprisonment for 10 years and fine.	Court of Session.
	If innocent person be thereby convicted and executed.	Ditto	Ditto	Ditto	Ditto	Death or as above.	Ditto
195	Giving or fabricating false evidence with intent to procure conviction of an offence punishable with transportation for life or with imprisonment for seven years or upwards.	Ditto	Ditto	Ditto	Ditto	The same as for the offence.	Ditto
196	Using in a judicial proceeding evidence known to be false or fabricated.	Ditto	Ditto	According as the offence of giving such evidence is bailable or not.	Ditto	The same as for giving or fabricating false evidence.	Court of Session, Presidency Magistrate or Magistrate of the first class.
197	Knowingly issuing or signing a false certificate relating to any fact of which such certificate is by law admissible in evidence.	Ditto	Ditto	Bailable.	Ditto	The same as for giving false evidence.	Ditto
198	Using as a true certificate one known to be false in a material point.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether ballable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
199	False statement made in any declaration which is by law receivable as evidence.	Shall not arrest without warrant.	Warrant.	Ballable.	Not compoundable.	The same as for giving false evidence.	Court of Session, Presidency Magistrate or Magistrate of the first class.
200	Using as true any such declaration known to be false.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
201	Causing disappearance of evidence of an offence committed, or giving false information touching it to screen the offender, if a capital offence.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Court of Session,
	If punishable with transportation for life or imprisonment for 10 years.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class
	If punishable with less than 10 years' imprisonment.	Ditto	Ditto	Ditto	Ditto	Imprisonment fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
202	Intentional omission to give information of an offence by a person legally bound to inform.	Ditto	Summons.	Ditto	Ditto	Imprisonment of either description for 6 months or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
203	Giving false information respecting an offence committed.	Ditto	Warrant.	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto
204	Secreting or destroying any document to prevent its production as evidence.	Ditto	Ditto	Ditto	Ditto	Ditto	Presidency Magistrate or Magistrate of the first class.
205	False personation for the purpose of any act or proceeding in a suit or criminal prosecution or for becoming bail or security.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, or fine or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
206	Fraudulent removal or concealment, etc., of property to prevent its seizure as a forfeiture, or in satisfaction of a fine under sentence, or in execution of a decree	Shall not arrest without warrant.	Warrant	Bailable.	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
207	Claiming property without right, or practising deception touching any right to it, to prevent its being taken as a forfeiture, or in satisfaction of a fine under sentence, or in execution of a decree	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
308	Fraudulently suffering a decree to pass for a sum not due, or suffering decree to be executed after it has been satisfied.	Ditto	Ditto	Ditto	Ditto	Ditto	Presidency Magistrate or Magistrate of the first class.
209	False claim in a Court of Justice.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, and fine.	Ditto
210	Fraudulently obtaining a decree for a sum not due, or causing a decree to be executed after it has been satisfied	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto
211	False charge of offence made with intent to injure.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
	If offence charged be punishable with imprisonment for 7 years or upwards.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
	If offence charged be capital, or punishable with transportation for life	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session,
212	Harbouring an offender, if the offence be capital.	May arrest without warrant.	Ditto	Ditto	Ditto	Imprisonment of either description for 5 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
	If punishable with transportation for life or with imprisonment for 10 years.	May arrest without warrant.	Warrant	Bailable.	Not compoundable.	Imprisonment of either description for 3 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
	If punishable with imprisonment for 1 year and not for 10 years.	Ditto	Ditto	Ditto	Ditto	Imprisonment for a quarter of the	Presidency Magistrate or Magistrate of the first class.
213	Taking gift, etc., to screen an offender from punishment, if the offence be capital.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Court of Session.
	If punishable with transportation for life, or with imprisonment for 10 years.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
	If with imprisonment for less than 10 years.	Ditto	Ditto	Ditto	Ditto	Imprisonment for a quarter of the longest term, and of the description provided for the offence, or fine, or both.	Presidency Magistrate or Magistrate of the first class, or Court by which the offence is triable.
214	Offering gift or restoration of property in consideration of screening offender, if the offence be capital.	Shall not arrest without warrant.	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Court of Session.
	If punishable with transportation for life, or with imprisonment for 10 years.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
	If with imprisonment for less than 10 years.	Ditto	Ditto	Ditto	Ditto	Imprisonment for a quarter of the longest term, and of the description provided for the offence, or fine or both.	Presidency Magistrate or Magistrate of the first class, or Court by which the offence is triable.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
215	Taking gift to help to recover moveable property of which a person has been deprived by an offence, without causing apprehension of offender.	May arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 2 years, or fine or both.	Presidency Magistrate or Magistrate of the first class.
216	Harbouring an offender who has escaped from custody, or whose apprehension has been ordered, if the offence be capital.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
	If punishable with transportation for life or with imprisonment for 10 years	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, with or without fine.	Ditto
	If with imprisonment for 1 year, and not for 10 years.	Ditto	Ditto	Ditto	Ditto	Imprisonment for a quarter of the longest term, and of the description provided for the offence or fine or both.	Presidency Magistrate or Magistrate of the first class or Court by which the offence is triable.
216 A	Harbouring robbers or dacoits,	Ditto	Ditto	Ditto	Ditto	Rigorous imprisonment for 7 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
217	Public servant disobeying a direction of law with intent to save person from punishment, or property from forfeiture.	Shall not arrest without warrant	Summons	Ditto	Ditto	Imprisonment of either description for 2 years or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
218	Public servant framing an incorrect record or writing with intent to save person from punishment, or property from forfeiture.	Ditto	Warrant.	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
219	Public servant in a judicial proceeding corruptly making and pronouncing an order, report, verdict or decision which he knows to be contrary to law.	Shall not arrest without warrant	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 7 years, or fine, or both.	Court of Sessions.
220	Commitment for trial or confinement by a person having authority, who knows that he is acting contrary to law.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
221	Intentional omission to apprehend on the part of a public servant bound by law to apprehend an offender, if the offence be capital.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, with or without fine.	Ditto
	If punishable with transportation for life, or imprisonment for 10 years.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 8 years, with or without fine.	Court of Sessions, Magistrate or District Judge of first class.
	If with imprisonment for less than 10 years.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, with or without fine.	Presidency Magistrate or Magistrate of the first or second class.
222	Intentional omission to apprehend on the part of a public servant bound by law to apprehend person under sentence of a Court of Justice, if under sentence of death.	Ditto	Ditto	Not bailable.	Ditto	Transportation for life, or imprisonment of either description for 14 years, with or without fine.	Court of Sessions.
	If under sentence of transportation or penal servitude for life, or transportation, imprisonment or penal servitude for 10 years or upwards.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, with or without fine.	Ditto

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Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
	If under sentence of imprisonment for less than 10 years or lawfully committed to custody.	Shall not arrest without warrant.	Warrant	Bailable.	Not compoundable.	Imprisonment of either description for 3 years, or fine or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
223	Escape from confinement negligently suffered by a public servant.	Ditto	Summons.	Ditto	Ditto	Simple imprisonment for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
224	Resistance or obstruction by a person to his lawful apprehension.	May arrest without warrant.	Warrant.	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto
225	Resistance or obstruction to the lawful apprehension of another person, or rescuing him from lawful custody.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
	If charged with an offence punishable with transportation for life or imprisonment for 10 years.	Ditto	Ditto	Not bailable.	Ditto	Imprisonment of either description for 3 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
	If charged with a capital offence.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine	Court of Session.
	If the person is sentenced to transportation for life, or to transportation, penal servitude or imprisonment for 10 years or upwards	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
	If under sentence of death.	Ditto	Ditto	Ditto	Ditto	Transportation for life, or imprisonment of either description for 10 years and fine.	Ditto
225 A	Omission to apprehend, or sufferance of escape on part of public servant, in cases not otherwise provided for— (a) in case of intentional omission or sufferance :	Shall not arrest without warrant.	Ditto	Bailable.	Ditto	Imprisonment of either description for 3 years, or fine or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
	(b) In case of negligent omission or sufferance.	Shall not arrest without warrant.	Summons.	Bailable.	Not compoundable.	Simple imprisonment for 2 years, or fine or both.	Presidency Magistrate or Magistrate of the first or second class.
225 B	Resistance or obstruction to lawful apprehension, or escape or rescue in cases not otherwise provided for.	May arrest without warrant.	Warrant	Ditto	Ditto	Imprisonment of either description for 6 months, or fine, or both.	Ditto
226	Unlawful return from transportation.	Ditto	Ditto	Not bailable.	Ditto	Transportation for life, and fine, and rigorous imprisonment for 3 years before transportation.	Court of Session.
227	Violation of condition of remission of punishment.	Shall not arrest without warrant.	Summons.	Ditto	Ditto	Punishment of original sentence, or, if part of the punishment has been undergone, the residue.	The Court by which the original offence was triable.
228	Intentional insult or interruption to a public servant sitting in any stage of a judicial proceeding.	Ditto	Ditto	Bailable.	Ditto	Simple imprisonment for 6 months, or fine of 1,000 rupees, or both.	The Court in which the offence is committed, subject to the provisions of Chapter XXXV.
229	Personation of a juror or assessor.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years or fine, or both.	Presidency Magistrate or Magistrate of the first class.

CHAPTER XII.—OFFENCES RELATING TO COIN AND GOVERNMENT STAMPS.

231	Counterfeiting, or performing any part of the process of counterfeiting, coin.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 7 years and fine.	Court of Session.
232	Counterfeiting, or performing any part of the process of counterfeiting the Queen's coin.	Ditto	Ditto	Ditto	Ditto	Transportation for life, or imprisonment of either description for 10 years, and fine.	Ditto

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Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
250	Delivery to another of coin possessed with the knowledge that it is altered.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 5 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
251	Delivery of Queen's coin possessed with the knowledge that it is altered.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years and fine.	Ditto
252	Possession of altered coin by a person who knew it to be altered when he became possessed thereof.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years and fine.	Ditto
253	Possession of Queen's coin by a person who knew it to be altered when he became possessed thereof.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 5 years and fine.	Ditto
254	Delivery to another of coin as genuine which, when first possessed, the deliverer did not know to be altered.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine of ten times the value of the coin.	Presidency Magistrate or Magistrate of the first or second class.
255	Counterfeiting a Government stamp.	Ditto	Ditto	Bailable.	Ditto	Transportation for life or imprisonment of either description for 10 years and fine.	Court of Session
256	Having possession of an instrument or material for the purpose of counterfeiting a Government stamp.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Ditto
257	Making, buying or selling instrument for the purpose of counterfeiting a Government stamp.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
258	Sale of counterfeit Government stamp.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
252	Having possession of a counterfeit Government stamp.	May arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 7 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
253	Using as genuine a Government stamp known to be counterfeit.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, or fine, or both.	Ditto
254	Effacing any writing from a substance bearing a Government stamp, or removing from a document a stamp used for it with intent to cause loss to Government.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Ditto
255	Using a Government stamp known to have been before used.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
256	Erasure of mark denoting that stamp has been used.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
257 A	Fictitious stamps.	Ditto	Ditto	Ditto	Ditto	Fine of 200 rupees.	Presidency Magistrate or Magistrate of the first class.

CHAPTER XIII.—OFFENCES RELATING TO WEIGHTS AND MEASURES.

264	Fraudulent use of false instrument for weighing.	Shall not arrest without warrant.	Summons.	Bailable.	Not compoundable.	Imprisonment of either description for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
265	Fraudulent use of false weight or measure.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
266	Being in possession of false weights or measures for fraudulent use.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
267	Making or selling false weights or measures for fraudulent use.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto

**CHAPTER XIV.—OFFENCES AFFECTING THE PUBLIC HEALTH, SAFETY,
CONVENIENCE, DECENCY AND MORALS.**

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
269	Negligently doing any act known to be likely to spread infection of any disease dangerous to life.	May arrest without warrant.	Summons.	Bailable	Not compoundable.	Imprisonment of either description for 6 months, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
270	Malignantly doing any act known to be likely to spread infection of any disease dangerous to life.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto
271	Knowingly disobeying any quarantine rules.	Shall not arrest without warrant.	Ditto	Ditto	Ditto	Imprisonment of either description for 6 months, or fine, or both.	Ditto
272	Adulterating food or drink intended for sale, so as to make the same noxious.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Ditto
273	Selling any food or drink as food and drink, knowing the same to be noxious.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
274	Adulterating any drug or medical preparation intended for sale so as to lessen its efficacy, or to change its operation, or to make it noxious.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
275	Offering for sale or issuing from a dispensary any drug or medical preparation known to have been adulterated.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
276	Knowingly selling or issuing from a dispensary any drug or medical preparation as a different drug or medical preparation.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
277	Defiling the water of a public spring or reservoir.	May arrest without warrant.	Summons.	Bailable.	Not compoundable.	Imprisonment of either description for 3 months, or fine of 200 rupees, or both.	Any Magistrate.
278	Making atmosphere noxious to health.	Shall not arrest without warrant.	Ditto	Ditto	Ditto	Fine of 200 rupees.	Ditto
279	Driving or riding on a public way so rashly or negligently as to endanger human life, etc.	May arrest without warrant.	Ditto	Ditto	Ditto	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Ditto
280	Navigating any vessel so rashly or negligently as to endanger human life, etc.	Ditto	Ditto	Ditto	Ditto	Ditto	Presidency Magistrate or Magistrate of the first or second class.
281	Exhibition of a false light, mark or buoy.	Ditto	Warrant.	Ditto	Ditto	Imprisonment of either description for 7 years, or fine or, both.	Court of Session.
282	Conveying for hire any person, by water, in a vessel in such a state, or so loaded, as to endanger his life.	Ditto	Summons.	Ditto	Ditto	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
283	Causing danger, obstruction or injury in any public way or line of navigation.	Ditto	Ditto	Ditto	Ditto	Fine of 200 rupees.	Ditto
284	Dealing with any poisonous substance so as to endanger human life, etc.	Shall not arrest without warrant.	Ditto	Ditto	Ditto	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Ditto
285	Dealing with fire or any combustible matter so as to endanger human life, etc.	May arrest without warrant.	Ditto	Ditto	Ditto	Ditto	Any Magistrate.
286	So dealing with any explosive substance.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
287	So dealing with any machinery.	Shall not arrest without warrant.	Summons.	Bailable.	Not compoundable.	Imprisonment of either description for 6 months, or fine of 1,000 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
288	A person omitting to guard against probable danger to human life by the fall of any building over which he has a right entitling him to pull it down or repair it.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
289	A person omitting to take order with any animal in his possession, so as to guard against danger to human life, or of grievous hurt, from such animal.	May arrest without warrant	Ditto	Ditto	Ditto	Ditto	Any Magistrate.
290	Committing a public nuisance.	Shall not arrest without warrant.	Ditto	Ditto	Ditto	Fine of 200 rupees.	Ditto
291	Continuance of nuisance after injunction to discontinue.	May arrest without warrant.	Ditto	Ditto	Ditto	Simple imprisonment for 6 months, or fine, or both.	Ditto
292	Sale, etc., of obscene books, etc.	Ditto	Warrant.	Ditto	Ditto	Imprisonment of either description for 6 months, or fine, or both.	Ditto
293	Sale, etc., of obscene objects to young persons.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 6 months, or fine, or both.	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
294	Obscene songs.	May arrest without warrant.	Warrant	Bailable.	Not compoundable.	Imprisonment of either description for 3 months, or fine, or both.	Any Magistrate.
294 A	Keeping a lottery office.	Shall not arrest without warrant.	Summons.	Ditto	Ditto	Imprisonment of either description for 6 months, or fine, or both.	Ditto
	Publishing proposals relating to lotteries.	Ditto	Ditto	Ditto	Ditto	Fine of 1,000 rupees.	Ditto

CHAPTER XV.—OFFENCES RELATING TO RELIGION.

295	Destroying, damaging or defiling a place of worship or sacred object with intent to insult the religion of any class of persons.	May arrest without warrant.	Summons.	Bailable	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
295 A	Maliciously insulting the religion or the religious beliefs of any class.	Shall not arrest without warrant.	Warrant	Not Bailable.	Ditto	Ditto	Court of Session or Presidency Magistrate.
296	Causing disturbance to an assembly engaged in religious worship.	May arrest without warrant.	Summons.	Bailable.	Ditto	Imprisonment of either description for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
297	Trespassing in place of worship or sepulture, disturbing funeral, with intention to wound the feelings or to insult the religion of any person, or offering indignity to a human corpse.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
298	Uttering any word or making any sound in the hearing, or making any gesture, or placing any object in the sight of any person, with intention to wound his religious feeling.	Shall not arrest without warrant.	Ditto	Ditto	Compoundable.	Ditto	Ditto

* Inserted by Act XXV of 1927.

CHAPTER XVI.—OFFENCES AFFECTING THE HUMAN BODY.

Of Offences affecting Life.

1	2	3	4	5	6	7	8-
Section.	Offence	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
302	Murder ...	May arrest without warrant.	Warrant.	Not Bailable.	Not compoundable.	Death or transportation for life and fine.	Court of Session.
303	Murder by a person under sentence of transportation for life.	Ditto	Ditto	Ditto	Ditto	Death	Ditto
304	Culpable homicide not amounting to murder, if act by which the death is caused is done with intention of causing death, etc.	Ditto	Ditto	Ditto	Ditto	Transportation for life, or imprisonment of either description for 10 years, and fine.	Ditto
	If act is done with knowledge that it is likely to cause death, but without any intention to cause death, &c.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years, or fine, or both.	Ditto
304 A	Causing death by rash or negligent act.	Ditto	Ditto	Bailable	Ditto	Imprisonment of either description for 2 years, or fine, or both	Court of Session, Presidency Magistrate or Magistrate of the first class.
305	A betment of suicide committed by a child, or insane, or delirious person, or an idiot, or a person intoxicated.	Ditto	Ditto	Not bailable	Ditto	Death, or transportation for life, or imprisonment for 10 years and fine.	Court of Session.
306	Abetting the commission of suicide.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years, and fine.	Ditto
307	Attempt to murder.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
	If such act cause hurt to any person.	Ditto	Ditto	Ditto	Ditto	Transportation for life, or as above.	Ditto
	Attempt by life-convict to murder, if hurt is caused.	Ditto	Ditto	Ditto	Ditto	Death or as above.	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
308	Attempt to commit culpable homicide.	May arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 3 years, or fine, or both.	Court of Session.
	If such act cause hurt to any person.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, or fine, or both.	Ditto
309	Attempt to commit suicide.	Ditto	Ditto	Ditto	Ditto	Simple imprisonment for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
311	Being a thug.	Ditto	Ditto	Not bailable.	Ditto	Transportation for life, and fine.	Court of Session.

Of the Causing of Miscarriage; of Injuries to Unborn Children; of the Exposure of Infants; and of the Concealment of Births.

312	Causing miscarriage.	Shall not arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 3 years, or fine, or both.	Court of Session.
	If the woman be quick with child.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Ditto
313	Causing miscarriage without woman's consent.	Ditto	Ditto	Not bailable.	Ditto	Transportation for life, or imprisonment of either description for 10 years, and fine.	Ditto
314	Death caused by an act done with intent to cause miscarriage.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years, and fine.	Ditto
	If act done without woman's consent.	Ditto	Ditto	Ditto	Ditto	Transportation for life or as above.	Ditto
315	Act done with intent to prevent a child being born alive, or to cause it to die after its birth.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years, or fine, or both.	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
316	Causing death of a quick unborn child by an act amounting to culpable homicide.	Shall not arrest without warrant	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 10 years, and fine.	Court of Session.
317	Exposure of a child under 12 years of age by parent or person having care of it with intention of wholly abandoning it.	May arrest without warrant.	Ditto	Bailable.	Ditto	Imprisonment of either description for 7 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
318	Concealment of birth by secret disposal of dead body.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto
<i>Of Hurt.</i>							
323	Voluntarily causing hurt.	Shall not arrest without warrant.	Summons.	Bailable.	Compoundable.	Imprisonment of either description for 1 year, or fine of 1,000 rupees or both.	Any Magistrate.
324	Voluntarily causing hurt by dangerous weapons or means.	May arrest without warrant.	Ditto	Ditto	Compoundable when permission is given by the Court before which a prosecution is pending.		class.
325	Voluntarily causing grievous hurt.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years and fine.	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
326	Voluntarily causing grievous hurt by dangerous weapons or means.	May arrest without warrant.	Summons.	Not bailable.	Not compoundable.	Transportation for life, or imprisonment of either description for 10 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
327	Voluntarily causing hurt to extort property or a valuable security, or to constrain to do anything which is illegal or which may facilitate the commission of an offence.	Ditto	Ditto	Warrant.	Ditto	Imprisonment of either description for 10 years, and fine.	Ditto
328	Administering stupefying drug with intent to cause hurt, etc.	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session.
329	Voluntarily causing grievous hurt to extort property or a valuable security, or to constrain to do anything which is illegal, or which may facilitate the commission of an offence.	Ditto	Ditto	Ditto	Ditto	Transportation for life, or imprisonment of either description for 10 years, and fine.	Ditto
330	Voluntarily causing hurt to extort confession or information, or to compel restoration of property etc.	Ditto	Ditto	Bailable.	Ditto	Imprisonment of either description for 7 years, and fine.	Ditto
331	Voluntarily causing grievous hurt to extort confession or information, or to compel restoration of property, etc.	Ditto	Ditto	Not bailable.	Ditto	Imprisonment of either description for 10 years, and fine.	Ditto
332	Voluntarily causing hurt to deter public servant from his duty.	Ditto	Ditto	Bailable.	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
346	Wrongful confinement in secret.	May arrest without warrant.	Summons.	Bailable.	Compoundable when permission is given by the Court before which the prosecution is pending.	Imprisonment of either description for 2 years in addition to imprisonment under any other section.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
347	Wrongful confinement for the purpose of extorting property, or constraining to an illegal act, etc.	Ditto	Ditto	Ditto	Not compoundable.	Imprisonment of either description for 3 years, and fine.	Ditto
348	Wrongful confinement for the purpose of extorting confession or information, or of compelling a restoration of property, etc.	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session, Presidency Magistrate or Magistrate of the first class.

Of Criminal Force and Assault.

352	Assault or use of criminal force otherwise than on grave provocation.	Shall not arrest without warrant.	Summons.	Bailable.	Compoundable.	Imprisonment of either description for 3 months, or fine of 500 rupees, or both.	Any Magistrate.
353	Assault or use of criminal force to deter a public servant from discharge of his duty.	May arrest without warrant.	Warrant.	Ditto	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
354	Assault or use of criminal force to a woman with intent to outrage her modesty.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
353	Assault or criminal force with intent to dishonour a person, otherwise than on grave and sudden provocation.	Shall not arrest without warrant.	Summons.	Bailable.	Compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
356	Assault or criminal force in attempt to commit theft of property worn or carried by a person.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Ditto	Any Magistrate.
357	Assault or use of criminal force in attempt wrongfully to confine a person.	Ditto	Ditto	Bailable	Compoundable when permission is given by the Court before which the prosecution is pending.	Imprisonment of either description for 1 year, or fine, of 1,000 rupees, or both.	Ditto
358	Assault or use of criminal force on grave and sudden provocation.	Shall not arrest without warrant.	Summons.	Ditto	Compoundable.	Simple imprisonment for 1 month, or fine of 200 rupees, or both.	Ditto

Of Kidnapping, Abduction, Slavery and Forced Labour.

363	Kidnapping ...	May arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 7 years and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
364	Kidnapping or abducting in order to murder.	Ditto	Ditto	Not bailable.	Ditto	Transportation for life, or rigorous imprisonment, for 10 years and fine.	Court of Session.
365	Kidnapping or abducting with intent secretly and wrongfully to confine a person.	Ditto	Ditto	Ditto	Ditto	" " " " " "	" " " " " "

THE CODE OF CRIMINAL PROCEDURE.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
366	Kidnapping or abducting a woman to compel her marriage or to cause her defilement, etc.	May arrest without warrant.	Warrant	Not bailable.	Not compoundable.	Imprisonment of either description for 10 years, and fine.	Court of Session
366 A.*	Procuration of minor girl.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
366 B.*	Importation of girl from foreign country.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
367	Kidnapping or abducting in order to subject a person to grievous hurt, slavery, etc.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
368	Concealing or keeping in confinement a kidnapped person.	Ditto	Ditto	Ditto	Ditto	Punishment for kidnapping abduction.	Court of Session, Presidency Magistrate or Magistrate of the first class.
369	Kidnapping or abducting a child with intent to take property from the person of such child.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Ditto
370	Buying or disposing of any person as a slave	Shall not arrest without warrant.	Ditto	Bailable.	Ditto	Ditto	Court of Session.
371	Habitual dealing in slaves.	May arrest without warrant.	Ditto	Not Bailable.	Ditto	Transportation for life, or imprisonment of either description for 10 years, and fine.	Ditto
372	Selling or letting to hire a minor for purposes of prostitution, etc.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
373	Buying or obtaining possession of a minor for the same purposes.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto

* Added by Act XX of 1923, S. 4.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
374	Unlawful compulsory labour.	Shall not arrest without warrant.	Warrant.	Bailable.	Compoundable.	Imprisonment of either description for 1 year, or fine, or both.	Any Magistrate.

Of Rape.

376	Rape— If the sexual intercourse was by a man with his own wife not being under 12 years of age.*	Shall not arrest without warrant.	Summons.	Bailable.	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Court of Session—Chief Presidency Magistrate or District Magistrate.
	If the sexual intercourse was by a man with his own wife being under 12 years of age.*	Ditto	Ditto	Ditto	Ditto	Transportation for life or imprisonment of either description for 10 years, and fine.	Court of Session.
	In any other case.	May arrest without warrant.	Warrant.	Not bailable.	Ditto	Ditto	Ditto

Of Unnatural Offences.

377	Unnatural offences.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Transportation for life, or imprisonment of either description for 10 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
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CHAPTER XVII.—OFFENCES AGAINST PROPERTY.

Of Theft.

379	Theft	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 3 years, or fine or both.	Any Magistrate.
380	Theft in a building, tent or vessel.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Ditto
381	Theft by clerk or servant of property in possession of master or employer.	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session, Presidency Magistrate or Magistrate of the first or second class.

* Amended by Act XXIX of 1925.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
392	Theft, preparation having been made for causing death, or hurt, or restraint, or fear of death, or of hurt, or of restraint, in order to the committing of such theft, or to retreating after committing it, or to retaining property taken by it.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Rigorous imprisonment for 10 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.

Of Extortion.

394	Extortion	Shall not arrest without warrant.	Warrant	Bailable.	Not compoundable.	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
395	Putting or attempting to put in fear of injury, in order to commit extortion.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto
396	Extortion by putting a person in fear of death or grievous hurt.	Ditto	Ditto	Not bailable.	Ditto	Imprisonment of either description for 10 years, and fine.	Court of Session.
397	Putting or attempting to put a person in fear of death or grievous hurt, in order to commit extortion.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Ditto
398	Extortion by threat of accusation of an offence punishable with death, transportation for life, or imprisonment for 10 years	Ditto	Bailable.	Ditto	Ditto	Imprisonment of either description for 10 years, and fine.	Ditto
	If the offence threatened be an unnatural offence.	Ditto	Ditto	Ditto	Ditto	Transportation for life.	Ditto

1	2	3	4	5	6	7	8
Section.	Offence	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
352	Putting a person in fear of accusation of offence punishable with death, transportation for life, or with imprisonment for 10 years, in order to commit extortion. If the offence be an unnatural offence.	Shall not arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 10 years, and fine. Transportation for life.	Court of Session. Ditto
<i>Of Robbery and Dacoity.</i>							
392	Robbery. If committed on the highway between sunset and sunrise.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Rigorous imprisonment for 14 years, and fine.	first class. Ditto.
393	Attempt to commit robbery.	Ditto	Ditto	Ditto	Ditto	Rigorous imprisonment for 7 years, and fine.	Ditto
394	Person voluntarily causing hurt committing or attempting to commit robbery, or any other person jointly concerned in such robbery.	Ditto	Ditto	Ditto	Ditto	Transportation or life, or rigorous imprisonment for 10 years, and fine.	Ditto
395	Dacoity.	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session.
396	Murder in dacoity.	Ditto	Ditto	Ditto	Ditto	Death, transportation for life, or rigorous imprisonment for 10 years, and fine.	Ditto
397	Robbery or dacoity with attempt to cause death or grievous hurt.	Ditto	Ditto	Ditto	Ditto	Rigorous imprisonment for not less than 7 years.	Ditto
398	Attempt to commit robbery or dacoity when armed with deadly weapon.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
414	Assisting in concealment or disposal of stolen property, knowing it to be stolen.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.

Of Cheating.

417	Cheating.	Shall not arrest without warrant.	Warrant.	Bailable.	Compoundable when permission is given by the Court before which the prosecution is pending.	Imprisonment of either description for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
418	Cheating a person whose interest the offender was bound, either by law or by legal contract, to protect.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
419	Cheating by personation.	May arrest without warrant.	Ditto	Ditto	Ditto	Ditto	Ditto
420	Cheating and thereby dishonestly inducing delivery of property or the making, alteration or destruction of a valuable security.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.

Of Fraudulent Deeds and Disposition of Property.

421	Fraudulent removal or concealment of property, etc., to prevent distribution among creditors.	Shall not arrest without warrant.	Warrant	Bailable.	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
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1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
422	Fraudulently preventing from being made available for his creditors a debt or demand due to the offender.	Shall not arrest without warrant.	Warrant	Bailable.	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
423	Fraudulent execution of deed of transfer containing a false statement of consideration.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
424	Fraudulent removal or concealment of property, of himself, or any other person, or assisting in the doing thereof, or dishonestly releasing any demand or claim to which he is entitled.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto

Of Mischief.

425	Mischief.	Shall not arrest without warrant.	Summons.	Bailable.	Compoundable when the only loss or damage caused is loss or damage to a private person.	Imprisonment of either description for 3 months, or fine, or both.	Any Magistrate.
427	Mischief, and thereby causing damage to the amount of 50 rupees or upwards.	Ditto	Warrant	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
428	Mischief by killing, poisoning, maiming or rendering useless any animal of the value of 10 rupees or upwards.	May arrest without warrant.	Ditto	Ditto	Not compoundable	Ditto	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
429	Mischief by killing, poisoning, maiming or rendering useless any elephant, or a mael, horse, etc., whatever may be its value, or any other animal of the value of 30 rupees or upwards.	May arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 5 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
430	Mischief by causing diminution of supply of water for agricultural purposes, etc.	Ditto	Ditto	Ditto	Compoundable when permission is given by the Court before which the prosecution is pending.	Ditto	Ditto
431	Mischief by injury to public road, bridge, navigable river or navigable channel and rendering it impassable or less safe for travelling or conveying property.	Ditto	Ditto	Ditto	Not compoundable.	Ditto	Ditto
432	Mischief by causing inundation or obstruction to public drainage, attended with damage.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
433	Mischief by destroying or moving or rendering useless any property, or, &c., to prevent distribution among creditors.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, or fine, or both.	Court of Session.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
434	Mischief by destroying or moving, etc., a land mark fixed by public authority.	Shall not arrest without warrant.	Warrant	Bailable.	Not compoundable.	Imprisonment of either description for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
435	Mischief by fire or explosive substance with intent to cause damage to amount of 100 rupees or upwards, or in case of agricultural produce, 10 rupees or upwards.	May arrest without warrant.	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
436	Mischief by fire or explosive substance with intent to destroy a house, etc.	Ditto	Ditto	Not bailable.	Ditto	Transportation for life, or imprisonment of either description for 10 years, and fine.	Court of Session.
437	Mischief with intent to destroy or make unsafe a decked vessel or a vessel of 20 tons burden.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years, and fine.	Ditto
438	The mischief described in the last section when committed by fire or any explosive substance.	Ditto	Ditto	Ditto	Ditto	Transportation for life, or imprisonment of either description for 10 years, and fine.	Ditto
439	Running vessel ashore with intent to commit theft, etc.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years, and fine.	Ditto
440	Mischief committed after preparation made for causing death, or hurt, etc.	Ditto	Ditto	Ditto	Ditto		class.

Of Criminal Trespass.

447	Criminal trespass.	May arrest without warrant.	Summons.	Bailable.	Compoundable.	Imprisonment of either description for 3 months, or fine of 500 rupees, or both.	Any Magistrate.
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1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
448	House-trespass.	May arrest without warrant.	Warrant	Bailable.	Compoundable.	Imprisonment of either description for one year, or fine of 1,000 rupees, or both.	Any Magistrate.
449	House-trespass in order to the commission of an offence punishable with death	Ditto	Ditto	Not bailable.	Not compoundable.	Transportation for life, or rigorous imprisonment for 10 years, and fine.	Court of Session.
450	House-trespass in order to the commission of an offence punishable with transportation for life.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years, and fine.	Ditto
451	House-trespass in order to the commission of an offence punishable with imprisonment.	Ditto	Ditto	Bailable.	Compoundable when permission is given by Court before which prosecution is pending.	Imprisonment of either description for 2 years, and fine.	Any Magistrate.
	If the offence is theft.	Ditto	Ditto	Not bailable.	Not compoundable.	Imprisonment of either description for 7 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
452	House-trespass, having made preparation for causing hurt, assault, etc.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
453	Lurking house-trespass or house-breaking	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, and fine.	Presidency Magistrate or Magistrate of the first or second class.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
454	Lurking house-trespass or house-breaking in order to the commission of an offence punishable with imprisonment.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 3 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
	If the offence is theft.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 10 years, and fine.	Ditto
455	Lurking house-trespass or house-breaking after preparation made for causing hurt, assault, etc.	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session, Presidency Magistrate or Magistrate of the first class.
456	Lurking house-trespass or house-breaking by night.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
457	Lurking house-trespass or house-breaking by night in order to the commission of an offence punishable with imprisonment.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 5 years, and fine.	Ditto
	If the offence is theft.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 14 years, and fine.	Ditto
458	Lurking house-trespass or house-breaking by night, after preparation made for causing hurt, etc.	Ditto	Ditto	Ditto	Ditto	Ditto	Court of Session, Presidency Magistrate or Magistrate of the first class.
459	Grievous hurt caused whilst committing lurking house-trespass or house-breaking.	Ditto	Ditto	Ditto	Ditto	Transportation for life, or imprisonment of either description for 10 years, and fine.	Court of Session.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
460	Death or grievous hurt caused by one of several persons jointly concerned in house-breaking by night, etc.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Transportation for life, or imprisonment of either description for 10 years, and fine.	Court of Session.
461	Dishonestly breaking open or unfastening any closed receptacle containing or supposed to contain property.	Ditto	Ditto	Bailable.	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
462	Being entrusted with any closed receptacle containing or supposed to contain any property, and fraudulently opening the same.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.

CHAPTER XVIII.—OFFENCES RELATING TO DOCUMENTS AND TO TRADE OR PROPERTY MARKS.

465	Forgery.	Shall not arrest without warrant.	Warrant.	Bailable.	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
466	Forgery of a record of a Court of Justice or of a Register of Births, etc., kept by a public servant.	Ditto	Ditto	Not bailable.	Ditto	Imprisonment of either description for 7 years, and fine.	Court of Session.
467	Forgery of a valuable security, will or authority to make or transfer any valuable security, or to receive any money, etc.	Ditto	Ditto	Ditto	Ditto	Transportation for life, or imprisonment of either description for 10 years, and fine.	Ditto
	When the valuable security is a promissory note of the Government of India.	May arrest without warrant.	Ditto	Ditto	Ditto	Ditto	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
463	Forgery for the purpose of cheating	Shall not arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 7 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
469	Forgery for the purpose of harming the reputation of any person, or knowing that it is likely to be used for that purpose.	Ditto	Ditto	Bailable.	Ditto	Imprisonment of either description for 3 years, and fine.	Ditto
471	Using as genuine a forged document which is known to be forged	Ditto	Ditto	Ditto	Ditto	Punishment for forgery of such document.	Same Court as that by which the forgery is triable.
	When the forged document is a promissory note of the Government of India.	May arrest without warrant.	Ditto	Ditto	Ditto	Ditto	Court of Session.
472	Making or counterfeiting a seal, plate, etc., with intent to commit a forgery punishable under section 467 of the Indian Penal Code, or possessing with like intent any such seal, plate, etc., knowing the same to be counterfeited.	Shall not arrest without warrant.	Ditto	Ditto	Ditto	Transportation for life, or imprisonment of either description for 7 years, and fine.	Ditto
473	Making or counterfeiting a seal, plate, etc., with intent to commit a forgery punishable otherwise than under section 467 of the Indian Penal Code, or possessing with like intent any such seal, plate, etc., knowing the same to be counterfeited.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 7 years, and fine.	Ditto

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
474	Having possession of a document, knowing it to be forged with intent to use it as genuine; if the document is one of the description mentioned in section 466 of the Indian Penal Code.	Shall not arrest without warrant.	Warrant	Bailable	Not compoundable.	Imprisonment of either description for 7 years, and fine.	Court of Session.
	If the document is one of the description mentioned in section 467 of the Indian Penal Code.	Ditto	Ditto	Ditto	Ditto	Transportation for life, or imprisonment of either description for 7 years, and fine.	Ditto
475	Counterfeiting a device or mark used for authenticating documents described in section 467 of the Indian Penal Code, or possessing counterfeit marked material.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
476	Counterfeiting a device or mark used for authenticating documents other than those described in section 467 of the Indian Penal Code, or possessing counterfeit marked material.	Ditto	Ditto	Not bailable.	Ditto	Imprisonment of either description for 7 years, and fine.	Ditto
477	Fraudulently destroying or defacing, or attempting to destroy or deface, or secreting a will, etc.	Ditto	Ditto	Ditto	Ditto	Transportation for life, or imprisonment of either description for 7 years, and fine.	Ditto
477 A	Falsification of accounts.	Ditto	Ditto	Bailable.	Ditto	Imprisonment of either description for 7 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.

Of Trade and Property Marks.

	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
452	Using a false trade or property-mark with intent to deceive or injure any person.	Shall not arrest without warrant.	Warrant.	Bailable.	Compoundable when permission is given by the Court before which the prosecution is pending.	Imprisonment of either description for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
453	Counterfeiting a trade or property-mark used by another, with intent to cause damage or injury.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Ditto
454	Counterfeiting a property-mark used by a public servant, or any mark used by him to denote the manufacture, quality, etc., of any property.	Ditto	Summons	Ditto	Not compoundable.	Imprisonment of either description for 3 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
455	Fraudulently making or having possession of any die, plate or other instrument for counterfeiting any public or private property or trade-mark.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 3 years, or fine, or both.	Ditto
456	Knowingly selling goods marked with a counterfeit property or trade-mark.	Ditto	Ditto	Ditto	Compoundable with permission of the Court before which the prosecution is pending.	Imprisonment of either description for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
487	Fraudulently making a false mark upon any package or receptacle containing goods, with intent to cause it to be believed that it contains goods which it does not contain, etc	Shall not arrest without warrant.	Summons.	Bailable.	Not compoundable.	Imprisonment of either description for 1 year, or fine, or both.	Court of Session or second class.
488	Making use of any such false mark.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
489	Removing, destroying or defacing any property-mark with intent to cause injury.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.

Of Currency Notes and Bank Notes.

489 A	Counterfeiting currency notes or bank notes.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Transportation for life or imprisonment of either description for 10 years, and fine.	Court of Session.
489 B	Using as genuine forged or counterfeited currency notes or bank notes.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
489 C	Possession of forged or counterfeited currency notes or bank notes.	Ditto	Ditto	Bailable.	Ditto	Imprisonment of either description for 7 years, and fine, or both.	Ditto
489 D	Making or possessing instruments or materials for forging or counterfeiting currency notes or bank notes	Ditto	Ditto	Not Bailable.	Ditto	Transportation for life, or imprisonment of either description for 10 years, and fine.	Ditto

CHAPTER XIX.—CRIMINAL BREACH OF CONTRACTS OF SERVICE.

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*Omitted by Act III of 1925.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
491	Being bound to attend on or supply the wants of a person who is helpless from youth, unsoundness of mind or disease, and voluntarily omitting to do so.	Shall not arrest without warrant.	Summons.	Bailable.	Compoundable.	Imprisonment of either description for 3 months, or fine of 200 rupees, or both.	Presidency Magistrate or Magistrate of the first or second class.
492*

CHAPTER XX.—OFFENCES RELATING TO MARRIAGE.

493	A man by deceit causing a woman not lawfully married to him to believe that she is lawfully married to him and to co-habit with him in that belief.	Shall not arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 10 years, and fine.	Court of Session.
494	Marrying again during the lifetime of a husband or wife.	Ditto	Ditto	Bailable.	Compoundable with permission of the Court before which the prosecution is pending.	Imprisonment of either description for 7 years, and fine.	Court of Session, Presidency Magistrate or Magistrate of the first class.
495	Same offences with concealment of the former marriage from the person with whom subsequent marriage is contracted.	Ditto	Ditto	Bailable.	Not compoundable.	Imprisonment of either description for 10 years, and fine.	Court of Session.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
496	A person with fraudulent intention going through the ceremony of being married, knowing that he is not thereby lawfully married.	Shall not arrest without warrant	Warrant	Bailable.	Not Compoundable.	Imprisonment of either description for 7 years, and fine.	Court of Session.
497	Adultery.	Ditto	Ditto	Ditto	Compoundable.	Imprisonment of either description for 5 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
498	Enticing or taking away or detaining with a criminal intent a married woman.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.

CHAPTER XXI.—DEFAMATION.

500	Defamation.	Shall not arrest without warrant.	Warrant.	Bailable.	Compoundable.	Simple imprisonment for 2 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
501	Printing or engraving matter knowing it to be defamatory.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto
502	Sale of printed or engraved substance containing defamatory matter, knowing it to contain such matter.	Ditto	Ditto	Ditto	Ditto	Ditto	Ditto

CHAPTER XXII.—CRIMINAL INTIMIDATION, INSULT AND ANNOYANCE.

504	Insult intended to provoke a breach of the peace.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, or fine, or both.	Any Magistrate.
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Section.	1	2	3	4	5	6	7	8
		Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
503		False statement, rumour, etc., circulated with intent to cause mutiny or offence against the public peace.	Shall not arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Imprisonment of either description for 2 years, or fine, or both.	Presidency Magistrate or Magistrate of the first class.
505		Criminal intimidation.	Ditto	Ditto	Bailable.	Compoundable.	Ditto	Presidency Magistrate or Magistrate of the first or second class.
		If threat be to cause death or grievous hurt, etc.	Ditto	Ditto	Ditto	Not compoundable.	Imprisonment of either description for 7 years, or fine, or both.	Court of Session, Presidency Magistrate or Magistrate of the first class.
507		Criminal intimidation by anonymous communication or having taken precaution to conceal whence the threat comes.	Ditto	Ditto	Ditto	Ditto	Imprisonment of either description for 2 years, in addition to the punishment under above section.	Ditto
508		Act caused by inducing a person to believe that he will be rendered an object of Divine displeasure.	Ditto	Ditto	Ditto	Compoundable.	Imprisonment of either description for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first or second class.
509		Uttering any word or making any gesture intended to insult the modesty of a woman, etc.	Ditto	Ditto	Ditto	Compoundable when permission is given by the Court before which the prosecution is pending.	Simple imprisonment for 1 year, or fine, or both.	Presidency Magistrate or Magistrate of the first class.
510		Appearing in a public place, etc., in a state of intoxication and causing annoyance to any person.	Ditto	Ditto	Ditto	Not compoundable.	Simple imprisonment for 24 hours, or fine of 10 rupees, or both.	Any Magistrate.

CHAPTER XXIII.—ATTEMPTS TO COMMIT OFFENCES.

1	2	3	4	5	6	7	8
Section.	Offence.	Whether the Police may arrest without warrant or not.	Whether a warrant or a summons shall ordinarily issue in the first instance.	Whether bailable or not.	Whether compoundable or not.	Punishment under the Indian Penal Code.	By what Court triable.
511	Attempting to commit offences punishable with transportation or imprisonment, and in such attempt doing any act towards the commission of the offence.	According as the offence is one in respect of which the police may arrest without warrant or not.	According as the offence is one in respect of which a summons or warrant shall or dinarily issue.	According as the offence contemplated by the offender is bailable or not.	Compoundable when the offence attempted is compoundable.	Transportation or imprisonment not exceeding half of the longest term, and of any description, provided for the offence, or fine, or both.	The Court by which the offence attempted is triable.

OFFENCES AGAINST OTHER LAWS.

If punishable with death, transportation or imprisonment for 7 years or upwards.	May arrest without warrant.	Warrant.	Not bailable.	Not compoundable.	Court of Session.
If punishable with imprisonment for 3 years and upwards, but less than 7.	Ditto	Ditto	Not bailable, except in cases under the Indian Arms Act, 1878, section 19, which shall be bailable.	Ditto	Court of Session, Presidency Magistrate or Magistrate of the first class.
If punishable with imprisonment for one year and upwards, but less than 3 years.	Shall not arrest without warrant.	Summons.	Bailable.	Ditto	Court of Session, Presidency Magistrate or Magistrate of the first or second class.
If punishable with imprisonment for less than one year, or with fine only.	Ditto	Ditto	Ditto	Ditto	Any Magistrate.

SCHEDULE III.

(See section 36).

ORDINARY POWERS OF PROVINCIAL MAGISTRATES.

I.—Ordinary Powers of a Magistrate of the Third Class.

- (1) Power to arrest, or direct the arrest of, and to commit to custody, a person committing an offence in his presence, section 64.
- (2) Power to arrest, or direct the arrest in his presence of, an offender, section 65.
- (3) Power to endorse a warrant, or to order the removal of an accused person arrested under a warrant, sections 83, 84 and 86.
- (4) Power to issue proclamations in cases judicially before him, section 87.
- (5) Power to attach and sell property and to dispose of claims to attached property in cases judicially before him, section 88.
- (6) Power to restore attached property, section 89.
- (7) Power to require search to be made for letters and telegrams, section 98.
- (8) Power to issue search-warrant, section 96.
- (9) Power to endorse a search-warrant and order delivery of thing found, section 99.
- (10) Power to command unlawful assembly to disperse, section 127.
- (11) Power to use civil force to disperse unlawful assembly, section 128.
- (12) Power to require military force to be used to disperse unlawful assembly, section 130.
- (13) " " Omitted by Act XVIII of 1923.
- (14) Power to authorise detention *not being detention in the custody of the police* of a person during a police investigation, section 167.
- (14a) Power to postpone the issue of process and enquire into the case himself, section 202.
- (15) Power to detain an offender found in Court, section 351.
- (16) " " Omitted by Act XXXVII of 1925.
- (17) Power to apply to District Magistrate to issue commission for examination of witness, section 506 (2).
- (18) Power to recover forfeited bond for appearance before Magistrate's Court, section 514, and require fresh security, section 514A.
- (18a) Power to make order as to custody and disposal of property pending inquiry or trial, section 516A.
- (19) Power to make order as to disposal of property, section 517.
- (20) Power to sell property of a suspected character, section 525.
- (21) Power to require affidavit in support of application, section 539A.
- (22) Power to make local inspection, section 539B.

II.—Ordinary Powers of a Magistrate of the Second Class.

- (1) The ordinary powers of a Magistrate of the third class.
- (2) Power to order the police to investigate an offence in cases in which the Magistrate has jurisdiction to try or commit for trial, section 155.
- (3) Power to postpone and issue of process and to enquire into a case or direct investigation, section 202.
- (4) " " Omitted by Act XVIII of 1923.

III.—Ordinary Powers of a Magistrate of the First Class.

- (1) The ordinary powers of a Magistrate of the second class.
- (2) Power to issue search-warrant otherwise than in course of an inquiry, section 98.
- (3) Power to issue search-warrant for discovery of persons wrongfully confined, section 100.
- (4) Power to require security to keep the peace, section 107.
- (5) Power to require security for good behaviour, section 109.
- (6) Power to discharge sureties, section 126A.
- (6a) Power to make orders as to local nuisances, section 133.
- (7) Power to make orders, etc., in possession cases, sections 145, 146 and 147.
- (7a) Power to record statements and confessions during a police investigation, section 164.

- (7aa) *Power to authorise detention of a person in the custody of the police during a police investigation, section 167.*
- (7b) *Power to hold inquests, section 174.*
- (8) *Power to commit for trial, section 206.*
- (9) *Power to stop proceedings when no complaint, section 249.*
- (9a) *Power to tender pardon to accomplice during inquiry into case by himself, section 337*
- (10) *Power to make orders of maintenance, sections 483 and 489.*
- (11) *Power to take evidence on commission, section 503.*
- (12) *Power to recover penalty on forfeited bond, section 514.*
- (12a) *Power to require fresh security, section 514A.*
- (12b) *Power to recall case made over by him to another Magistrate, section 528 (4).*
- (13) *Power to make order as to first offenders, section 562.*
- (14) *Power to order released convicts to notify residence, section 565.*

IV.—Ordinary Powers of a Sub-divisional Magistrate appointed under section 13.

- (1) *The ordinary powers of a Magistrate of the first class.*
- (2) *Power to direct warrants to landholders, section 78.*
- (3) *Power to require security for good behaviour, section 110.*
- (4) * * *Omitted by Act XVIII of 1923.*
- (5) *Power to make orders prohibiting repetitions of nuisances, section 143.*
- (6) *Power to make orders under section 144.*
- (7) *Power to depute subordinate Magistrate to make local inquiry, section 148.*
- (8) *Power to order police investigation into cognizable case, section 156.*
- (9) *Power to receive report of police-officer and pass order, section 173.*
- (10) * * *Omitted by Act XVIII of 1923.*
- (11) *Power to issue process for person within local jurisdiction who has committed an offence outside the local jurisdiction, section 186.*
- (12) *Power to entertain complaints, section 190.*
- (13) *Power to receive police reports, section 190.*
- (14) *Power to entertain cases without complaint, section 190.*
- (15) *Power to transfer cases to a subordinate Magistrate, section 192.*
- (16) *Power to pass sentence on proceedings recorded by a subordinate Magistrate, section 342.*
- (17) *Power to forward record of inferior Court to District Magistrate, section 435 (2).*
- (18) *Power to sell property alleged or suspected to have been stolen, etc., section 524.*
- (19) *Power to withdraw cases other than appeals, and to try or refer them for trial, section 523.*
- (20) * * *Omitted by Act XVIII of 1923.*

V.—Ordinary Powers of a District Magistrate.

- (1) *The ordinary powers of a Sub-divisional Magistrate.*
- (1a) *Power to try juvenile offenders, section 29 A.*
- (2) *Power to require delivery of letters, telegrams, etc., section 95.*
- (3) *Power to issue search-warrants for documents in custody of postal or telegraph authorities, section 96.*
- (4) *Power to require security for good behaviour in case of sedition, section 108.*
- (5) *Power to discharge persons bound to keep the peace or to be of good behaviour, section 124.*
- (6) *Power to cancel bond for keeping the peace, section 125.*
- (6a) *Power to order preliminary investigation by police-officer not below the rank of Inspector in certain cases, section 196 B.*
- (7) *Power to try summarily, section 200.*
- (7a) *Power to tender pardon to accomplice at any stage of a case, section 337.*
- (8) *Power to quash convictions in certain cases, section 350.*
- (9) *Power to hear appeals from orders requiring security for keeping the peace or good behaviour, section 400.*
- (9a) *Power to hear appeals from orders of Magistrates refusing to accept or reject sureties, section 400 A.*

- (10) Power to hear or refer appeals from convictions by Magistrates of the second and third classes, section 407.
 (11) Power to call for records, section 435.
 (12) *Power to order inquiry into complaint dismissed or case of accused discharged, section 436.*
 (13) Power to order commitment, section 437.
 (14) Power to report case to High Court, section 438.
 (15) * Omitted by Act XXXVII of 1925.
 (16) * Omitted by Act XXXVII of 1925.
 (17) Power to appoint person to be Public Prosecutor in particular case, section 492 (2).
 (18) Power to issue commission for examination of witness, sections 503 and 506.
 (19) Power to hear appeals from or revise orders passed under sections 514, 515.
 (20) Power to compel restoration of abducted female, section 552.

SCHEDULE IV.

(See sections 37 and 35.)

ADDITIONAL POWERS WITH WHICH PROVINCIAL MAGISTRATES MAY BE INVESTED.

POWERS WITH WHICH
A MAGISTRATE OF
THE FIRST CLASS
MAY BE INVESTED.

BY THE
LOCAL
GOVERNMENT.

- (1) Power to require security for good behaviour in case of seditious, section 108;
 (2) Power to require security for good behaviour, section 110;
 (3) * Omitted by Act XVIII of 1923;
 (4) Power to make orders prohibiting repetitions of nuisances, section 143
 (5) Power to make orders under section 144;
 (6) Omitted by Act XVIII of 1923;
 (7) Power to issue process for person within local jurisdiction who has committed an offence outside the local jurisdiction, section 186;
 (8) Power to take cognizance of offences upon complaint, section 190;
 (9) Power to take cognizance of offences upon police reports, section 190;
 (10) Power to take cognizance of offences without complaint, section 190;
 (11) Power to try summarily, section 260;
 (12) Power to hear appeals from convictions by Magistrates of the second and third classes, section 407;
 (13) Power to sell property alleged or suspected to have been stolen, etc., section 524;
 (14) * Omitted by Act XVIII of 1923;
 (15) Power to try cases under section 124A of the Indian Penal Code.

BY THE
DISTRICT
MAGISTRATE.

- (1) Power to make orders prohibiting repetitions of nuisances, section 143;
 (2) Power to make orders under section 144;
 (3) * Omitted by Act XVIII of 1923;
 (4) Power to take cognizance of offences upon complaint, section 190;
 (5) Power to take cognizance of offences upon police reports, section 190;
 (6) Power to transfer cases, section 192.

**POWERS WITH WHICH
A MAGISTRATE OF
THE SECOND CLASS
MAY BE INVESTED.**

**BY THE
LOCAL
GOVERNMENT**

- (1) * Omitted by Act IV of 1909.
- (2) Power to make orders prohibiting repetitions of nuisances, section 143 :
- (3) Power to make orders under section 144 :
- (3a) *Power to record statements and confessions during a police investigation, section 164.*
- (3b) *Power to authorise detention, of a person in the custody of the police during a police investigation, section 167 :*
- (4) Power to hold inquests, section 174 :
- (5) Power to take cognizance of offences upon complaint, section 190 :
- (6) Power to take cognizance of offences upon police reports, section 190 :
- (7) Power to take cognizance of offences without complaint, section 190 :
- (8) Power to commit for trial, section 206 :
- (9) Power to make order as to first offenders, section 562 :

**BY THE
DISTRICT
MAGISTRATE.**

- (1) Power to make orders prohibiting repetitions of nuisances, section 143 :
- (2) Power to make orders under section 144 :
- (3) Power to hold inquests, section 174 :
- (4) Power to take cognizance of offences upon complaint, section 190 :
- (5) Power to take cognizance of offences upon police reports, section 190 :

**POWERS WITH WHICH
A MAGISTRATE OF
THE THIRD CLASS
MAY BE INVESTED.**

**BY THE
LOCAL
GOVERNMENT**

- (1) Power to make orders prohibiting repetitions of nuisances, section 143 :
- (2) * Omitted by Act XVIII of 1923.
- (3) Power to hold inquests, section 174 :
- (4) Power to take cognizance of offences upon complaint, section 190 :
- (5) Power to take cognizance of offences upon police reports, section 190 :
- (6) * Omitted by Act XVIII of 1923

**BY THE
DISTRICT
MAGISTRATE.**

- (1) Power to make orders prohibiting repetitions of nuisances, section 143 :
- (2) * Omitted by Act XVIII of 1923 :
- (3) Power to hold inquests, section 174 :
- (4) Power to take cognizance of offences upon complaint, section 190 .
- (5) Power to take cognizance of offences upon police reports, section 190 :

**POWERS WITH WHICH
A SUB-DIVISIONAL
MAGISTRATE MAY BE
INVESTED.**

**BY THE
LOCAL
GOVERNMENT**

- Power to call for records, section 435 :

SCHEDULE V.

(See section 535.)

FORMS.

I.—SUMMONS TO AN ACCUSED PERSON.

(See section 69.)

To _____ of _____

WHEREAS your attendance is necessary to answer to a charge of *(state shortly the offence charged)*, you are hereby required to appear in person *(or by pleader, as the case may be)* before the *(Magistrate)* _____ of _____

_____ on the _____
day of _____ . Herein fail not,

Dated this _____ day of _____ 19 _____ .
(Seal).

(Signature).

II.—WARRANT OF ARREST.

(See section 75.)

To *(name and designation of the person or persons who is or are to execute the warrant.)*

WHEREAS _____ of _____ stands charged with the offence of *(state the offence)*, you are hereby directed to arrest the said _____, and to produce him before me. Herein fail not,

Dated this _____ day of _____ 19 _____ .
(Seal).

(Signature).

(See section 76.)

This warrant may be endorsed as follows —

If the said _____ shall give bail himself in the sum of _____ with, one surety in the sum of _____ *(or two sureties each in the sum of)* to attend before me on the _____ day of _____ and to continue so to attend until otherwise directed by me, he may be released.

Dated this _____ day of _____ 19 _____ .
(Seal).

(Signature).

III.—BOND AND BAIL-BOND AFTER ARREST UNDER A WARRANT.

(See section 86.)

I *(name)* of _____ being brought before the District Magistrate of _____ *(or as the case may be)* under a warrant issued to compel my appearance to answer to the charge of _____, do hereby bind myself to attend in the Court of _____ on the _____ day of _____ next, to answer to the said charge, and to continue so to attend until otherwise directed by the Court; and, in case of my making default therein, I bind myself to forfeit, to His Majesty the King, Emperor of India, the sum of rupees _____.

Dated this _____ day of _____ 19 _____ .
(Seal).

(Signature).

I do hereby declare myself surety for the abovenamed _____ of _____ that he shall attend before _____ in the Court of _____ on the _____ day of _____ next, to answer to the charge on which he has been arrested, and shall continue so to attend until otherwise directed by the Court; and, in case of his making default therein, I bind myself to forfeit to His Majesty the King, Emperor of India, the sum of rupees _____.

Dated this _____ day of _____ 19 _____ .
(Seal).

(Signature).

IV.—PROCLAMATION REQUIRING THE APPEARANCE OF A PERSON ACCUSED.

(See section 87.)

WHEREAS complaint has been made before me that *(name, description and address)* _____ has committed *(or is suspected to have committed)* the offence of _____, punishable under section of the Indian Penal Code, and it has been returned to a warrant of arrest thereupon issued that the said *(name)* cannot be found, and whereas it has been shown to my satisfaction

that the said (name) has absconded (or is concealing himself to avoid the service of the said warrant) ;

Proclamation is hereby made that the said _____ of _____ is required to appear at (place) before this Court (or before me) to answer the said complaint on the day of _____.

Dated this _____ day of _____ 19 _____.

(Seal).

(Signature).

V.—PROCLAMATION REQUIRING THE ATTENDANCE OF A WITNESS.

(See section 87.)

WHEREAS complaint has been made before me that (name, description and address) has committed (or is suspected to have committed) the offence of (mention the offence concisely) and a warrant has been issued to compel the attendance of (name, description and address of the witness) before this Court to be examined touching the matter of the said complaint ; and whereas it has been returned to the said warrant that the said (name of witness) cannot be served, and it has been shown to my satisfaction that he has absconded (or is concealing himself to avoid the service of the said warrant) ;

Proclamation is hereby made that the said (name) is required to appear at (place) before the Court of _____ on the _____ day of _____ next at _____ o'clock, to be examined touching _____ the offence complained of.

Dated this _____ day of _____ 19 _____.

(Seal).

(Signature).

VI.—ORDER OF ATTACHMENT TO COMPEL THE ATTENDANCE OF A WITNESS

(See section 88.)

To the police-officer in-charge of the police-station at _____

WHEREAS a warrant has been duly issued to compel the attendance of (name, description and address) to testify concerning a complaint pending before this Court, and it has been returned to the said warrant that it cannot be served ; and whereas it has been shown to my satisfaction that he has absconded (or is concealing himself to avoid the service of the said warrant) ; and thereupon a Proclamation has been or is being duly issued and published requiring the said _____ to appear and give evidence at the time and place mentioned therein, * * * ;

This is to authorise and require you to attach by seizure the moveable property belonging to the said _____ to the value of rupees _____ which you may find within the district of _____ and to hold the said property under attachment pending the further order of this Court, and to return this warrant with an endorsement certifying the manner of its execution.

Dated this _____ day of _____ 19 _____.

(Seal).

(Signature).

ORDER OF ATTACHMENT TO COMPEL THE APPEARANCE OF A PERSON ACCUSED.

(See section 89.)

To (name and designation of the person or persons who is or are to execute the warrant)

WHEREAS complaint has been made before me that (name, description and address) has committed (or is suspected to have committed) the offence of _____ punishable under section _____ of the Indian Penal Code, and it has been returned to a warrant of arrest thereupon issued that the said (name) cannot be found ; and whereas it has been shown to my satisfaction that the said (name) has absconded (or is concealing himself to avoid the service

of the said warrant); and thereupon a Proclamation has been or is being duly issued and published requiring the said _____ to appear to answer the said charge within _____ days; and whereas the said _____ is possessed of the following property other than land paying revenue to Government in the village (or town) of _____ in the district of _____, viz: _____, and an order has been made for the attachment thereof;

You are hereby required to attach the said property by seizure and to hold the same, under attachment pending the further order of this Court, and to return this warrant with an endorsement certifying the manner of its execution.

Dated this _____ day of _____ 19 ____
(Seal).

(Signature).

ORDER AUTHORISING AN ATTACHMENT BY THE DEPUTY COMMISSIONER AS COLLECTOR.

(See section 85.)

To the Deputy Commissioner of the District of _____

WHEREAS complaint has been made before me that (name, description and address) has committed (or is suspected to have committed) the offence of _____, punishable under section _____ of the Indian Penal Code, and it has been returned to a warrant of arrest thereupon issued that the said (name) cannot be found; and whereas it has been shown to my satisfaction that the said (name) has absconded (or is concealing himself to avoid the service of the said warrant) and thereupon a Proclamation has been or is being duly issued to appear to answer the said charge within _____ days; and whereas the said _____ is possessed of certain land paying revenue to Government in the village (or town) of _____ in the district of _____;

You are hereby authorised and requested to cause the said land to be attached, and to be held under attachment pending the further order of this Court and to certify without delay what you may have done in pursuance of this order.

Dated this _____ day of _____ 19 ____
(Seal).

(Signature).

VII.—WARRANT IN THE FIRST INSTANCE TO BRING UP A WITNESS.

(See section 90.)

To (name and designation of the police-officer or other person or persons who is or are to execute the warrant.)

WHEREAS complaint has been made before me that _____ of _____ has (or is suspected to have) committed the offence of (mention the offence concisely), and it appears likely that (name, and description of witness) can give evidence concerning the said complaint, and whereas I have good and sufficient reason to believe that he will not attend as a witness on the hearing of the said complaint unless compelled to do so;

This is to authorise and require you to arrest the said (name) and on the _____ day of _____ to bring him before this Court, to be examined touching the offence complained of.

Given under my hand and the seal of the Court, this _____ day of _____ 19 ____
(Seal).

(Signature).

VII.—WARRANT TO SEARCH AFTER INFORMATION OF A PARTICULAR OFFENCE.

(See section 96.)

To (name and designation of the police-officer or other person or persons who is or are to execute the warrant.)

WHEREAS information has been laid (or complaint has been made) before me of the commission (or suspected commission) of the offence of (mention the offence concisely) and it

(Where a bond with sureties is to be executed, add)—We do hereby declare ourselves sureties for the abovenamed that he will be of good behaviour to His Majesty the King, Emperor of India, and to all His subjects during the said term or until the completion of the inquiry; and, in case of his making default therein, we bind ourselves, jointly and severally, to forfeit to his Majesty the sum of rupees

Dated this day of 19 .

(Signature).

XII.—SUMMONS ON INFORMATION OF A PROBABLE BREACH OF THE PEACE.

(See section 114.)

To of

WHEREAS it has been made to appear to me by credible information that (state the substance of the information), and that you are likely to commit a breach of the peace (or by which act a breach of the peace will probably be occasioned), you are hereby required to attend in person (or by a duly authorised agent), at the office of the Magistrate of on the day of 19 , at ten o'clock in the forenoon, to show cause why you should not be required to enter into a bond for rupees {when sureties are required, add, and also to give security by the bond of one (or two) as the case may be, surety (or sureties) in the sum of rupees (each if more than one)} that you will keep the peace for the term of

Given under my hand and the seal of the Court, this day of 19 .

(Seal). (Signature).

XIII.—WARRANT OF COMMITMENT ON FAILURE TO FIND SECURITY TO KEEP THE PEACE.

(See section 123.).

To the Superintendent (or Keeper) of the jail at

WHEREAS (name and address) appeared before me in person (or by his authorised agent) on the day of in obedience to a summons calling upon him to show cause why he should not enter into a bond for rupees with one surety (or a bond with two sureties each in rupees), that he, the said (name), would keep the peace for the period of months; and whereas an order was then made requiring the said (name) to enter into and find such security (state the security ordered when it differs from that mentioned in the summons), and he has failed to comply with the said order,

This is to authorise and require you, the said Superintendent (or Keeper), to receive the said (name) into your custody, together with this warrant, and him safely to keep in the said jail for the said period of (term of imprisonment) unless he shall in the meantime be lawfully ordered to be released and to return this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this day of 19 .

(Seal). (Signature).

XIV.—WARRANT OF COMMITMENT ON FAILURE TO FIND SECURITY FOR GOOD BEHAVIOUR.

(See section 123.)

To the Superintendent (or Keeper) of the jail at

WHEREAS it has been made to appear to me that (name and description, has been and is lurking within the district of having no ostensible means of subsistence (or, and that he is unable to give any satisfactory account of himself);

or

WHEREAS, etc., etc., (as the case may be);

I do hereby direct and require you within (state the time allowed) to (state what is required to be done to abate the nuisance), or to appear at _____ in the _____ Court of _____ on the _____ day of _____ next, and to show cause why this order should not be enforced;

or

I do hereby direct and require you within (state the time allowed) to cease carrying on the said trade or occupation at the said place, and not again to carry on the same, or to remove the said trade from the place where it is now carried on, or to appear, etc.;

or

I do hereby direct and require you within (state the time allowed) to put up a sufficient fence (state the kind of fence and the part to be fenced); or to appear, etc.;

or

I do hereby direct and require you, etc. (as the case may be).

Given under my hand and the seal of the Court, this _____ day of _____ 19_____.
(Seal). (Signature).

XVII.—MAGISTRATE'S ORDER CONSTITUTING A JURY.

(See section 135.)

WHEREAS on the _____ day of _____ 19_____ an order was issued to (name) requiring him (state the effect of the order), and whereas the said (name) has applied to me, by a petition bearing date the _____ day of _____ for an order appointing a Jury to try whether the said recited order is reasonable and proper; I do hereby appoint (the names, etc., of the five or more Jurors) to be the Jury to try and decide the said question, and do require the said Jury to report their decision within _____ days from the date of this order at my office at _____.

Given under my hand and the seal of the Court, this _____ day of _____ 19_____.
(Seal). (Signature).

XVIII.—MAGISTRATE'S NOTICE AND PEREMPTORY ORDER AFTER THE FINDING BY A JURY.

(See section 140.)

To (name, description and address).

I HEREBY give you notice that the Jury duly appointed on the petition presented by you on the _____ day of _____ have found that the order issued on the _____ day of _____ requiring you (state substantially the requisition in the order) is reasonable and proper. Such order has been made absolute, and I hereby direct and require you to obey the said order within (state the time allowed), on peril of the penalty provided by the Indian Penal Code for disobedience thereto.

Given under my hand and the seal of the Court, this _____ day of _____ 19_____.
(Seal). (Signature).

XX—INJUNCTION TO PROVIDE AGAINST IMMINENT DANGER PENDING INQUIRY BY JURY.

(See section 142.)

To (name, description and address).

WHEREAS the inquiry by a Jury appointed to try whether my order issued on the _____ day of _____ 19_____ is reasonable and proper is still pending, and it has been made to appear to me that the nuisance mentioned in the said order is attended with so imminent serious danger to the public as to render necessary immediate measures to prevent such danger, I do hereby, under the provisions of section 142 of the Code of Criminal Procedure, direct and enjoin you forthwith to (state plainly what is required to be done as a temporary safe-guard), pending the result of the local inquiry by the Jury.

Given under my hand and the seal of the Court, this _____ day of _____ 19_____.
(Seal). (Signature).

I hereby declare myself (or we jointly and severally declare ourselves and each of us) surety (or sureties) for the abovesaid that he shall attend at in the Court of , on the day of next (or on such day as he may hereafter be required to attend), further to answer to the charge pending against him, and, in case of his making default therein, I hereby bind myself (or we hereby bind ourselves) to forfeit to His Majesty the King, Emperor of India, the sum of rupees .

Dated this day of 19 .

(Signature).

XXVI.—BOND TO PROSECUTE OR GIVE EVIDENCE.

(See section 170.)

I (name), of (place), do hereby bind myself to attend at in the Court of , at o'clock on the day of next, and then and there to prosecute (or to prosecute and give evidence) (or to give evidence) in the matter of a charge of against one A.B., and, in case of making default herein, I bind myself to forfeit to His Majesty the King, Emperor of India, the sum of rupees

Dated this day of 19 .

(Signature).

XXVII.—NOTICE OF COMMITMENT BY MAGISTRATE TO GOVERNMENT PLEADER

(See sections 218.)

THE Magistrate of hereby gives notice that he has committed one for trial at the next Sessions; and the Magistrate hereby instructs the Government Pleader to conduct the prosecution of the said case.

The charge against the accused is that, etc. (*state the offence as in the charge*).

Dated this day of 19 .

(Signature).

XXVIII.—CHARGES.

(See sections 221, 222 and 223.)

(I)—CHARGES WITH ONE HEAD.

(a) I (name and office of Magistrate, etc.,) hereby charge you [name of accused person] as follows :—

(b) That you, on or about the day of at waged war against His Majesty the King, Emperor of India, and On Penal Code, S. 121. thereby committed an offence punishable under section 121 of the Indian Penal Code, and within the cognizance of the Court of Session [when the charge is framed by a Presidency Magistrate, for Court of Session substitute High Court].

(c) And I hereby direct that you be tried by the said Court on the said charge.

[Signature and seal of the Magistrate].

[To be substituted for (b)] :—

(2) That you, on or about the day of at , with the intention of inducing the Hon'ble A. B., Member of the Council of the Governor-General of India, to refrain from exercising a lawful power as such Member, assaulted such Member, and thereby committed an offence punishable under section 124 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(3) That you, being a public servant in the Department, directly accepted from [state the name], for another party [state the name], a gratification other than legal remuneration, as a motive for forbearing to do an official act, and thereby committed an offence punishable under section 161 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(4) That you, on or about the day of , at , did [or omitted to do, as the case may be] such conduct being contrary to the provisions of Act , section , and known by you to be prejudicial to and thereby committed an offence punishable under section 166 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(5) That you, on or about the day of , at , in the course of the trial of , before , stated in evidence that " " which statement you either knew or believed to be false, or did not believe to be true, and thereby committed an offence punishable under section 193 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(6) That you, on or about the day of , at , committed culpable homicide not amounting to murder, causing the death of , and thereby committed an offence punishable under section 304 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(7) That you, on or about the day of , at , abetted the commission of suicide by A B, a person in a state of intoxication, and thereby committed an offence punishable under section 306 of the Indian Penal Code and within the cognizance of the Court of Session [or High Court].

(8) That you, on or about the day of , at , voluntarily caused grievous hurt to , and thereby committed an offence punishable under section 325 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(9) That you, on or about the day of , at , robbed [state the name], and thereby committed an offence punishable under section 392 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(10) That you, on or about the day of , at , committed dacoity, an offence punishable under section 395 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

[In cases tried by Magistrates substitute "within my cognizance" for "within the cognizance of the Court of Session," and in (c) omit "by the said Court".]

(II)—CHARGES WITH TWO OR MORE HEADS.

(a) I [name and office of Magistrate, etc.] hereby charge you [name of accused person] as follows:—

(b) First.—That you, on or about the day of , at , knowing a coin to be counterfeit, delivered the same to another person by name A.B., as genuine, and thereby committed an offence punishable under section 241 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

Secondly.—That you, on or about the _____ day of _____, at _____, knowing a coin to be counterfeit, attempted to induce another person, by name A. B., to receive it as genuine, and thereby committed an offence punishable under section 241 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(c) And I hereby direct that you be tried by the said Court on the said charge.

[Signature and seal of the Magistrate].

[To be substituted for (b)] .—

(2) *First.*—That you, on or about the _____ day of _____, at _____, committed murder by causing the death of _____, and thereby committed an offence punishable under section 302 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

Secondly.—That you, on or about the _____ day of _____, at _____, by causing the death of _____, committed culpable homicide not amounting to murder, and thereby committed an offence punishable under section 304 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(3) *First.*—That you, on or about the _____ day of _____, at _____, committed theft, and thereby committed an offence punishable under section 379 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

Secondly.—That you, on or about the _____ day of _____, at _____, committed theft, having made preparation for causing death to a person in order to the committing of such theft, and thereby committed an offence punishable under section 382 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

Thirdly.—That you, on or about the _____ day of _____, at _____, committed theft, having made preparation for causing restraint to a person in order to the effecting of your escape after the committing of such theft, and thereby committed an offence punishable under section 383 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

Fourthly.—That you, on or about the _____ day of _____, at _____, committed theft, having made preparation for causing fear of hurt to a person in order to the retaining of property taken by such theft, and thereby committed an offence punishable under section 384 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

(4) That you, on or about the _____ day of _____, at _____, in the course of the inquiry into _____, before _____, stated in evidence that " _____ " and, that you, on or about the _____ day of _____, at _____, in the course of the trial, of _____ before _____ stated in evidence that " _____ ", one of which statements you either know or believed to be false, or did not believe to be true, and thereby committed an offence punishable under section 193 of the Indian Penal Code, and within the cognizance of the Court of Session [or High Court].

[In cases tried by Magistrates substitute " within my cognizance " for " within the cognizance of the Court of Session " and in (c) omit " by the said Court "].

(III)—CHARGE FOR THEFT AFTER PREVIOUS CONVICTION.

I (name and office of Magistrate, etc.) hereby charge you (name of the accused person) as follows:—

That you, on or about the _____ day of _____, at _____, committed theft, and thereby committed an offence punishable under section 379 of the Indian Penal Code, and

within the cognizance of the Court of Session [or { High Court
Magistrate } as the case may be.

And you, the said (name of the accused), stand further charged that you, before the committing of the said offence, that is to say on the day of had been convicted by the (state Court by which conviction was had) at of an offence punishable under Chapter XVII of the Indian Penal Code with imprisonment for a term of three years, that is to say, the offence of house-breaking by night (describe the offence in the words used in the section under which the accused was convicted), which conviction is still in full force and effect and that you are thereby liable to enhanced punishment under section 75 of the Indian Penal Code.

And I hereby direct that you be tried, etc.

XXIX.—WARRANT OF COMMITMENT ON A SENTENCE OF IMPRISONMENT OR FINE IF PASSED BY A MAGISTRATE.

(See sections 245 and 253.)

To the Superintendent (or Keeper) of the Jail at

WHEREAS on the day of 19 (name of prisoner), the (1st, 2nd, 3rd, as the case may be) prisoner in case No. of the Calendar for 19, was convicted before me (name and official designation) of the offence (mention the offence or offences concisely) under section (or sections) of the Indian Penal Code (or of Act), and was sentenced to (state the punishment fully and distinctly);

This is to authorise and require you, the said Superintendent (or Keeper), to receive the said (prisoner's name) into your custody in the said jail, together with this warrant, and there carry the aforesaid sentence into execution according to law.

Given under my hand and the seal of the Court, this day of 19 .
(Seal). (Signature).

XXX.—WARRANT OF IMPRISONMENT ON FAILURE TO RECOVER AMENDS BY ATTACHMENT AND SALE.

(See section 250.)

To the Superintendent (or Keeper) of the Jail at

WHEREAS (name and description) has brought against (name and description of the accused person) the complaint that (mention it concisely), and the same has been dismissed as false and frivolous (or vexatious), and the order of dismissal awards payment by the said name of the complainant of the sum of rupees as amends; and whereas the said sum has not been paid and an order has been made for his simple imprisonment in Jail for the period of days, unless the aforesaid sum be sooner paid;

This is to authorise and require you, the said Superintendent (or Keeper), to receive the said (name) into your custody, together with this warrant, and him safely to keep in the said Jail for the said period of (term of imprisonment), subject to the provisions of section 69 of the Indian Penal Code, unless the said sum be sooner paid and on the receipt thereof forthwith to set him at liberty, returning this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this day of 19 .
(Seal). (Signature).

XXXI.—SUMMONS TO WITNESS.

(See sections 68 and 252.)

To of has (or is suspected to have) committed the offence of (state the offence concisely with time and place), and it appears to me that you are likely to give material evidence for the prosecution;

You are hereby summoned to appear before this Court on the _____ day of _____ next at 10 o'clock in the forenoon, to testify what you know concerning the matter of the said complaint, and not to depart thence without leave of the Court; and you are hereby warned that, if you shall without just excuse neglect or refuse to appear on the said date, a warrant will be issued to compel your attendance.

[illegible]

XXXII.—PRECEPT TO DISTRICT MAGISTRATE TO SUMMON JURORS AND ASSESSORS.

(See section 326.)

To the District Magistrate of

WHEREAS a Criminal Session is appointed to be held in the Court-house at _____ on the _____ day of _____ next, and the names of the persons herein stated have been duly drawn by lot from among those named in the revised list of Jurors and Assessors furnished to this Court; you are hereby required to summon the said persons to attend at the said Court of Session at 10 A.M., on the said date, and, within such date, to certify that you have done so in pursuance of this precept.

(Here enter the names of Jurors and Assessors).

[illegible]

XXXIII.—SUMMONS TO ASSESSOR OR JUROR.

(See section 328.)

To (name) of (place).

PURSUANT to a precept directed to me by the Court of Session of _____ requiring
your attendance as an Assessor (or a Juror) at the next Criminal Session, you are hereby
summoned to attend at the said Court of Session at (place) at 10 o'clock in the forenoon
on the _____ day of _____ next.

[illegible]

XXXIV.—WARRANT OF COMMITMENT UNDER SENTENCE OF DEATH.

(See section 374.)

To the Superintendent (or Keeper) of the Jail at

WHEREAS at the Session held before me on the _____ day of _____ 19____, (name of prisoner), the (1st, 2nd, 3rd, as the case may be) prisoner in case No. _____ of the Oslender at the said Session, was duly convicted of the offence of culpable homicide amounting to murder under section _____ of the Indian Penal Code, and sentenced to suffer death, subject to the confirmation of the said sentence by the _____ Court of _____;

This is to authorize and require you, the said Superintendent (or Keeper), to receive the said (prisoner's name) into your custody in the said jail, together with this warrant, and him there safely to keep until you shall receive the further warrant or order of this Court, carrying into effect the order of the said Court.

[illegible]

XXXV.—WARRANT OF EXECUTION ON A SENTENCE OF DEATH.

(See section 331.)

To the Superintendent (or Keeper) of the Jail at

WHEREAS (*name of prisoner*), the (1st, 2nd, 3rd, as the case may be) prisoner in Case No. _____ of the Calendar at the Session held before me on the _____ day of _____, 19____, has been by a warrant of this Court, dated the _____ day of _____, committed to your custody under sentence of death; and whereas the order of the Court of _____ confirming the said sentence has been received by this Court;

This is to authorise and require you, the said Superintendent (or Keeper), to carry the said sentence into execution by causing the said _____ to be hanged by the neck until he be dead, at (*time and place of execution*), and to return this warrant to the Court with an endorsement certifying that the sentence has been executed.

Given under my hand and the seal of the Court, this _____ day of _____ 19____.
(Seal). (Signature).

XXXVI.—WARRANT AFTER A COMMUTATION OF A SENTENCE.

(See sections 331 and 332.)

To the Superintendent (or Keeper) of the Jail at

WHEREAS at Session held on the _____ day of _____, 19____, (*name of prisoner*) the (1st, 2nd, 3rd, as the case may be) prisoner in Case No. _____ of the Calendar at the said Session, was convicted of the offence of _____, punishable under section _____ of the Indian Penal Code, and sentenced to _____ and was thereupon committed to your custody; and whereas by the order of the _____ Court of _____ (a duplicate of which is hereunto annexed) the punishment adjudged by the said sentence has been commuted to the punishment of transportation for life (*or as the case may be*);

This is to authorise and require you, the said Superintendent (or Keeper), safely to keep the said (*prisoner's name*) in your custody in the said jail, as by law is required, until he shall be delivered over by you to the proper authority and custody for the purpose of his undergoing the punishment of transportation under the said order,

or

if the mitigated sentence is one of imprisonment, say, after the words "custody in the said Jail" and "there to carry into execution the punishment of imprisonment under the said order according to law."

Given under my hand and the seal of the Court, this _____ day of _____ 19____.
(Seal). (Signature).

XXXVII.—WARRANT TO LEVY A FINE BY ATTACHMENT AND SALE.

(See section 336 (1) (a).)

To (*name and designation of the police-officer or other person or persons who is or are to execute the warrant*).

WHEREAS (*name and description of the offender*) was on the _____ day of _____, 19____, convicted before me of the offence of (*mention the offence concisely*) and sentenced to pay a fine of rupees _____, and whereas the said (*name*), although required to pay the said fine, has not paid the same or any part thereof;

This is to authorise and require you to attach any moveable property belonging to the said (*name*) which may be found within the district of _____; and, if within (*state the number of days or hours allowed*), next after such attachment the said sum shall not be paid (*or forthwith*), to sell the moveable property attached or so much thereof as shall

This is to authorise and require you to take the said (name) into custody, and him safely to keep in your custody for the space of _____ days unless in the meantime he shall consent to be examined and to answer the questions asked of him, and on the last of the said days, or forthwith on such consent being known, to bring him before this Court to be dealt with according to law, returning this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this _____ day of _____ 19 .
(Seal). (Signature).

XL.—WARRANT OF IMPRISONMENT ON FAILURE TO PAY MAINTENANCE.

(See section 483.)

To the Superintendent (or Keeper) of the Jail at _____

WHEREAS (name, description and address), has been proved before me to be possessed of sufficient means to maintain his wife (name), [or his child (name), who is by reason of (state the reason) unable to maintain herself (or himself)], and to have neglected (or refused) to do so, and an order has been duly made requiring the said (name) to allow to his said wife (or child) for maintenance the monthly sum of rupees _____; and whereas it has been further proved that the said (name) in wilful discharge of the said order has failed to pay rupees _____, being the amount of the allowance for the month (or months) of _____

And thereupon an order was made adjudging him to undergo simple (or rigorous imprisonment) in the said jail for the period of _____

This is to authorise and require you, the said Superintendent (or Keeper), to receive the said (name) into your custody in the said jail, together with this warrant, and there carry the said order into execution according to law, returning this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this _____ day of _____ 19 .
(Seal) (Signature).

XLI.—WARRANT TO ENFORCE THE PAYMENT OF MAINTENANCE BY ATTACHMENT AND SALE.

(See section 488.)

To (name and designation of the police-officer or other person to execute the warrant), _____

WHEREAS an order has been duly made requiring (name) to allow to his said wife (or child) for maintenance the monthly sum of rupees _____, and whereas the said (name) in wilful disregard of the said order has failed to pay rupees _____, being the amount of the allowance for the month (or months) of _____

This is to authorise and require you to attach any moveable property belonging to the said (name) which may be found within the district of _____, and if within (state the number of days or hours allowed) next after such attachment the said sum shall not be paid (or forthwith) to sell the moveable property attached, or so much thereof as shall be sufficient to satisfy the said sum, returning this warrant, with an endorsement certifying what you have done under it, immediately upon its execution.

Given under my hand and the seal of the Court, this _____ day of _____ 19 .
(Seal). (Signature).

XLII.—BOND AND BAIL-BOND ON A PRELIMINARY INQUIRY BEFORE A MAGISTRATE.

(See sections 496 and 499.)

I (name), of (place), being brought before the Magistrate of (as the case may be) charged with the offence of _____, and required to give security for my attendance in his Court

THE CODE OF CRIMINAL PROCEDURE.

and at the Court of Session, if required, do bind myself to attend at the Court of Magistrate on every day of the preliminary inquiry into the said charge and, should be sent for trial by the Court of Session, to be, and appear before the said Court upon to answer the charge against me; and, in case of my making default herein myself to forfeit to His Majesty the King, Emperor of India, the sum of rupees

Dated this

day of

19

(Signature)

I hereby declare myself (or we jointly and severally declare ourselves and each surety (or sureties) for the said (name) that he shall attend at the Court of Magistrate on every day of the preliminary inquiry into the offence charged against him, and should be sent for trial by the Court of Session, that he shall be, and appear, before the said Court to answer the charge against him, and in case of his making default therein, I bind myself (or ourselves) to forfeit to His Majesty the King, Emperor of India, the sum of rupees

Dated this

day of

19

(Signature)

XLIII.—WARRANT TO DISCHARGE A PERSON IMPRISONED
ON FAILURE TO GIVE SECURITY.

(See section 500.)

To the Superintendent (or Keeper) of the Jail at

in whose custody the person is,

or other officer

WHEREAS (name and description of prisoner) was committed to your custody under warrant of this Court, dated the day of and has since with his surety (or sureties) duly executed a bond under section 499 of the Code of Criminal Procedure;

This is to authorise and require you forthwith to discharge the said (name) from your custody, unless he is liable to be detained for some other matter.

Given under my hand and the seal of the Court, this

day of

19

(Signature).

XLIV.—WARRANT OF ATTACHMENT TO ENFORCE A BOND.

(See section 514.)

To the police-officer in charge of the police-station at

WHEREAS (name, description and address of person) has failed to appear on (mention the occasion) pursuant to his recognizance, and has by such default forfeited to His Majesty the King, Emperor of India, the sum of rupees (the penalty in the bond); and whereas the said (name of person) has, on due notice to him, failed to pay the said sum or show any sufficient cause why payment should not be enforced against him;

This is to authorise and require you to attach any moveable property of the said (name) that you may find within the district of by seizure and detention, if the said amount be not paid within three days, to sell the property so attached or so much of it as may be sufficient to realise the amount aforesaid, and to make return of what you have done under this warrant immediately upon its execution.

Given under my hand and the seal of the Court, this

day of

19

(Signature).

XLV.—NOTICE TO SURETY ON BREACH OF BOND.

(See section 514.)

To WHEREAS on the

of

day of

19

, you became surety for (name) of (place), and bound yourself that he should appear before this Court on the day of

In default thereof to forfeit the sum of rupees _____ to His Majesty the King, Emperor of India; and whereas the said (name) has failed to appear before this Court, and by reason of such default you have forfeited the aforesaid sum of rupees _____;

You are hereby required to pay the said penalty or show cause, within _____ days from this date, why payment of the said sum should not be enforced against you.

Given under my hand and the seal of the Court, this _____ day of _____ 19 _____.

(Seal).

(Signature)

XLVI.—NOTICE TO SURETY OF FORFEITURE OF BOND FOR GOOD BEHAVIOUR.

(See section 514.)

To _____ of _____
WHEREAS on the _____ day of _____, 19 _____, you became surety by a bond for (name) of (place) that he would be of good behaviour for the period of _____ and bound yourself in default thereof to forfeit the sum of rupees _____ to His Majesty the King, Emperor of India; and whereas the said (name) has been convicted of the offence of (*mention the offence concisely*) committed since you became such surety, whereby your security bond has become forfeited;

You are hereby required to pay the said penalty of rupees _____, or to show cause within _____ days why it should not be paid.

Given under my hand and the seal of the Court, this _____ day of _____ 19 _____.

(Seal).

(Signature).

XLVII.—WARRANT OF ATTACHMENT AGAINST A SURETY

(See section 514.)

To _____ of _____
WHEREAS (name, description and address) has bound himself as surety for the appearance of (*mention the condition of the bond*) and the said (name) has made default, and thereby forfeited to His Majesty the King, Emperor of India, the sum of rupees _____ (*the penalty in the bond*);

This is to authorise and require you to attach any moveable property of the said (name) which you may find within the district of _____, by seizure and detention, and, if the said amount be not paid within three days, to sell the property so attached, or so much of it as may be sufficient to realize the amount aforesaid, and make return of what you have done under this warrant, immediately upon its execution.

Given under my hand and the seal of the Court, this _____ day of _____ 19 _____.

(Seal).

(Signature).

XLVIII.—WARRANT OF COMMITMENT OF THE SURETY OF AN ACCUSED PERSON ADMITTED TO BAIL.

(See section 514.)

To the Superintendent (or Keeper) of the Civil Jail at _____

WHEREAS (name and description of surety) has bound himself as a surety for the appearance of (*state the condition of the bond*) and the said (name) has therein made default whereby the penalty mentioned in the said bond has been forfeited to His Majesty the King, Emperor of India; and whereas the said (name of surety) has, on due notice to him, failed to pay the said sum or show any sufficient cause why payment should not be enforced against him, and the same cannot be recovered by attachment and sale of moveable property of his, and an order has been made for his imprisonment in the Civil Jail for (*specify the period*);

This is to authorise and require you, the said Superintendent (or Keeper), to receive the said (name) into your custody with this warrant and him safely to keep in the said jail for the said (term of imprisonment), and to return this warrant with an endorsement certifying the manner of its execution.

[illegible]

XLIX.—NOTICE TO THE PRINCIPAL OF FORFEITURE OF A BOND TO KEEP THE PEACE.

(See section 514.)

To (name, description and address).

WHEREAS on the _____ day of _____, 19____, you entered into a bond not to commit, etc. (as in the bond), and proof of the forfeiture of the same has been given before me and duly recorded :

You are hereby called upon to pay the said penalty of rupees _____ or to show cause before me within _____ days why payment of the same should not be enforced against you.

[illegible]

L.—WARRANT TO ATTACH THE PROPERTY OF THE PRINCIPAL ON BREACH
OF A BOND TO KEEP THE PEACE.

(See section 514.)

To (name and designation of police officer), at the police-station of

WHEREAS (name and description) did, on the day of 19 , enter into a bond for the sum of rupees , binding himself not to commit a breach of the peace, etc. (as in the bond), and proof of the forfeiture of the said bond has been given before me and duly recorded; and whereas notice has been given to the said (name) calling upon him to show cause why the said sum should not be paid, and he has failed to do so or to pay the said sum:

This is to authorise and require you to attach by seizure moveable property belonging to the said (name) to the value of rupees which you may find within the district of and, if the said sum be not paid within , to sell the property so attached, or so much of it as may be sufficient to realise the same; and to make return of what you have done under this warrant immediately upon its execution.

[illegible]

LI.—WARRANT OF IMPRISONMENT ON BREACH OF A BOND TO KEEP THE PEACE.

(See section 514.)

To the Superintendent (or Keeper) of the Civil Jail at

WHEREAS proof has been given before me and duly recorded that (name and description) has committed a breach of the bond entered into by him to keep the peace, whereby he has forfeited to His Majesty the King, Emperor of India, the sum of rupees _____ and whereas the said (name) has failed to pay the said sum or to show cause why the said sum should not be paid, although duly called upon to do so, and payment thereof cannot be enforced by attachment of his moveable property, and an order has been made for the imprisonment of the said (name) in the Civil Jail for the period of (term of imprisonment);

This is to authorise and require you, the said Superintendent (or Keeper) of the said Civil Jail, to receive said (name) into your custody, together with this warrant and him safely to keep in the said jail for the said period of (*term of imprisonment*) and to return that warrant with an endorsement certifying the manner of its execution,

Given under my hand and the seal of the Court, this day of 19 .

(Seal).

(Signature).

LII.—WARRANT OF ATTACHMENT AND SALE ON FORFEITURE OF BOND FOR GOOD BEHAVIOUR.

(See section 514.)

To the police-officer in charge of the police-station at

WHEREAS (name, description and address) did on the day of 19 , gives security by bond in the sum of rupees for the good behaviour of (name, etc., of the principal), and proof has been given before me and duly recorded of the commission by the said (name) of the offence of whereby the said bond has been forfeited; and whereas notice has been given to the said (name) calling upon him to show cause why the said sum should not be paid, and he has failed to do so or to pay the said sum:

This is to authorise and require you to attach by seizure moveable property belonging to the said (name) to the value of rupees which you may find within the district of

and, if the said sum be not paid within , to sell the property so attached, or so much of it, as may be sufficient to realise the same, and to make return of what you have done under this warrant immediately upon its execution.

Given under my hand and the seal of the Court, this day of 19 .

(Seal).

(Signature).

LIII.—WARRANT OF IMPRISONMENT ON FORFEITURE OF BOND FOR GOOD BEHAVIOUR

(See section 514).

To the Superintendent (or Keeper of the Civil Jail at

WHEREAS (name description and address) did on the day of 19 , give security by bond in the sum of rupees for the good behaviour of (name, etc., of the principal), and proof of the breach of the said bond has been given before me and duly recorded, whereby the said (name) has forfeited to His Majesty the King Emperor of India, the sum of rupees , and whereas he has failed to pay the said sum or to show cause why the said sum should not be paid although duly called upon to do so, and payment thereof cannot be enforced by attachment of his moveable property, and an order has been made for the imprisonment of the said (name) in the Civil Jail for the period of (*term of imprisonment*);

This is to authorise and require you, the Superintendent (or Keeper), to receive the said (name) into your custody, together with this warrant, and him safely to keep in the said jail for the said period of (*term of imprisonment*) returning this warrant with an endorsement certifying the manner of its execution.

Given under my hand and the seal of the Court, this day of 19 .

(Seal)

(Signature).

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